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DIGEST^c

OF NEW YORK STATUTES AND REPORTS,

FROM THE EARLIEST PERIOD TO THE YEAR 1860.

BY
BENJAMIN VAUGHAN ABBOTT,
AND
AUSTIN ABBOTT.

COMPRISING

THE ADJUDICATIONS OF ALL THE COURTS OF THE STATE,

PRESENTED IN THE REPORTS BY

ABBOTT, ANTHON, BARBOUR, BOSWORTH, BRADFORD, CAINES, CLARKE, COLEMAN,
COMSTOCK, COWEN, DENIO, DUER, EDWARDS, HALL, HILL, HILTON, HOFFMAN,
HOPKINS, HOWARD, JOHNSON, KERNAN, PAIGR, PARKER, SANDFORD,
SELDEN, E. D. SMITH, E. P. SMITH, AND WENDELL;

AND

IN THE CHANCERY SENTINEL, THE CITY HALL RECORDER, THE CODE REPORTS AND REPORTER, HILL & DENIO'S
SUPPLEMENT, HOWARD'S COURT OF APPEALS CASES, LIVINGSTON'S JUDICIAL OPINIONS,
THE NEW YORK LEGAL OBSERVER, WHEELER'S CRIMINAL CASES, ETC.

TOGETHER WITH

THE STATUTES,

As embodied in the Revised Laws of 1818, the Revised Statutes, and the general Acts passed since 1822.

PRECEDED BY

A TABLE OF CASES CRITICISED.

THIRD EDITION: REVISED AND CORRECTED.

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By BENJAMIN VAUGHAN ABBOTT and AUSTIN ABBOTT,
In the Clerk's Office of the District Court for the Southern District of New York.

Entered according to Act of Congress, in the year one thousand eight hundred and sixty-three,
By BENJAMIN VAUGHAN ABBOTT and AUSTIN ABBOTT,
In the Clerk's Office of the District Court for the Southern District of New York.

Entered according to Act of Congress, in the year one thousand eight hundred and sixty-four,
By BENJAMIN VAUGHAN ABBOTT and AUSTIN ABBOTT,
In the Clerk's Office of the District Court for the Southern District of New York.

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DIGEST

OF

NEW YORK STATUTES AND REPORTS.

FROM THE EARLIEST PERIOD TO THE YEAR 1860.

[Statutes are distinguished by the use of a smaller type.]

MECHANICS' LIEN.

[This title embraces only the statutory lien given in favor of persons furnishing labor or materials in the erection of buildings. For the common-law liens of mechanics and others, see LIEN and titles there referred to.]

I. THE LIEN. II. THE FORFEITURE.

I. THE LIEN.

1. **The statutes.** There have been a number of statutes on the subject of mechanics' liens, applicable in different counties of the State. They correspond in general features, though they differ in details. For these statutes, see* the session laws; or 3 *Rev. Stat.*, 5 ed., 804-828.

2. **Act of 1830**, provides for creating and foreclosing a lien, in favor of persons performing work towards the construction of any building in the city of New York. *Laws of 1830*, 412, ch. 830; repealed, *Laws of 1851*, 956, ch. 518, § 18.

3. The above act extended to apply to materials furnished, and also to apply to verbal contracts as well as written ones. *Laws of 1832*, 181, ch. 120.

4. **Act of 1844**, provides for a lien in favor of contractors or sub-contractors performing labor or furnishing materials towards constructing any building or appurtenances in the city of New York. *Laws of 1844*, 839, ch. 220; repealed, *Laws of 1851*, 956, ch. 518, § 18.

5. Construction of the Mechanics' Lien

* See, especially, the Westchester Act, *Laws of 1854*, 1086, ch. 402; and *Laws of 1858*, 824, ch. 204, extending the Westchester Act to all the counties of the State, except New York and Erie.

The act so frequently referred to in the above title as "the act of 1851," is the act relative to the city of New York, *Laws of 1851*, 958, ch. 518. Wherever the act of 1851, relative to Westchester, Ulster, and Putnam counties (*Laws of 1851*, 819, ch. 169), is cited, the particular reference is given.

Law of 1844. *Freeman v. Arment*, 5 *N. Y. Leg. Obs.*, 381.

6. The powers conferred by the Mechanics' Lien Law of 1851, relative to New York city (*Laws of 1851*, 958, ch. 518), are of such a nature as to call for a strict construction of the act. *N. Y. Com. Pl., Sp. T.*, 1857, *Roberts v. Fowler*, 3 *E. D. Smith*, 682; *S. O.*, 4 *Abbotts' Pr.*, 268.

7. **Who may acquire a lien.** The right to acquire a lien, given by the Lien Law for the city of New York (*Laws of 1851*, 958, ch. 518), is limited to the following classes of persons or contractors: 1. Any contractor who has contracted directly with the owner for the furnishing of labor or materials used in the erecting or altering of a building, and who has furnished the same in conformity with the terms of his contract. 2. Any person who, under an agreement made by him with such original contractor, has performed labor or furnished materials used in such erection or alteration, provided such labor or materials were in conformity with the terms of such original contract with the owner. *N. Y. Com. Pl., Sp. T.*, 1858, *Heroy v. Hendricks*, 4 *E. D. Smith*, 768.

8. One employed by a sub-contractor to furnish materials, is not entitled to the benefit of the act. [17 *Wend.*, 550; 22 *Id.*, 395; 1 *E. D. Smith*, 716; 2 *Id.*, 555; *Nott's Lien L.*, 85.] *Id.*

9. The acts of 1830 and 1832 (*Laws of 1830*, 412, ch. 830; 1832, 181, ch. 120) apply to persons employed by, or who furnish materials to the person contracted with the owner,

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but not to those dealing with or laboring for a sub-contractor. *Ct. of Errors*, 1889, Donaldson v. Wood, 22 *Wend.*, 895.

10. Assignee. The act of 1851 confers no authority upon an assignee of one who has furnished labor or materials, to create a lien. The right to file the original notice is confined to the original party. It is only after a lien has been effected by him, that he can transfer it. *N. Y. Com. Pl., Sp. T.*, 1857, *Roberts v. Fowler*, 8 *E. D. Smith*, 682; *S. C.*, 4 *Abbotts' Pr.*, 268.

11. The right is cumulative. Filing a notice to create a lien is no bar to an ordinary personal action against the owner to recover the demand. *N. Y. Com. Pl.*, 1854, *Pollock v. Ehle*, 2 *E. D. Smith*, 541.

12. The plaintiff having filed a lien against the defendant as owner, and charging also the contractor, as employer, for the amount of his claim, is not thereby estopped from proceeding by action against the defendant upon a separate contract made with him. [2 *E. D. Smith*, 541; *Id.*, 540.] *N. Y. Com. Pl.*, 1858, *Cremin v. Byrnes*, 4 *E. D. Smith*, 756.

13. The pendency of a proceeding instituted by a sub-contractor against the owner, to enforce a lien, is no defence to an action by the same claimant against the contractor, to recover what is due him. It is only satisfaction in the one proceeding that bars the other. The proceeding under the Lien Law is a mere foreclosure of a security. *N. Y. Com. Pl.*, 1853, *Gridley v. Rowland*, 1 *E. D. Smith*, 670; *S. P.*, 1854, *Maxey v. Larkin*, 2 *Id.*, 540.

14. The right of the contractor to acquire a lien is not lost by taking the owner's note for the amount; even though a receipt acknowledging payment is given. The only effect of this is to suspend the right to enforce the lien, during the term of credit. *N. Y. Com. Pl., Sp. T.*, 1856, *Althause v. Warren*, 2 *E. D. Smith*, 657; *S. P.*, 1856, *Lutz v. Ey*, 3 *Id.*, 621; *S. C.*, 8 *Abbotts' Pr.*, 475.

15. Taking the note of the contractor for the amount of the work or materials, does not deprive the sub-contractor of his right to acquire a lien. Such lien may be acquired by filing a notice with the county clerk before the note is due, and enforced after it has matured; unless the term of credit is so long that the lien has meantime expired by the Statute of Limitations, or unless steps taken by the

owner have defeated it. *N. Y. Com. Pl.*, 1854, *Miller v. Moore*, 1 *E. D. Smith*, 739.*

16. Where it appeared that the claimant had received the note of the contractors for the amount of his claim, and had passed the note away, receiving from the indorsee the amount thereof, and such indorsee had recovered a judgment thereon against the contractor, which judgment remained in full force and unsatisfied,—*Held*, 1. That the claimant could not recover without showing that he had, by payment to the indorsee or otherwise, become reinvested with the title to the debt. 2. That the mere production of the note on the trial was not sufficient. The plaintiff must furnish an assurance to the contractor that payment to the claimant in satisfaction of the lien, would be a protection to him against the apparent title of the judgment-creditor to collect the same debt by means of the judgment. *N. Y. Com. Pl.*, 1855, *Teaz v. Chrystie*, 2 *E. D. Smith*, 621; *S. C.*, 2 *Abbotts' Pr.*, 109.

17. Who is "owner." One who has sold lots, and agreed to make a building-loan, is not to be deemed "owner," within the meaning of the lien laws, although the title is not, by the agreement of sale, to be transferred to the vendee until the completion of the proposed building. *Ct. of Appeals*, 1854, *Loonie v. Hogan*, 9 *N. Y. (5 Seld.)*, 435; *S. C.*, 2 *E. D. Smith*, 681; 12 *N. Y. Leg. Obs.*, 225; overruling *McDermott v. Palmer*, 11 *Barb.*, 9. *S. P.*, *N. Y. Com. Pl.*, 1854, *Gay v. Brown*, 1 *E. D. Smith*, 725; *Miller v. Clark*, 2 *Id.*, 543. *N. Y. Superior Ct.*, 1853, *Belmont v. Smith*, 1 *Duer*, 675; *S. C.*, 11 *N. Y. Leg. Obs.*, 216. Compare *Cox v. Broderick*, 4 *E. D. Smith*, 721.

18. Not even though the agreement to convey was by parol only, and therefore void by the Statute of Frauds. *N. Y. Com. Pl.*, 1856, *Walker v. Paine*, 2 *E. D. Smith*, 662.

19. Vendee. A sale of the premises, in good faith, before the notice of lien is filed, prevents the acquisition of any lien. The statute only authorizes a lien to the extent of the interest of the owner existing at the time when the notice is filed. *N. Y. Com. Pl.*, 1855, *Cox v. Broderick*, 4 *E. D. Smith*, 721.

20. A lien for work done, or materials furnished before a conveyance of premises, can-

* The decision at special term is also reported, 12 *N. Y. Leg. Obs.*, 68.

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not be acquired by filing a notice of lien after the conveyance, although the purchaser took with notice of the amount of the claim, and the conveyance was made subject to its payment. *N. Y. Com. Pl.*, 1857, *Sinclair v. Fitch*, 3 *E. D. Smith*, 677.

21. Filing a notice of lien against A. as owner, after A. has conveyed to B., and the conveyance has been recorded, is ineffectual. *Supreme Ct.*, 1859, *Noyes v. Barton*, 29 *Barb.*, 681; *S. C.*, 17 *How. Pr.*, 449.

22. Assignee. Where the owner of a building in the city of New York conveys it, with the lot, to trustees for the benefit of creditors, material-men, laborers, and contractors, do not, by afterwards filing notices under the Mechanics' Lien Law, acquire any lien under the statute upon the premises, although the notices are filed before the recording of the deed. Nor do they acquire a lien as against the grantees. If in such case the material-men, &c., do acquire an equitable lien, it is not one which can be enforced by proceedings in the Marine Court under the Mechanics' Lien Law. *N. Y. Com. Pl.*, 1855, *Quimby v. Sloan*, 2 *E. D. Smith*, 594; *S. C.*, 2 *Abbotts' Pr.*, 98.

23. Where the owner of a building in the city of New York conveys it, with the lot, to trustees for the benefit of creditors, material-men, laborers, and contractors do not, by afterwards filing notices under the Mechanics' Lien Law, acquire a lien upon the premises, such that it can be enforced by proceedings under that statute, although the proceedings are conducted in a court having general equity jurisdiction. *N. Y. Com. Pl., Sp. T.*, 1855, *Jackson v. Sloan*, 2 *E. D. Smith*, 616; *S. C.*, 2 *Abbotts' Pr.*, 104.

24. Tenant. The lien given by the act of 1852 (*Laws of 1852*, 611, ch. 384),—applying to certain counties,—attaches wherever labor is performed or materials furnished for a building, under a contract with the owner thereof, however temporary his interest in the land on which it stands. It attaches to the land and to the building, to the extent of the interest of the owner of the building in them respectively. Such lien exists, therefore, upon a building erected by a tenant from year to year, or at will, where, as between landlord and tenant, the latter has the right to remove it. *Ct. of Appeals*, 1859, *Ombony v. Jones*, 19 *N. Y. (5 Smith)*, 284.

25. The lessee of an inn erected a ball-room, resting upon stone posts slightly imbedded in the soil, and removable without injury to the inheritance. *Held*, that the ball-room was, within the principle of erections made for purposes of trade, removable by the tenant, and that the right passed to a material-man, who purchased the building under execution on a judgment establishing his lien. *Id.*

26. Prior incumbrances. In the foreclosure of a lien under section 1 of the act of 1851,—which confined the lien to the right, &c., of the owner, existing at the time of filing the notice,—any prior liens existing at such time must be taken into account, and the amount secured by them deducted from the contract price, in determining the amount which the owner can be compelled to pay. *N. Y. Com. Pl.*, 1852, *Oronk v. Whittaker*, 1 *E. D. Smith*, 647; *S. P.*, *Lehretter v. Koffman*, *Id.*, 664; *Sp. T.*, *Chamberlain v. O'Connor*, *Id.*, 665; 1853, *Kaylor v. O'Connor*, *Id.*, 672.

27. An injunction will not be granted to restrain proceedings to foreclose a lien, on the ground that there are prior liens exceeding the amount due from the owner. The existence of such liens is a good defence to the proceeding. If they are set up as such defence, the claimant may impeach them. *N. Y. Com. Pl., Sp. T.*, 1852, *Lehretter v. Koffman*, 1 *E. D. Smith*, 664; *S. C.*, 1 *Code R., N. S.*, 284.

28. Deceased owner. That a lien cannot, in general, be created by a sub-contractor, by filing a notice after the death of the owner, with whom the contract was made. *N. Y. Com. Pl.*, 1855, *Crystal v. Flannelly*, 2 *E. D. Smith*, 583.

29. Married woman. Whether a married woman can so contract for the erection of a building on her separate estate, as to subject it to the creation of a lien,—*Query?* *Hauptman v. Catlin*, 1 *E. D. Smith*, 729. Compare *Berry v. Weiss*, 2 *Id.*, 662, *note*.

30. Where a contract is made with a husband acting as agent of his wife, for erection of a building upon land which she owns as her separate estate, a lien may be acquired. *N. Y. Com. Pl.*, 1857, *Hauptman v. Catlin*, 8 *E. D. Smith*, 666; *S. C.*, 4 *Abbotts' Pr.*, 472; affirmed, 20 *N. Y. (6 Smith)*, 247.

31. Although the notice stated that the building was owned by a wife, and described the contract as being made with the husband,

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yet it being admitted on the pleadings that the contract was entered into by the husband in the capacity of *agent* of his wife,—*Held*, that the proceeding might be sustained. *Id.*

32. Several buildings. Where materials are furnished for several buildings, belonging to one owner, situated upon adjacent lots, under one contract for the construction of all, a single lien, charging the whole debt upon all the premises, is proper. *N. Y. Com. Pl., Sp. T., 1858, Paine v. Bonney, 4 E. D. Smith, 734; S. O., 6 Abbotts' Pr., 99.*

33. Contract with the owner. Under the act of 1851, relative to Westchester, &c., counties (*Laws of 1851, 819, ch. 514*), there can be no lien unless the work or materials were furnished under a contract with the owner. *Supreme Ct., Sp. T., 1852, Dressel v. French, 7 How. Pr., 350.*

34. Where it appeared that by the original contract nothing was yet due to the contractor, but it was contended that an earlier time for payment had been substituted by a subsequent parol agreement;—*Held*, under the act of 1851, relative to New York (*Laws of 1851, 958, ch. 518*), there appearing not to have been any consideration for the alleged parol modification, it could have no effect on the sealed agreement; and the sub-contractor could not recover. *N. Y. Com. Pl., 1858, Tinker v. Geraghty, 1 E. D. Smith, 687.*

35. The recovery by a sub-contractor must be limited to the amount due to the contractor by the very terms of the building-contract itself. *N. Y. Com. Pl., 1856, Nolan v. Gardner, 4 E. D. Smith, 727.*

36. Where the owner promised during the execution of the work to pay the contractor a specified sum as damages, for an unforeseen loss,—*Held*, that this indebtedness could not be reached by the sub-contractor. *Id.*

37. — must be express. The mere implied agreement on the part of the owner, which may be inferred from his suffering improvements to be made upon his premises, that he will pay what the same may be reasonably worth, is not such a contract as can form the basis of a lien in behalf of a sub-contractor. *N. Y. Com. Pl., 1856, Walker v. Paine, 2 E. D. Smith, 662.*

38. — must have been performed. To entitle the sub-contractor to recover against the owner, he must show work done, &c., by him under the contract, for the contractor,

and that the contractor has so far performed the contract, as to become entitled to payment under it. If the owner denies that the contract has been performed, the burden of showing performance is upon the claimant. *N. Y. Com. Pl., 1858, Hauptman v. Halsey, 1 E. D. Smith, 668; S. P., Sullivan v. Brewster, Id., 681; 1854, Dixon v. La Farge, Id., 722; 1856, Walker v. Paine, 2 Id., 662.*

39. A sub-contractor cannot enforce a lien where he has not fulfilled his contract with the contractor, even though prevented by the latter from performing. For that he has a right of action against the contractor, but no lien under the statute. *N. Y. Com. Pl., 1856, Dennistoun v. McAllister, 4 E. D. Smith, 729.*

40. The sub-contractor cannot have a lien (under *Laws of 1880, 412, ch. 380*) upon money due from the owner to the contractor, by way of unliquidated damages for preventing the contractor from completing the contract. The lien is confined to what is due for performance. *Ct. of Errors, 1844, Hoyt v. Miner, 7 Hill, 525; affirming S. O., 4 Id., 198.*

41. Deviation. Although the work of the sub-contractor was done pursuant to the contract between himself and the contractor, yet if there has been such a deviation on the part of the contractor from the terms of his contract with the owner, that the latter is not liable to the contractor upon the contract, the sub-contractor cannot sustain a lien. *N. Y. Com. Pl., Sp. T., 1856, Grogan v. Mayor, &c., of N. Y., 2 E. D. Smith, 698.*

42. Abandonment. Where the original contractor abandons the work before any payment has become due, so that *by the terms of the contract* the owner is not liable, the sub-contractor cannot create a lien. It makes no difference that the contractor was induced to enter into the contract by false and fraudulent representations from the owner. If the contractor has a right of action under such circumstances, for the value of his work, it is not one which can be made the basis of a lien, under the statute, in favor of a sub-contractor. *N. Y. Com. Pl., 1855, Linn v. O'Hara, 2 E. D. Smith, 560.*

43. A contract with an owner for the erection of a building, stipulating no time of payment, nor any sum, excepting that the labor was to be done by days' work, is an entire contract, and not divisible as to the time of payment. *N. Y. Com. Pl., 1857, Cunningham*

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v. Jones, 8 *E. D. Smith*, 650; S. C., 4 *Abbotts' Pr.*, 438.

44. The contractor upon such a contract having abandoned the work and absconded, leaving the building not inclosed. *Held*, that he was entitled to no payment, and that a laborer or material-man had no claim against the owner. *Id.*

45. **Payments.** Under the act of 1851 the owner cannot be compelled to pay any greater sum than the contract-price. Any payments made by him to the contractor, in good faith, according to the terms of the contract, and before the notice of lien is filed, must be allowed to him in making up the aggregate which he may be compelled to pay. Nor can he be required to pay money to the claimant, before it becomes payable by the terms of his contract. *N. Y. Com. Pl.*, 1852, Doughty v. Devlin, 1 *E. D. Smith*, 625; S. P., Cronk v. Whittaker, *Id.*, 647; Kennedy v. Paine, *Id.*, 652; McBride v. Crawford, *Id.*, 658; 1853, Allen v. Carman, *Id.*, 692; 1854, Spalding v. King, *Id.*, 717; S. C., 12 *N. Y. Leg. Obs.*, 186; *Trial T.*, 1857, Lynch v. Oashman, 8 *E. D. Smith*, 660. *Ct. of Appeals*, 1855, Carman v. McInerow, 13 *N. Y.* (8 *Kern.*), 70; S. C., 2 *E. D. Smith*, 689.

46. *So held*, under the act of 1830. *Supreme Ct.*, 1834, Haswell v. Goodchild, 12 *Wend.*, 373.

47. **Credit in account.** Where, by mutual consent, the contractor, instead of receiving a payment due under the contract, in cash, has received a credit therefor upon an account due from him to the owner, such credit is equivalent to a payment within the rule that the sub-contractor cannot recover from the owner, where the contractor has been paid all that is due. *N. Y. Com. Pl.*, 1853, Allen v. Carman, 1 *E. D. Smith*, 692.

48. **For what work a lien may be acquired.** The act of 1851 (*Laws*, 953, ch. 513), relative to mechanics' liens, is not unconstitutional, even in its application to contracts made before its passage. It does not affect the contract, but provides a new remedy. *N. Y. Com. Pl.*, 1853, Sullivan v. Brewster, 1 *E. D. Smith*, 681; S. C., 8 *How. Pr.*, 207; 1854, Miller v. Moore, 1 *E. D. Smith*, 739. *Ct. of Appeals*, 1857, Hauptman v. Catlin, 20 *N. Y.* (6 *Smith*), 247; affirming S. C., 3 *E. D. Smith*, 666; 4 *Abbotts' Pr.*, 472.

As to the constitutionality of statutes affect-

ing the Remedy, as distinguished from the contract, see CONSTITUTIONAL LAW.

49. A party cannot acquire a lien under the act of 1851, for labor, &c., furnished prior to that act. *N. Y. Com. Pl.*, 1853, Donaldson v. O'Connor, 1 *E. D. Smith*, 695. Compare *Smith v. Manice*, 1 *Code R.*, *N. S.*, 283.

50. **Extra work**, not within the contract, cannot be made the subject of a mechanic's lien. *N. Y. Com. Pl.*, 1855, Foley v. Alger, 4 *E. D. Smith*, 719.

51. Under the act of 1830 (*Laws*, 412, ch. 380), the sub-contractor may establish a lien for extra work. There must have been a written contract for the erection of the building; but it is not necessary it should have been performed without any departure. *Supreme Ct.*, 1834, Haswell v. Goodchild, 12 *Wend.*, 373.

52. Work done under the contract, though pursuant to an oral modification of its terms in respect to time, may be recovered for. *N. Y. Com. Pl.*, 1856, Foley v. Gough, 4 *E. D. Smith*, 724.

53. **Sidewalks.** Under the act of 1830 (*Laws*, 412, ch. 380, § 1),—which only allows a lien for work done in erecting, &c., *buildings*,—no lien can be acquired for the construction of sidewalks in front of the building. The term "appurtenances," employed in *Laws* of 1844, 389, ch. 220, § 1; and *Id.*, 451, ch. 305, § 1, would probably include sidewalks. *Ct. of Appeals*, 1853, McDermott v. Palmer, 8 *N. Y.* (4 *Seld.*), 333; S. C., 2 *E. D. Smith*, 675.

54. **Contract with owner.** Where the laborer's notice of lien is filed for work done for the contractor, he cannot recover under it for work done under a contract direct with the owner. *N. Y. Com. Pl.*, 1853, Hauptman v. Halsey, 1 *E. D. Smith*, 668.

55. **Requisites of the notice of lien.** It is indispensable to the creation of a lien, under the act of 1851, that the prescribed notice should be filed. No particular form of notice need be followed; but the notice must state the matters required by statute to be stated. If defective, in omitting any essential particular, it cannot be aided by amendment in the proceeding to enforce the lien. *N. Y. Com. Pl.*, 1852, Beals v. Congregation B'nai Jeshurun, 1 *E. D. Smith*, 654.

56. **Name of owner.** The notice omitted to state the name of the owner of the building.

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The defendants, a religious society, appeared, and set up the defect as a ground of defence. *Held*, 1. That the notice was essentially defective. 2. That the appearance did not waive the objection. 3. That no amendment could be allowed. *Id.*

57. Contract with agent. Where the contract is made with an agent of the owner, it is not necessary that a notice filed to create a lien under the act of 1851, should state the name of the person with whom the contract was made. *Op. of Appeals*, 1857, *Hauptman v. Catlin*, 20 *N. Y. (6 Smith)*, 247; affirming *S. C.*, 3 *E. D. Smith*, 636; 4 *Abbotts' Pr.*, 472.

58. Time of performing work. It is not material to state, in the notice filed to create a lien, that the work was done within six months. If it was not, that is matter of defence to be shown affirmatively. *N. Y. Com. Pl.*, 1856, *Lutz v. Ey*, 3 *E. D. Smith*, 621; *S. C.*, 3 *Abbotts' Pr.*, 475.

59. Capacity. A notice to create a lien is not insufficient because it fails to state in what capacity—whether as contractor or laborer, &c.—the claimant rendered the services. *Id.*

60. Filing. There is no need that a notice filed to create a lien should state when it was or would be filed. *N. Y. Com. Pl.*, 1853, *Tinker v. Geraghty*, 1 *E. D. Smith*, 687.

61. Description of premises. A notice sustained, though it did not state with precision that the building was situate within the city and county of New York. *Id.*

62. A description of premises in a notice of lien, by a general statement that they are on the west side of a street, between two other streets, may be sufficient if the street-number of the building is unknown. *N. Y. Com. Pl.*, 1857, *Duffy v. McMannus*, 3 *E. D. Smith*, 657; *S. C.*, 4 *Abbotts' Pr.*, 432.

63. Verification. The provision in the amendatory law of 1855 (*Laws*, 761, ch. 404, § 7), requiring the verification of the notice of lien, does not affect proceedings instituted prior to the passage of that act. *N. Y. Com. Pl.*, 1856, *Foley v. Gough*, 4 *E. D. Smith*, 724.

64. Under the act of 1855,—requiring the notice of lien to be verified “in the same manner as a pleading,”—a verification alleging only that “the statement of the balance due, &c., is true according to deponent’s knowledge,” is insufficient. *N. Y. Com. Pl.*, 1857, *Conklin v. Wood*, 3 *E. D. Smith*, 662.

65. A notice so verified is void, and fur-

nishes no foundation for a judgment. The objection can be taken at the trial. *Id.*

66. Expiration of the lien. A mechanic’s lien, under *Laws of 1844*, 839, ch. 290,—relating to the city of New York,—expires in one year from its commencement. It is not prolonged by obtaining a judgment against the owner of the property within the year. *Op. of Appeals*, 1850, *Freeman v. Oram*, 3 *N. Y. (3 Comst.)*, 805.

67. If proceedings have been commenced within the year, the inchoate lien created by the filing of the claim continues after the year, and until judgment in the proceedings, which becomes itself a lien, relating back, and having effect as an incumbrance, as of the day of filing the claim. So held, under the act of 1851. *N. Y. Com. Pl., Sp. T.*, 1853, *Paine v. Bonney*, 4 *E. D. Smith*, 784; *S. C.*, 6 *Abbotts' Pr.*, 99.

68. Although a person having a mechanic’s lien upon certain premises is joined as a party to an action to foreclose a mortgage on such premises, he is not thereby relieved from the necessity of foreclosing his lien within one year, as required by statute. [Laws of 1851, 954, ch. 518.] And if he fail to do so, he cannot receive the amount of his expired lien out of the surplus remaining after a foreclosure sale. *Supreme Ct.*, 1859, *Noyes v. Burton*, 29 *Barb.*, 681; *S. C.*, 17 *How. Pr.*, 449.

69. Discharge of the lien. The payment by the owner to the county clerk of the amount of claimant’s demand, under section 11 of the act of 1851, simply reclaims the land from the lien. The right to the money remains unsettled; to recover it the claimant must prosecute his claim before the court. If he fails in his suit the defendant is entitled to a return. *N. Y. Com. Pl., Sp. T.*, 1854, *Dunning v. Clark*, 2 *E. D. Smith*, 535.

70. Therefore where the owner, having made such payment, failed to appear in the proceeding to foreclose,—Held, that the plaintiff was regular in issuing a writ of inquiry, &c., and was entitled to the costs of his proceedings to establish the demand. *Id.*

71. In proceedings to enforce a mechanic’s lien, the omission to notify the county clerk, within a year of the filing of the claim, that legal steps to enforce the lien have been taken, does not operate to discharge the lien. It is not the want of such notice, but the act of the clerk in making the entry in the book of liens,

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stating that no such notice has been given, that discharges the lien. *N. Y. Com. Pl., Sp. T.*, 1858, *Paine v. Bonney*, 4 *E. D. Smith*, 734; *S. C.*, 6 *Abbotts' Pr.*, 99.

72. The practice of the county clerk in requiring, before making such an entry, the affidavit of the owner that he has had no notice within the year of proceedings to enforce the lien, approved. *Id.*

73. What are the requisites of a notice to the county clerk that legal steps have been taken to enforce the lien, considered. *Id.*

II. THE FORECLOSURE.

74. In general. The proceedings in an action to foreclose a mechanic's lien (under the act of 1851), subsequent to the appearance of the parties, are in the same form, and are governed by the same rules, as those in other civil actions brought for the enforcement of similar rights. *N. Y. Com. Pl.*, 1852, *Doughty v. Devlin*, 1 *E. D. Smith*, 625.

75. Arbitrating. That the agreement to arbitrate a controversy arising between the contractor and sub-contractor, provided for by Laws of 1830, 412, ch. 330, § 3,—must be in writing. *N. Y. Superior Ct.*, 1849, *Monteith v. Evans*, 8 *Sandf.*, 65.

76. Jurisdiction of the Common Pleas. In administering the Mechanic's Lien Law, the New York Common Pleas acts as a court of equity; and has power to adapt the judgment or decree to the special circumstances of the case. *N. Y. Com. Pl.*, 1852, *Doughty v. Devlin*, 1 *E. D. Smith*, 625; *S. P.*, 1854, *Sullivan v. Decker*, *Id.*, 699.

77. The jurisdiction of the inferior courts in mechanics' lien cases is not exclusive, but simply concurrent with that of the Common Pleas. Plaintiff may prosecute in the Common Pleas, although for an amount less than \$100, subject only to the risk of paying his own costs, if his recovery does not extend to \$50. *N. Y. Com. Pl., Sp. T.*, 1855, *Jaques v. Morris*, 2 *E. D. Smith*, 639.

78. — of the Supreme Court. The Supreme Court has no jurisdiction over mechanics' liens in the city of New York. It can recognize their existence, and keep a fund in court while proceedings are taken to enforce a lien upon it, and, it seems, might in such case order the lien to be satisfied out of the fund in court; but it cannot order the property to be sold for that purpose. That judgment can be

rendered only by the Common Pleas. *Supreme Ct.*, 1859, *Noyes v. Burton*, 29 *Barb.*, 681; *S. C.*, 17 *How. Pr.*, 449.

79. The object of the law is to give a lien from the time of filing the notice, and it is the duty of all courts to aid in carrying this object into effect. There is no doubt of either the power or the duty of the Supreme Court to see to the preservation of such a lien where it is asserted in proceedings before the court,—a. g., in foreclosure of a mortgage on property claimed to be subject to such a lien. *Ct. of Appeals*, 1859, *Livingston v. Mildrum*, 19 *N. Y.* (5 *Smith*), 440.

80. A defendant in an action of foreclosure, in the Supreme Court, claimed a mechanic's lien on the premises, but omitted to take any steps in the Common Pleas to enforce the lien. *Held*, that by the lapse of a year from the filing of his lien it ceased, notwithstanding the foreclosure. The fact of his being made a party to the action did not relieve him. During the year the Supreme Court could recognize the lien as existing, and could continue the property or keep its proceeds in court, subject to the lien, if proper proceedings were taken to enforce it, and might, perhaps, obtain jurisdiction so far over the subject-matter as to order the lien to be discharged by payments, if it were brought to a close within the year, or if proceedings were still pending for that purpose. But they could give no judgment ordering the property to be sold to satisfy the lien, either before or after the year expired, because that judgment can only be rendered by the Common Pleas. *Supreme Ct., Sp. T.*, 1859, *Noyes v. Burton*, 29 *Barb.*, 681; *S. C.*, 17 *How. Pr.*, 449.

81. — of district court. In a proceeding in a district court to enforce a mechanic's lien, it is no objection to the jurisdiction of the justice that the accounts between the parties exceed \$400, if the amount claimed by the plaintiff does not exceed \$100. *N. Y. Com. Pl.*, 1856, *Foley v. Gough*, 4 *E. D. Smith*, 724.

82. Parties. The New York Common Pleas has general power, in proceedings to foreclose a lien, to bring in additional parties, whenever necessary to the complete determination of the controversy. *N. Y. Com. Pl.*, 1854, *Sullivan v. Decker*, 1 *E. D. Smith*, 699; *S. C.*, 12 *N. Y. Leg. Obs.*, 109.

83. So has the Marine Court. *N. Y. Com. Pl.*, 1855, *Lowber v. Childs*, 2 *E. D. Smith*, 577.

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84. In what manner new parties may be brought in. *Sullivan v. Decker*, 1 *E. D. Smith*, 699; *S. C.*, 12 *N. Y. Leg. Obs.*, 109; *Lowber v. Childs*, 2 *E. D. Smith*, 577.

85. Sub-contractor. Where the plaintiff is a sub-contractor, or laborer, or vendor of the contractor, and claims for money which he alleges to be due to him from the contractor, the latter is a proper party to the proceeding, and will be ordered by the court to be brought in, on the defendant's application, upon proper notice. Such application may be made on the appearance of the parties in court, pursuant to the notice to appear, and on due notice of an intention to apply for the order, without waiting until the issue is joined between the owner and the claimant. *N. Y. Com. Pl.*, 1854, *Sullivan v. Decker*, 1 *E. D. Smith*, 699; *S. C.*, 12 *N. Y. Leg. Obs.*, 109. Approved in *Foster v. Skidmore*, 1 *E. D. Smith*, 719; and *Lowber v. Childs*, 2 *Id.*, 577.

86. A demurrer will not lie to the complaint of a sub-contractor filed to foreclose a lien, on the ground that the contractor has not been made a party. The proper course for the defendant is to apply to the court for an order bringing in the contractor. *N. Y. Com. Pl.*, 1854, *Foster v. Skidmore*, 1 *E. D. Smith*, 719.

87. Nor can the proceeding be dismissed on such ground. *N. Y. Com. Pl.*, 1855, *Lowber v. Childs*, 2 *E. D. Smith*, 577.

88. The act of 1851 makes no provision for any summary proceeding on the part of the contractor, to compel a sub-contractor to submit to an accounting. It provides only two modes of enforcing a settlement: one by notice to foreclose, served by the claimant, under section 4; the other by notice served by the owner, under section 11, subd. 4, requiring the claimant to proceed in thirty days. *N. Y. Com. Pl., Sp. T.*, 1855, *Carpenter v. Jaques*, 2 *E. D. Smith*, 571; *S. P., Sp. T.*, 1856, *Butler v. Magie*, *Id.*, 654.

89. Therefore, where the contractor served on the claimant a notice to appear and submit to an accounting and settlement,—*Held*, that the court had no jurisdiction to make any order except to dismiss the proceedings. *N. Y. Com. Pl., Sp. T.*, *Carpenter v. Jaques*, 2 *E. D. Smith*, 571.

90. Other lien-holders. In general, liens are entitled to be paid in full in the order of time of filing the notice of lien. In proceedings to foreclose a lien, it is not essential to make

holders of other liens parties. But if there are other liens prior in point of time, the holders of which are not made parties, the whole amount secured by them will be allowed to the owner, before he can be required to pay any thing to the claimant. If the latter wishes to contest the validity, amount, &c., of such prior lien, he must institute some proceeding appropriate to that purpose. *N. Y. Com. Pl., Sp. T.*, 1853, *Kaylor v. O'Connor*, 1 *E. D. Smith*, 672; *S. P.*, 1854, *Sullivan v. Decker*, *Id.*, 699.

91. Under Laws of 1855, 760, ch. 404, § 5,—allowing the contractor to be made a defendant, and authorizing a personal judgment against him,—the making the contractor a party is, in effect, the same as commencing a personal action against him. He may avail himself of any defence which would be available in an ordinary action; and may set up a counter-claim against the plaintiff, and recover judgment for the excess. *N. Y. Com. Pl., Sp. T.*, 1858, *Grogan v. McMahon*, 4 *E. D. Smith*, 754; *S. C.*, 6 *Abbotts' Pr.*, 306.

92. The notice to foreclose. Under the act of 1851, service of the notice provided in section 4 is the commencement of the suit. If the owner pays the claim on the filing of the original notice, no suit has been commenced, and no right to costs arises. *N. Y. Com. Pl., Sp. T.*, 1851, *Reynolds v. Hamil*, 1 *Code R., N. S.*, 280.

93. What it must specify. The notice to foreclose the lien, must advise the owner of the fact of the lien; stating the amount claimed, and the time when the notice was docketed. *N. Y. Com. Pl., Sp. T.*, 1852, *McSorley v. Hogan*, 1 *Code R., N. S.*, 285.

94. The notice to appear in the proceedings to foreclose the lien, must contain a sufficient reference to the lien intended to be foreclosed. But there is no absolute need that it should specify the date when the notice to create the lien was filed. *N. Y. Com. Pl.*, 1853, *Tinker v. Geraghty*, 1 *E. D. Smith*, 687.

95. The proper form of notice, mode of proceeding to foreclose a lien created under the act of 1851, relating to Westchester, &c., counties (*Laws of 1851*, 819, ch. 169),—considered. *Dressel v. French*, 7 *How. Pr.*, 850.

96. Waiving defects. The owner, by appearing and entering upon his defence without objection, waives any defect in the notice to appear in court, served upon him (*Laws of*

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1851, 954, ch. 518, § 4),—*s. g.*, that the notice did not state the name of the contractor. *N. Y. Com. Pl.*, 1852, *McBride v. Crawford*, 1 *E. D. Smith*, 658.

97. The complaint is subject to the rules governing pleadings in other actions. *N. Y. Com. Pl., Sp. T.*, 1857, *Duffy v. McManus*, 8 *E. D. Smith*, 657; *S. O.*, 4 *Abbotts' Pr.*, 432.

98. Creation of lien. The proceeding to foreclose a lien, by material-man against owner, under the act of 1851, being a proceeding *in rem*, it is essential for the claimant to aver and show that he has taken the proper steps to create a lien. Unless this is done there is no foundation for the proceeding. *N. Y. Com. Pl.*, 1852, *Oronkright v. Thomson*, 1 *E. D. Smith*, 661.

99. The complaint must show that the claimant has taken the requisite steps to create a lien. An ordinary complaint for work and labor merely, may be set aside on motion. *So held*, in a proceeding by the original contractor. *N. Y. Com. Pl., Sp. T.*, 1855, *Foster v. Poillon*, 2 *E. D. Smith*, 556.

100. It is not enough to recite the notice of lien by way of showing the facts relied on. The complaint must aver independently the facts constituting the grounds of the alleged claim, and showing the plaintiff's right to the remedy. *N. Y. Com. Pl., Sp. T.*, 1857, *Duffy v. McManus*, 8 *E. D. Smith*, 857; *S. O.*, 4 *Abbotts' Pr.*, 432.

101. Description of premises. The complaint must contain a sufficient description of the premises to enable the sheriff, in the event of the defendant having more than one building in the same locality, to determine by the judgment the premises to be sold, beyond a doubt. *Id.*

102. Averment of performance. The complaint must aver performance of the contract before the filing the notice of lien. So much of the act of 1844 as allowed a contractor to acquire a lien before performance, is repealed by the act of 1851. *N. Y. Com. Pl., Sp. T.*, 1855, *Jaques v. Morris*, 2 *E. D. Smith*, 689.

103. Hence a complaint which only avers performance "before the commencement of this action," is defective. *Id.*

104. — by sub-contractor. Where the proceeding is by a sub-contractor, his complaint must aver that the labor or materials were furnished in conformity with the con-

tract between the owner and the original contractor. If it fails to show this it may be required to be amended. *N. Y. Com. Pl.*, 1855, *Broderick v. Poillon*, 2 *E. D. Smith*, 554.

105. If it does not show this, it shows no right of action. *So held*, on a motion for an injunction pending the suit. *N. Y. Com. Pl., Sp. T.*, 1855, *Quinn v. Mayor, &c.*, of *N. Y.*, 2 *E. D. Smith*, 558.

106. That money is due. Where the party seeking to enforce a lien is not the original contractor, but a sub-contractor, laborer, &c., it is not necessary for him to aver in his complaint that money was due and payable from the owner at the time of filing the notice of lien. Moneys which become due afterwards, may be reached. But the complaint should show that the work or materials sued for, were furnished in conformity with the contract made with the owner for the erection of the building; and that the money is due and payable to claimant therefor; also that he has taken the requisite steps to acquire a lien. *So held*, under the act of 1851. *N. Y. Com. Pl.*, 1852, *Doughty v. Devlin*, 1 *E. D. Smith*, 625; *S. P.*, 1853, *Sullivan v. Brewster, Id.*, 681; and see *Dixon v. La Farge, Id.*, 722.

107. Set-off. In a proceeding under the act of 1851, prosecuted by the contractor, the owner may set off a general indebtedness arising independent of the building contract. The statute does not restrict defendant to set-off for matters arising out of the contract. And the proceeding being of an equitable character a set-off is peculiarly proper. *N. Y. Com. Pl., Sp. T.*, 1853, *Owens v. Ackerson*, 8 *How. Pr.*, 199.

108. In proceedings between the contractor and the owner, to foreclose a lien created under the act of 1851, the owner may set off a demand against the contractor, although it arises out of matters unconnected with the contract. *N. Y. Com. Pl., Sp. T.*, 1853, *Owens v. Ackerson*, 1 *E. D. Smith*, 691.

109. In a proceeding by contractor against owner, under the act of 1851, it is not necessary, in order to entitle the owner to prove that the work has not been performed, or to recoup damages for imperfect performance, that he should give notice of this claim by bill of particulars, or otherwise, before the time of appearing. Such a claim is not an "offset," within the meaning of section 5. *N. Y. Com.*

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Pl., 1854, *Gourdier v. Thorp*, 1 *E. D. Smith*, 697.

110. Whether a general indebtedness in favor of the contractor to the owner, may be set off in a proceeding by sub-contractor. *Miner v. Hoyt*, 4 *Hill*, 198; S. C., on appeal, 7 *Id.*, 525.

111. *Interpleading*. In a proceeding instituted by a sub-contractor, under the act of 1851, to foreclose a lien, the court will not grant the owner an order under section 122 of the Code of Procedure, that on paying the sum which he admits to be due into court, he be discharged, and the various lien-holders be left to litigate the priority of their liens between themselves, where the claimant alleges that a larger sum is due from the owner than the latter admits. *N. Y. Com. Pl., Sp. T.*, 1852, *Chamberlain v. O'Connor*, 1 *E. D. Smith*, 665.

112. *Issues*. In proceedings to foreclose a mechanic's lien, under the act of 1851, it is competent for defendant either to answer, or demur to the complaint. The act does not confine the parties to issues of fact only. *N. Y. Com. Pl.*, 1852, *Doughty v. Devlin*, 1 *E. D. Smith*, 625.

113. Practice as to joining issue. *N. Y. Com. Pl., Sp. T.*, 1851, *Smith v. Maince*, 1 *Code R., N. S.*, 280.

114. *Burden of proof*. Under the act of 1850 (*Laws*, 412, ch. 830), it is sufficient, in the first instance, for the mechanic to prove performance by the contractor; and it then devolves upon the defendant to prove payment to the contractor, before service of the plaintiff's account upon the defendant pursuant to the act. *Supreme Ct.*, 1841, *Rudd v. Davis*, 1 *Hill*, 277.

115. The sub-contractor must show, before he can have judgment, that work has been done, pursuant to the contract, for which the owner is already liable. A lien may be acquired upon money not due at the time of filing the notice; but it cannot be enforced until the money becomes payable. *N. Y. Com. Pl.*, 1854, *Pendleburg v. Meade*, 1 *E. D. Smith*, 728. Approved, 1856, *Dennistoun v. McAllister*, 4 *Id.*, 729.

116. A sub-contractor must prove, affirmatively, that money was due from the owner when the lien was filed, or has become due subsequently. *N. Y. Com. Pl.*, 1855, *Oox v. Broderick*, 4 *E. D. Smith*, 721; 1856, *Fergu-*

son v. Burk, *Id.*, 760. S. P., *Supreme Ct.*, 1854, *Haswell v. Goodchild*, 12 *Wend.*, 378.

117. The promise of the owner to pay the mechanic if he would procure the contractor's order upon him, and his requesting the mechanic to serve lien-papers upon him, are at most but an implied admission that there is something due on the contract. He is not precluded thereby from proving that there was nothing due to the contractor. *N. Y. Superior Ct.*, 1847, *Pike v. Irwin*, 1 *Sandf.*, 14.

118. *Proof of title*. Judgment in favor of plaintiff should not be reversed for want of proof that defendant was the owner of the building, where the complaint (in the Marine Court) averred his title, and defendant set up other grounds of defence in his answer, and litigated the case on the trial without objecting to the lack of evidence of ownership. *N. Y. Com. Pl.*, 1854, *Dixon v. La Farge*, 1 *E. D. Smith*, 722.

119. — *of the contract*. In proceedings to foreclose a mechanic's lien, the defendant did not object that there was no evidence of a contract, but confined himself to the defence that the plaintiff had not performed his agreement with the contractor. *Held*, that on appeal the existence of a contract would be presumed. *N. Y. Com. Pl.*, 1856, *Dennistoun v. McAllister*, 4 *E. D. Smith*, 729.

120. Contractor, though joined as defendant, a competent witness for the claimant. *Cannon v. Van Wagner*, 2 *E. D. Smith*, 590.

121. *On appeal* from a judgment in lien-law proceedings, the return should embrace the exhibits put in evidence, or copies of them. *N. Y. Com. Pl.*, 1853, *Foley v. Alger*, 4 *E. D. Smith*, 719.

122. Where, upon the question whether such a performance of the contract has been shown, as entitles the contractor to a lien, the evidence adduced is contradictory, the general term will not interfere with the finding below. *N. Y. Com. Pl.*, 1856, *Lutz v. Ey*, 3 *E. D. Smith*, 621; S. C., 3 *Abbotts' Pr.*, 475.

123. *Judgment*. In a proceeding to foreclose a lien, the plaintiff can recover no more than the sum (with interest) which he claimed in the notice filed to create the lien. *N. Y. Com. Pl., Sp. T.*, 1853, *Protective Union v. Nixon*, 1 *E. D. Smith*, 671.

124. Where plaintiff has recovered judgment for more than the sum claimed in his notice, filed to create the lien, he may be

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allowed to remit the excess and retain the judgment for the residue. *Id.*

125. Cannot be personal. In an action to foreclose a mechanic's lien, brought by a person employed by a contractor, against the owner, there can be no personal judgment, but a mere foreclosure of the lien upon his interest in the land, with a judgment directing the sale of such interest to pay the amount found to be due. A personal judgment in such case is erroneous. But the error may, it seems, be remedied by the entry of a new judgment in proper form. *N. Y. Com. Pl.*, 1856, *Walker v. Paine*, 2 *E. D. Smith*, 662.

126. The proceeding is *in rem*, and a judgment against the owner personally, in favor of a sub-contractor or employee of the contractor, is not proper. *N. Y. Com. Pl.*, 1855, *Cox v. Broderick*, 4 *E. D. Smith*, 721.

127. Proceedings commenced to foreclose a lien cannot be used for the purpose of recovering a merely personal judgment for money. The rule, that the court may grant any relief proper to the facts, is not applicable to allow such a judgment in such proceedings. *N. Y. Com. Pl.*, 1857, *Sinclair v. Fitch*, 3 *E. D. Smith*, 677.

128. A personal judgment against the contractor and owner jointly, is erroneous on that ground, and should be reversed even on the contractor's appeal. *N. Y. Com. Pl.*, 1856, *Dennistown v. McAllister*, 4 *E. D. Smith*, 729.

129. As to the form of judgment and execution proper in proceedings to foreclose a mechanic's lien. *Doughty v. Devlin*, 1 *E. D. Smith*, 625; *Dunning v. Clark*, 2 *Id.*, 535; *Eagleson v. Clark*, *Id.*, 644; S. C., 2 *Abbotts' Pr.*, 364; *Althaus v. Warren*, 2 *E. D. Smith*, 657; *Lenox v. Trustees of Yorkville Baptist Church*, *Id.*, 678; *Smith v. Corey*, 3 *Id.*, 642; *Dennistown v. McAllister*, 4 *Id.*, 729.

130. The transcript and docket, in mechanics' lien cases, as well as the judgment itself, and the execution issued, must be special, directing the sale of the owners' interest existing at the time when the notice of lien was filed. [Laws of 1855, 760, ch. 404.] Where they are in the form employed in ordinary personal actions, they will be set aside on motion; but without prejudice to filing and issuing a correct transcript and execution. *N. Y. Com. Pl.*, *Sp. T.*, 1856, *Lenox v. Yorkville Baptist Church*, 2 *E. D. Smith*, 678.

131. Limiting the judgment. That the

court will not impair the security of a lienholder who has proceeded to judgment pursuant to the statute, by limiting the operation of the judgment or exempting any part of the premises from it, except in an extreme case. *N. Y. Com. Pl.*, 1857, *Paine v. Bonney*, 4 *E. D. Smith*, 784; S. C., 6 *Abbotts' Pr.*, 99.

132. Judgment of dismissal. On a proceeding to foreclose a lien, it appeared that a lien had been duly effected, but that proceedings had been taken to foreclose it, which had been dismissed; and that the present proceeding was founded on a new notice to appear, served to foreclose the same lien. *Held*, that the previous dismissal was a bar to the present proceeding. A judgment of nonsuit or of dismissal is a "judgment" within the meaning of Laws of 1851, 958, ch. 518, § 9, and operates to discharge the lien. *N. Y. Com. Pl.*, 1852, *Sullivan v. Brewster*, 1 *E. D. Smith*, 681; S. C., 8 *How. Pr.*, 207.

133. On motion for rehearing in a peculiar case,—*Held*, that the proper form of judgment in the case, was a judgment final for defendants; not a judgment of dismissal, merely. *N. Y. Com. Pl.*, 1855, *Teaz v. Chrystie*, 2 *E. D. Smith*, 635; S. C., 2 *Abbotts' Pr.*, 259.

134. Costs. The sub-contractor having filed a notice to create a lien, the owner retained in his hands an amount enough to cover the claim; but suffered a default; and interposed no obstacle to the claimant's proceeding. The original contractor, however, was joined as a party at his own request, and litigated the claim, on which the claimant finally prevailed. *Held* (under the act of 1855, which authorizes the court to award such costs as may be just, &c.), that the owner ought not to be charged with the costs of the litigation between the claimant and contractor. *N. Y. Com. Pl.*, 1855, *Eagleson v. Clark*, 2 *E. D. Smith*, 644; S. C., 2 *Abbotts' Pr.*, 364.

135. It was not essential that the owner should pay the money into court, to escape such costs. *Id.*

136. Costs of the owner's default and of the judgment against him thereon, were allowed. *Id.*

137. No extra allowance, by way of costs, allowable in lien cases where defendant has not answered, but damages were assessed by writ of inquiry. *Randolph v. Foster*, 3 *E. D. Smith*, 648; S. C., 4 *Abbotts' Pr.*, 262.

History of the Statutes.

By-laws.

Geneva College.

138. **The sale.** The proceeding to foreclose a mechanic's lien (under the act of 1851) is an equitable one,—is a proceeding *in rem* and not *in personam*,—and operates only as the foreclosure of a lien and not as an action for the collection of a debt. The sale authorized is an absolute sale, as in case of foreclosure of a mortgage, of all the interest of the owner. *N. Y. Com. Pl., Sp. T., 1857, Randolph v. Leary, 8 E. D. Smith, 637; S. O., 4 Abbotts' Pr., 205.*

139. The provisions of 2 Rev. Stat., 370,—allowing a right of redemption on the sale of real property by virtue of an *execution*,—are inapplicable to sales made upon the foreclosure of a mechanic's lien. *Id.*

140. Hence, when a sale is made by the sheriff, he is bound to execute a *deed* to the purchaser, conveying the owner's interest. A mere *certificate* of sale is not enough. *Id.*

141. The judgment directed the sheriff to sell the interest of the defendant in the premises at the time of filing the notice to create the lien, and to execute the deed therefor to the purchaser. The sheriff sold the *premises* in question (not the defendant's *interest* at the time of filing), and sold them subject to the mortgages and judgments thereon. He offered to the purchaser a certificate of sale as upon a sale under execution, but refused to give a deed. *Held*, that the motion of the purchaser, to compel the execution of the deed, could not be granted. The judgment was regular (3 *E. D. Smith, 637; S. O., 4 Abbotts' Pr., 205*); but selling the premises, instead of defendant's interest, was irregular; and a resale must be had pursuant to the judgment. *N. Y. Com. Pl., Sp. T., 1857, Smith v. Corey, 8 E. D. Smith, 642.*

MEDICAL SOCIETIES.

1. **History** of the statutes relative to the incorporation of medical societies.* *People v. Medical Society of Erie, 24 Barb., 570.*

2. **Refusing admission.** Power of a medical society to *refuse to admit* an applicant, on,

* The various statutes (which are somewhat numerous), authorizing the formation of medical societies, and defining their authority and powers, will be found collected in 2 *Rev. Stat.*, 5 ed., 58-67; *Id.*, 648-652. See, also, as to medical colleges and schools, *Id.*, 634, §§ 7-14.

the ground of unfitness; unprofessional practice, &c. *Exp. Paine, 1 Hill, 665.*

3. **Initiation fee.** A county medical society has authority, under the power to pass by-laws relative to the admission of members, to demand an initiation fee as a condition of admittance. *Supreme Ct., 1880, People v. Medical Society of N. Y., 8 Wend., 426.*

4. **Power of expulsion.** The provisions of 1 Rev. Stat., 452,—giving county medical societies the right to try members for ignorance, misconduct, or immorality, and expel them therefor,—are not unconstitutional. *Supreme Ct., 1833, Matter of Smith, 10 Wend., 449.*

5. A medical society is not precluded from preferring charges against a physician, by the fact of having once before refused to prefer the same charges. In such proceeding the society are but accusers, like a grand jury, and may receive additional testimony or reconsider the case, and change their determination upon the original evidence. *Id.*

6. **By-laws.** A medical society established a tariff of fees for medical services to be performed by its members, and fixed a minimum salary to be received by any member who should be appointed to any public office, in a professional capacity, and adopted a resolution declaring that it should be dishonorable for any member of the society to accept any appointment, or perform any services contained in such tariff of prices, at a less sum than was therein specified. Subsequently, in pursuance of a by-law to that effect, a member was expelled for a violation of this regulation. *Held*, that the regulation was void, as being unreasonable, and against public policy, and contrary to law; and that the expulsion of the member was unauthorized and illegal. *Supreme Ct., 1857, People v. Medical Society of Erie, 24 Barb., 570.*

7. The power of medical societies to enact by-laws, considered. *Id.*

8. **Geneva College** not entitled to send a delegate to the State Medical Society. *People v. Medical Society of the State of N. Y., 18 Wend., 539.*

MERGER.

1. **Whenever a greater estate and a less coincide in the same person, without any intermediate estate, the lesser is invariably**

In what Cases it takes place.

merged at law, though in equity it is not invariably so, but depends upon intention. *Supreme Ct.*, 1828, *Roberts ad. Jackson*, 1 *Wend.*, 478. To the same effect, *Ct. of Errors*, 1828, *James v. Morey*, 2 *Cow.*, 246, 284, 300; reversing *S. C.*, *sub nom. James v. Johnson*, 6 *Johns. Ch.*, 417.

2. The general doctrine of merger discussed. *James v. Morey*, 2 *Cow.*, 246, and 6 *Johns. Ch.*, 417; *Clift v. White*, 12 *N. Y.* (2 *Kern.*), 519, and 15 *Barb.*, 70.

3. *Lease*. The owner of a mortgage, and the owner of the equity of redemption, leased the premises for a term, and the mortgage was afterwards assigned, and foreclosed by the assignee; and on the sale the lessee became the purchaser. *Held*, that he had merged his lease in the fee, and had no claim at law, or in equity, against his lessors; especially since, although the sale was announced as free from all incumbrances, the lessee had given notice that he should claim that it was subject to his lease. *Chancery*, 1820, *Chesterman v. Gardner*, 5 *Johns. Ch.*, 29.

4. *It seems*, that where a tenant in fee, holding in trust for himself and another, receives from the owner of the reversion a deed thereof to himself and such other, jointly, the two estates thus acquired are merged, and each becomes the absolute owner of the fee as tenant in common with the other. *Hosford v. Merwin*, 5 *Barb.*, 51.

5. *Where the legal and equitable estates in land, being coextensive, unite in the same person, the equitable is merged in the legal, and is no longer recognized in equity; but the legal estate is left to prevail according to the rules of law.* [Doug., 771; 1 Bro., 364; 3 Ves., 126, 339.] *Chancery*, 1815, *Nicholson v. Halsey*, 1 *Johns. Ch.*, 417.

6. Thus, where A., having paid for a purchase of land, died before a conveyance was made, and B. afterwards took a conveyance in trust for the infant daughter of A., to whom he afterwards executed a deed in fee;—*Held*, that she having thus acquired the legal title, her equitable title from her father was merged; and, on her death without issue, the estate descended to her brothers and sisters of the half-blood, to the exclusion of her paternal uncle. *Id.*

7. Where land was conveyed to a mother, in fee, in trust for her daughter, in case she did not die in her minority, and without law-

ful issue; and if she so died, then to the mother in fee; and the mother died, leaving the daughter her only heir, in her minority;—*Held*, that the legal and equitable estate met in the daughter, and that the latter was merged. *Chancery*, 1884, *Matter of De Kay*, 4 *Paige*, 408.

8. *Whether one lien can merge in another.* *Schermerhorn v. Merrill*, 1 *Barb.*, 511.

9. *Where a deed has been adjudged void as fraudulent, it must be regarded, as to the grantee, as if it never existed; and if the grantee subsequently acquires a mortgage upon the premises, it does not merge in his lost estate.* *Supreme Ct.*, 1828, *Roberts ad. Jackson*, 1 *Wend.*, 478.

10. *Void remainder*. Where an heir takes by will a life-estate, and, through the invalidity of the provisions of the will, disposing of the remainder, takes also an undivided share in fee of the realty, the former estate is merged in the latter. *Supreme Ct.*, 1851, *Taylor v. Gould*, 10 *Barb.*, 388.

11. *Certificate of sale*. The mortgagor took, by assignment, the sheriff's certificate of a sale of the mortgaged premises under an execution, but transferred it to another, who took the deed of the sheriff. *Held*, that the two estates had never met, and the mortgage was not merged. *Supreme Ct.*, 1853, *Reed v. Latson*, 15 *Barb.*, 9.

12. *Merger of mortgage*. After giving a mortgage, the mortgagor conveyed to the mortgagee by an absolute deed, which was recorded, and took back a defeasance, which was not recorded. The latter assigned the mortgage to defendant, and subsequently conveyed in fee, with full covenants, to plaintiff, who had no notice of the defeasance or assignment. *Held*, that, as regarded the plaintiff, the mortgage was merged by the absolute deed to the mortgagee, and that he took an absolute fee, discharged of the mortgage. *Chancery*, 1821, *Mills v. Comstock*, 5 *Johns. Ch.*, 214.

13. Where the owner of an equity of redemption pays off a subsisting mortgage, and takes an assignment of it, it may be presumed that he does it to exonerate his estate, and that the mortgage is extinguished, unless it is made to appear that he has some beneficial interest in keeping the legal and equitable estates distinct. *Chancery*, 1817, *Gardner v. Astor*, 3 *Johns. Ch.*, 58; 1822, *Starr v. Ellis*, 6 *Id.*, 398.

Merger of Mortgage in the Fee.

14. The court will not permit him to keep the charge outstanding, to the prejudice of a *bona-fide* purchaser under him. *Chancery*, 1822, *Starr v. Ellis*,* 6 *Johns. Ch.*, 393.

15. Where a mortgagee takes a release of the equity of redemption from the mortgagor for full consideration, and with full covenants, the mortgage-debt is to be presumed merged in the estate and satisfied by the purchase, without very precise proof to the contrary; especially where no claim is set up for more than six years after the purchase. *Chancery*, 1821, *Burnet v. Denniston*, 5 *Johns. Ch.*, 35; and see *Loomer v. Wheelwright*, 8 *Sandf. Ch.*, 135.

16. If a mortgagee who has assigned the mortgage, with a guaranty of collectibility, becomes the purchaser on a foreclosure of a prior mortgage, the holder of the mortgage assigned not being a party, the prior mortgage is not, as against the assigned mortgage, merged in the equity of redemption acquired by the purchase. *Chancery*, 1844, *Vanderkemp v. Shelton*, 11 *Paige*, 38.

17. **Grantee of part.** A mortgage of the whole premises, purchased by a grantee of a parcel of the premises (or his assigns), whose deed expressly charged him with payment of such mortgage, is thereby extinguished. *So held*, where the parcel of the premises was ample for the payment of the whole mortgage. *Ct. of Appeals*, 1852, *Russell v. Pistor*, 7 *N. Y. (8 Seld.)*, 171.

18. **Question of intention.** Where the mortgagee purchases the equity of redemption, the question of merger is one of intention express or implied. He is not bound to make his election immediately;† nor do mere declarations, importing an *intent* to merge, necessarily preclude subsequent *acts* which treat the estates as not merged. Until there is some person in interest to be affected, mere intention ought not to be conclusive against him. Thus where a mortgagee purchased the equity of redemption at sheriff's sale, and represented himself as owner of the premises, but afterwards assigned the mortgage, covenanting for the amount due on it, and subsequently conveyed the premises,—*Held*, that the mortgage was not merged. *Ct. of Errors*, 1823,

James v. Morey, 2 *Cow.*, 246; reversing *S. C.*, *sub nom. James v. Johnson*, 6 *Johns. Ch.*, 417. *Chancery*, 1828, *Russell v. Austin*, 1 *Paige*, 192. *S. P.*, *Supreme Ct.*, *Sp. T.*, 1847, *Sohermerhorn v. Merrill*, 1 *Barb.*, 511; and see *Clift v. White*, 12 *N. Y. (2 Kern.)*, 519; *Spencer v. Harford*, 4 *Wend.*, 381; *Cooper v. Whitney*, 3 *Hill*, 95.

19. A conveyance of mortgaged premises from the owner to the mortgagee, does not merge the mortgage where it was not the intention of the parties that it should. *Supreme Ct.*, 1855, *Van Nest v. Lataon*, 19 *Barb.*, 604.

20. **Mistake.** That where the intent is clear, the fact that it was formed under a mistake of the law is immaterial. *A. V. Chan. Ct.*, 1845, *Loomer v. Wheelwright*, 8 *Sandf. Ch.*, 135.

21. **Express agreement.** Where the equity of redemption is conveyed to the mortgagor, with a written agreement that the deed shall not operate as a merger of the mortgage, except at the election of the mortgagor, equity will preserve the two estates distinct, if it does not appear that the mortgagor elected that they should be merged. *Ct. of Appeals*, 1854, *Spencer v. Ayrault*, 10 *N. Y. (6 Seld.)*, 202.

22. **Trust.** Where a mortgagee acquires the equity of redemption, the fact the mortgage is held by him in trust, and so appears on its face, will prevent a court of equity from deeming the mortgage thereby merged. *Chancery*, 1844, *Hadley v. Chapin*, 11 *Paige*, 245.

23. The executors of a mortgagee took a second mortgage from the mortgagor, and foreclosed it, and, on the sale, one of the executors purchased the premises in his own right.

Held (by the *Supreme Ct.*), that the first mortgage merged in the legal estate acquired by the executor. A merger will take place upon the union of a greater and lesser estate in the same person, although they may be held in different rights (provided the accession of one estate to the other is by the act of the party, and he has the right to dispose of the lesser estate), under the same circumstances, and to the same extent, that it would take place if the estate were held in his own right, leaving it in equity to be determined as a question of intention, express or implied. 1853, *Clift v. White*, 15 *Barb.*, 70.

* Explained, as turning on the ground of fraud, *James v. Morey*, 2 *Cow.*, 246, 305.

† See, also, as to this point, *Van Dyne v. Thayer*, 19 *Wend.*, 162.

Several Parties.

Portion of Estate.

Action for Mesne Profits

Held (by the *Ct. of Appeals*, reversing this judgment), that even if a merger could take place in such a case it would turn on the question of intention; and as the facts showed that the executor here intended that the mortgage should remain a lien on a portion of the mortgaged premises; as to this portion, the mortgage was not extinguished, although he evinced an intention that other portions should be regarded as discharged from the lien. 1855, *Oliff v. White*, 12 *N. Y. (2 Kern.)*, 519.

24. **Husband and wife.** Where a wife acquires an equity of redemption by deed, and the forfeited mortgage is assigned to the husband, there is no merger. Their interests are separate. *Supreme Ct.*, 1842, *Cooper v. Whitney*, 3 *Hill*, 95.

25. **Surety.** Where the mortgagee buys the equity of redemption, the mortgage title is merged, so that the debt is *pro tanto* satisfied, as against one who was liable as a surety. *V. Chan. Ct.*, 1844, *Wheelright v. Loomer*, 4 *Edw.*, 282.

26. The husband mortgaged his land for his debt, and the wife joined him in a mortgage of her land for the same debt. *Held*, 1. That by the mortgagee's buying the husband's equity of redemption in his land, the husband's mortgage was merged, and the wife's mortgage extinguished. 2. That even if there were no merger, the price of the equity of redemption (which exceeded the debt) must be allowed upon the wife's mortgage. *A. V. Chan. Ct.*, 1845, *Loomer v. Wheelwright*, 3 *Sandf. Ch.*, 185.

27. **Estoppel.** That one who purchased land expressly subject to a mortgage, cannot afterwards claim that the mortgage had previously been merged. *Supreme Ct.*, 1853, *Reed v. Latson*, 15 *Barb.*, 9.

28. **Intermediate mortgage.** In equity, a prior mortgage cannot be merged in the mortgagee's subsequently acquired legal title to the equity of redemption, where there is an intermediate mortgage. [8 *Johns. Ch.*, 446; 6 *Dana*, 402.] *Chancery*, 1839, *Millsbaugh v. McBride*, 7 *Paige*, 509; and see *Skeel v. Spraker*, 8 *Id.*, 182.

29. **A merger as to a portion of the premises**, legal titles to which become united, may take place *pro tanto*, although no union takes place as to the residue. [2 *Co.*, 61.] *Ct. of Errors*, 1823, *James v. Morey*, 2 *Cow.*, 246; reversing *S. C.*, *sub nom.* *James v. Johnson*, 6

Johns. Ch., 417. *Supreme Ct.*, *Sp. T.*, 1851, *Casey v. Buttolph*, 12 *Barb.*, 637.

30. Where land is charged with an annuity, and an undivided half of the land comes to the annuitant by descent, the half of the annuity chargeable upon his share of the land is thereby merged, but the other half is not. *Chancery*, 1832, *Jenkins v. Van Shaaack*, 3 *Paige*, 242.

31. Where a mortgagor conveyed one portion of the land to A., and the rest to B., they being his sons, possession to be taken after his death; and after his death A. bought the mortgage,—*Held*, that it was not merged as to B.'s portion. *Supreme Ct.*, *Sp. T.*, 1851, *Casey v. Buttolph*, 12 *Barb.*, 637.

32. Where one bought a mortgage which covered his own and other land,—*Held*, that so much of it as was primarily chargeable upon his own land was merged, but no further. *A. V. Chan. Ct.*, 1845, *Knickerbacker v. Boutwell*, 2 *Sandf. Ch.*, 819.

33. **Vessel.** Where one colorably bought a vessel upon which there was a mortgage lien, and took an assignment of the lien, which he afterwards assigned to one who in good faith lent money on the faith of the assignment,—*Held*, that though the lien was extinguished so far as the purchaser of the vessel was concerned, it was not extinguished as against the assignee of the lien. *N. Y. Superior Ct.*, *Sp. T.*, 1857, *Thompson v. Van Vechten*, 5 *Abbotts' Pr.*, 458.

MESNE PROFITS.

1. **Defences.** An action for mesne profits is a liberal and equitable action, and will allow of every kind of equitable defence. *Ct. of Errors*, 1800, *Murray v. Gouverneur*, 2 *Johns. Cas.*, 488.

2. **Improvements.** One who took possession under a *bona-fide* purchase, may be allowed for permanent improvements, in an action for the mesne rents and profits, to the extent of the rents and profits claimed. *Supreme Ct.*, 1825, *Jackson v. Loomis*, 4 *Cow.*, 168. Compare *Moore v. Cable*, 1 *Johns. Ch.*, 385.

3. **Suggestion instead of action.** The action for mesne profits is abolished by 2 *Rev. Stat.*, 810, §§ 43, 44, and a suggestion upon the record in the ejectment-suit substituted there-

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for. *Supreme Ct.*, 1831, *Jackson v. Leonard*, 6 *Wend.*, 534.

4. And the proceeding by suggestion is substantially an action for use and occupation. *Supreme Ct.*, 1833, *Broughton v. Wellington*, 10 *Wend.*, 566.

5. But an action of trespass may still be brought for the original entry, or for mesne profits, where plaintiff obtains possession without suit. The statute must be restricted to cases where the claim is against the defendants in the ejectment-suit. *Supreme Ct.*, 1844, *Leland v. Tousey*, 6 *Hill*, 328.

6. Mode of procedure under the Code. *People v. Mayor, &c.*, of N. Y., 10 *Abbott's Pr.*, 111; *Thompson v. Sherrard*, 12 *Id.*, 427.

Consult, also, *EJECTMENT*, 46-51.

As to the Time for which mesne profits may be recovered, see *LIMITATION*.

METROPOLITAN POLICE

POLICE.

MILITARY BOUNTY-LANDS.

1. *Relation back.* Under the act of 1803, a patent for military bounty-lands, though issued after the patentee's death, if he died before March 27, 1783, vested the title in him, as though it had been issued to him living. *Supreme Ct.*, 1805, *Jackson v. Phelps*, 3 *Cai.*, 62; 1818, *Smith v. Van Dursen*, 15 *Johns.*, 343; 1828, *Jackson v. Mumford*, 9 *Cow.*, 254. See, also, *Fisher v. Fields*, 10 *Johns.*, 495.

So held, in favor of the one who was heir at the soldier's death. 1806, *Jackson v. Winslow*, 2 *Johns.*, 80; 1817, *Jackson v. Howe*, 14 *Id.*, 405. Compare *Stevens v. Woolsey*, 9 *Id.*, 325.

So held, in favor of his widow's claim of dower. 1842, *Sherwood v. Vandenburg*, 2 *Hill*, 808.

2. *The exception* in section 8 of the act of 1803, in respect to the application of the Statute of Descents of 1786, in cases where the lands were held by *bona-fide* purchasers, &c., does not contemplate actual possession and improvement by the purchaser, but only legal possession, or holding of the title. *Supreme Ct.*, 1828, *Jackson v. Mumford*, 9 *Cow.*, 254.

3. *Under the act of April 6, 1790*, a grant to a soldier who was not alive in March, 1783, was not authorized, and nothing passes by such a grant. *Supreme Ct.*, 1821, *Jackson v. Skeels*, 19 *Johns.*, 198; and see *Jackson v. Lyon*, 9 *Cow.*, 664.

4. *The act of April 3, 1807* (5 *Webst. L.*, 124),—which vests the lands patented to a deceased soldier, in his heirs, though aliens, in like manner as it would have descended to them had they been citizens of this State, at the time of his death,—intends the law of descent at the time of passing the act; and the title of the heirs, as it respects limitation of actions, is to be deemed to have accrued from the time of passing the act. *Supreme Ct.*, 1821, *Jackson v. Skeels*, 19 *Johns.*, 198; 1824, *Jackson v. Lyon*, 9 *Cow.*, 664.

5. The act of 1803 having vested the land in the heirs of the patentee at the time of his death, whenever that happened, the act of 1807 cannot divest the title of such heirs, and transfer it to others theretofore incapable of inheriting by reason of alienism. *Supreme Ct.*, 1824, *Jackson v. Lyon*, 9 *Cow.*, 664.

6. *Slave.* A patent of military lands, issued, pursuant to the statute, for military services in the Revolution, to a slave and his heirs and assigns, enables his children, though born in matrimony before marriages between slaves were legalized, to inherit, and their conveyance of the land is good. The disabilities are removed by the statute authorizing the grant. *Supreme Ct.*, 1826, *Jackson v. Lervey*, 5 *Cow.*, 397. *S. P.*, *Ct. of Errors*, 1828, *Goodell v. Jackson*, 20 *Johns.*, 693.

7. *A sale to defray the expenses* of survey, of the 50 acres reserved for that purpose in a corner of each lot of the military tract, vests a complete title in the purchaser, which cannot be affected by a mistake in the original survey, according to which patents were issued, by which an adjoining lot, as surveyed, contained in fact only 550, instead of 600 acres. The boundaries depend on the actual survey and location. *Supreme Ct.*, 1819, *Jackson v. Cole*, 16 *Johns.*, 257.

8. *That the power of the attorney-general* to sell the reservation depends on the issuing of the patent, and the patentee's default to pay for the survey. *Hill v. Draper*, 10 *Barb.*, 454.

9. *Improvements.* One who had settled on land in the military tract, under color of a

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bona-fide purchase, made prior to April 5, 1808, is entitled to be paid for improvements before being put out of possession. *Supreme Ct.*, 1808, Jackson v. Bush, 8 *Johns.*, 512.

10. When one enters under color of title by descent, and leases the land, the lessee is not entitled to be paid for his improvements under that act. *Supreme Ct.*, 1818, Jackson v. Stanley, 10 *Johns.*, 188.

Nor does the act apply except to sales made under it, and improvements ascertained and paid for before patent issued. 1808, Jackson v. Seaman, 8 *Id.*, 495.

11. **Deposit of deeds.** A deed of military bounty-lands, though recorded before the enactment of Jan. 8, 1794, is void as to a subsequent purchaser for a valuable consideration, whose deed is first deposited. The object of the act is not merely to give notice, but to facilitate detection of forgeries, which a record does not do. *Supreme Ct.*, 1808, Jackson v. Hubbard, 1 *Cal.*, 82. To the same effect, *Ct. of Errors*, 1822, Wendell v. Wadsworth, 20 *Johns.*, 659; reversing S. C., 5 *Johns. Ch.*, 224. *Supreme Ct.*, 1843, Taylor v. Marshall, *Hill & D. Supp.*, 98; S. P., 1826, Jackson v. Bowen, 6 *Cow.*, 141.

12. The words "subsequent purchaser for valuable consideration," in the act of 1794, are equivalent to "*bona-fide* purchaser." [10 *Johns.*, 457.] The act applies only to deeds dated prior to it. *Supreme Ct.*, 1837, Van Rensselaer v. Clark, 17 *Wend.*, 25.

13. Where a conveyance is by attorney, the power as well as the conveyance, must be deposited. *Supreme Ct.*, 1826, Jackson v. Bowen, 6 *Cow.*, 141; overruling Jackson v. Neely, 10 *Johns.*, 374.

14. A deed, though not deposited, is good as against the grantor and his heirs. *Supreme Ct.*, 1828, Jackson v. Phillips, 9 *Cow.*, 94.

15. The act does not apply to deeds or patents granted by authority of the State,—*e. g.*, a conveyance by the surveyor-general of a fifty-acre reservation for surveys. *Supreme Ct.*, 1828, Jackson v. Colver, 1 *Wend.*, 488.

16. Nor to the deed of such reservation by the grantee thereof. *Supreme Ct.*, 1832, Jackson v. Chamberlain, 8 *Wend.*, 620.

17. **Recording.** The act of February, 1798 (§ 5), prohibited recording deeds of military bounty-lands executed before May 1 preceding, unless they were proved or acknowledged according to the provisions of the act of 1797; but the supplementary act (Feb., 1798) ex-

tended the time when the act of 1797 should take effect, until December 1, 1798. *Chancery*, 1843, Crowder v. Hopkins, 10 *Paige*, 188.

As to the Form and Effect of patents, see PATENT (FOR LANDS).

18. **Sheriff's deed.** Under the statute of registering conveyances, &c., of military bounty-lands (1 *Rev. L.* of 1818, 209), a sheriff's deed for such land must be recorded to be valid against a subsequent *bona-fide* purchaser for value. [2 *Cal.*, 61.] *Supreme Ct.*, 1816, Jackson v. Terry, 13 *Johns.*, 471.

MILITARY LAW.

1. A soldier imprisoned by his superior officer, is not thereby exempted from obligation to do any duty which, under his restraint, he can perform. *Supreme Ct.*, 1817, Schuneman v. Diblee, 14 *Johns.*, 235.

2. **Unwritten law.** That the law martial is not wholly written, but is composed, in part, of military usage. *Id.*

3. **Soldiers not to be quartered in a house without consent of owner, &c.** 1 *Rev. Stat.*, 98, § 6.

MILITIA.

1. **Organisation and regulation of the militia of the State.** *Const.* of 1846, art. 10, §§ 1-6; 1 *Rev. Stat.*, 5 ed., 715-810.

2. Of the reorganization of the militia, under various statutes from 1846 to 1855. *People v. Scrugham*, 25 *Barb.*, 216; reversing S. C., 20 *Id.*, 302; *People v. Sampson*, 25 *Id.*, 354; and see *People v. Ewen*, 17 *How. Pr.*, 375.

3. **Exempted persons enumerated.** 1 *Rev. Stat.*, 5 ed., 715, 716.

4. Also persons of religious denominations averse to bearing arms. *Const.* of 1846, art. 11, § 1.

5. Certain canal officers. 1 *Rev. Stat.*, 250, § 187.

6. Certain officers of the salt-works. 1 *Rev. Stat.*, 278, § 153.

7. Keepers of poor-houses. 1 *Rev. Stat.*, 631, § 72.

8. Officers of Metropolitan Police. 2 *Laws of 1857*, 211, ch. 569, § 18; and see *Squires' Case*, 12 *Abbott's Pr.*, 38.

9. Foremen in town fire-companies. *Laws of 1845*, 264, ch. 244.

10. If a person exempt—*e. g.*, a Quaker—does not claim his exemption, and offer proper

Appointment of Officers.**Fines.****Service of United States.**

proof of it, no action will lie against the officer who returned him to the court-martial as a delinquent, unless malice express or implied be shown. *Supreme Ct.*, 1814, *Vanderbilt v. Downing*, 11 *Johns.*, 88.

11. A contractor for carrying the mail is not exempt from military duty, under the act of Sess. 32, ch. 145, § 2. *Supreme Ct.*, 1816, *Johnson v. Hunt*, 18 *Johns.*, 186.

12. **Infant.** Though the enlistment of an infant be deemed void, he is not entitled to desert; and if he deserts from actual service of the United States, he may legally be arrested as a deserter. *Ct. of Errors*, 1814, *Wilbur v. Grace*, 12 *Johns.*, 68; reversing S. C., 10 *Id.*, 458.

13. **The governor**, as the commander-in-chief of the militia, is made the supreme head of the military forces of the State. Every subordinate officer is dependent on him and owes obedience to him, and he is the ultimate judge of every disputed election in the militia of the State. The court cannot, on mandamus to one of his officers, review his orders to his subordinates, in relation to the military affairs committed to his discretion. *Supreme Ct.*, 1857, *People v. Scrugham*, 25 *Barb.*, 216; reversing S. C., 20 *Id.*, 302.

14. **Appointment of officers.** Under the act of 1851 (*Laws of 1851*, 887, ch. 180),—which, to facilitate the organization of the new military districts, authorized the governor, as commander-in-chief, to appoint and commission the brigade, regimental, and company officers necessary to complete the organization of all military districts not then organized,—the only prerequisite to the exercise of the power is, that he should deem the appointment necessary to complete the organization of the brigade-district, he being the proper and ultimate judge as to the completeness of the organization; and the fact of his having exercised the power, by appointing such an officer, is conclusive evidence that the necessity for the appointment existed. *Supreme Ct., Sp. T.*, 1857, *People v. Sampson*, 25 *Barb.*, 254.

15. Of the distinction between the right to office and the possession of a command. *People v. Scrugham*, 25 *Barb.*, 216; reversing S. C., 20 *Id.*, 302; *People v. Ewen*, 17 *How. Pr.*, 875.

16. **The commissary-general** has no authority to loan the arms of the State, or to

make any other disposition of them not specially authorized by statute. *Supreme Ct.*, 1842, *State of N. Y. v. City of Buffalo*, 2 *Hill*, 484.

17. **Fines.** Under 1 Rev. Stat., 516,—which required delinquents to be summoned to appear to show cause why a fine should not be levied,—a summons is in the nature of process, and should be served personally. *Supreme Ct.*, 1810, *Capron v. Austin*, 7 *Johns.*, 96.

18. **Disregarding void discharge.** Where a captain of militia returned as a delinquent one who held a discharge which was void for want of the signature of the proper officer;—*Held*, that in so doing he was but performing his duty; and that he was not liable to an action therefor. It was for the court-martial to judge of the validity of the discharge; and their decision fining the delinquent was conclusive that the return was not false and malicious. *Supreme Ct.*, 1818, *Ferris v. Armstrong*, 10 *Johns.*, 100; S. P., 1814, *Vanderbilt v. Downing*, 11 *Id.*, 88.

19. **Disorder.** Privates who appear in fantastic dress tending to excite disorder, may be returned as delinquents in duty, and fined. *Supreme Ct.*, 1836, *Rathbun v. Sawyer*, 15 *Wend.*, 451.

20. **Collection of fines.** Fines under 1 Rev. Stat., 307–316, imposed by any regimental court-martial, can be collected only by warrant, and not by action; and this applies to fines on commissioned officers under *Laws of 1835*, 350, § 21. *Supreme Ct.*, 1843, *People v. Hazard*, 4 *Hill*, 207.

21. Under the *Laws of 1835*, 352, § 28, the warrant for fines imposed by court-martial, cannot be executed by a marshal, but must be by a constable. That act impliedly repeals 1 Rev. Stat., 311, § 34. *Supreme Ct.*, 1844, *Hall v. Jackaway*, 7 *Hill*, 51.

22. **Militia in the service of the United States** under the act of 1795, are subject to the rules and articles of war of the United States, though made after that act. *Supreme Ct.*, 1814, *Vanderheyden v. Young*, 11 *Johns.*, 150.

23. The militia of the several States are not subject to the rules and articles of war unless they are in the actual service of the United States.* *Supreme Ct.*, 1821, *Mills v. Martin*,

* But see *Martin v. Mott*, 12 *Wheat.*, 19.

Accessories.

Forging Receipt.

19 *Johns.*, 7. Followed, 1828, *Rathbun v. Martin*, 20 *Id.*, 843.

24. An act to authorize a volunteer militia, and to provide for the public defence. *Laws of 1861*, 634, ch. 277.

As to the constitutionality of the Consolidation authorized by the act of 1854, see CONSTITUTIONAL LAW, 329.

MISDEMEANOR.*

1. **Accessories.** In misdemeanors there are no accessories; but all the guilty actors, whether present or absent at the commission of the offence, are principals, and should be indicted as such. *Supreme Ct.*, 1847, *People v. Erwin*, 4 *Den.*, 129.

2. Thus where one leases a house to be kept as a house of ill fame, and it is so kept with his knowledge and to his profit, he is indictable as a keeper of the house. *Id.*; overruling *Brookway v. People*, 2 *Hill*, 558.

3. **Merger.** A conspiracy to commit a misdemeanor is not merged in the misdemeanor. Where two crimes are of equal grade there can be no legal, technical merger. *Supreme Ct.*, 1830, *People v. Mather*, 4 *Wend.*, 229, 265.†

4. **Force and effect of the word "misdemeanor,"** in the description of an offence in a commitment, considered. *People v. Cavanagh*, 2 *Abbotts' Pr.*, 84; S. C. more fully reported, 2 *Park. Cr.*, 650.

5. **Prohibited acts, in general.** Where the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition, or in any other section or statute, the doing such act shall be deemed a misdemeanor. 2 *Rev. Stat.*, 696, § 89.

6. **Wilful wrong-doing.** In general, where the common law or a statute forbids the doing a thing, the doing it wilfully, though without any corrupt motive, is indictable. *Supreme Ct.*, 1849, *People v. Norton*, 7 *Barb.*, 477. To nearly same effect is, 1856, *People v. Bogart*, 3 *Park. Cr.*, 143; S. C., 3 *Abbotts' Pr.*, 198.

* For the very numerous statutes creating or defining misdemeanors, or prescribing the punishment of particular offences, the session laws themselves, or the Revised Statutes, 5 ed., should be consulted.

† Approved in *Commonwealth v. Delany*, 1 *Grant's (Penn.) Cas.*, 224.

7. Thus, commissioners of excise are liable to indictment for wilfully granting a license to sell liquor to a person known to them not to possess the requisite qualifications. *Supreme Ct.*, 1849, *People v. Norton*, 7 *Barb.*, 477.

8. So a police-justice is indictable for misdemeanor in letting an offender to bail contrary to law, without proof of a corrupt motive. *Supreme Ct.*, 1856, *People v. Bogart*, 3 *Park. Cr.*, 143.

9. **Neglect of official duty.** Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, shall be a misdemeanor. 2 *Rev. Stat.*, 696, § 88.

10. **Malicious mischief to the person of another,** a misdemeanor. *People v. Blake*, 1 *Wheel. Cr.*, 490; *Gilmore's Case*, 2 *City H. Rec.*, 29.

11. **Malicious and wanton mischief to property,** is indictable as a misdemeanor. If the act is done, not from any expectation of gain, but from a spirit of wanton cruelty or revenge, it is deemed a criminal offence, both from its moral turpitude and from its tendency to provoke to a breach of the peace. [Reviewing the cases.] *Supreme Ct.*, 1825, *People v. Smith*, 5 *Cow.*, 258; 1838, *Loomis v. Edgerton*, 19 *Wend.*, 419.

12. *So held*, of the wanton killing a domestic animal. *People v. Smith*, 5 *Cow.*, 258.

13. *So held*, of the wanton destruction of a chattel. *Loomis v. Edgerton*, 19 *Wend.*, 419.

14. The mere fact that an injury to property was malicious, and without hope of profit to the offender, does not make it indictable. The cases indicating that rule are to be sustained upon special circumstances,—*e. g.*, that the offence was committed clandestinely, or involved aggravated cruelty to animals, &c. *Supreme Ct.*, 1848, *Kilpatrick v. People*, 5 *Den.*, 277.

15. Thus the wilful and malicious breaking of windows in a dwelling-house is not a misdemeanor at common law. *Id.*

16. **Cruelty to animals,—*e. g.*, calves,—**a misdemeanor. *Morris' Case*, 6 *City H. Rec.*, 62.

17. **Forging a receipt for a promissory note,** "to be, when paid, in full," &c., although not forgery within the statute, is a misde-

What is a Misnomer.

meanor at common law. *Oyer & T.*, 1823, *People v. Hoag*, 2 *Park. Cr.*, 86.

18. **Removing landmarks**, not a misdemeanor at common law, although one by statute. *Young v. Miller*, 3 *Hill*, 21.

19. **Marrying after divorce**. Although one who has been divorced from his wife for his own adultery is not guilty of bigamy, in marrying again while his former wife is yet living, he may be punished for misdemeanor therein. *Supreme Ct.*, 1849, *People v. Hovey*, 5 *Barb.*, 117.

20. **Refusal to assist an officer in overcoming resistance to an unlawful execution of process**, not a misdemeanor, under 2 Rev. Stat., 441, § 82. *Supreme Ct.*, 1833, *Elder v. Morrison*, 10 *Wend.*, 128.

21. **Breaking open private letter**, a misdemeanor at common law. *Noah's Case*, 3 *City H. Rec.*, 13; *Gill's Case*, *Id.*, 61.

22. **Selling liquor without a license**, punishable as a misdemeanor, under Laws of 1857, 410, ch. 628, § 13. *Ct. of Appeals*, 1858, *Behan v. People*, 17 *N. Y.* (3 *Smith*), 516; *S. O.*, 7 *Abbotts' Pr.*, 82; 16 *How. Pr.*, 153; 3 *Park. Cr.*, 686. *Supreme Ct.*, 1857, *People v. Shea*, 3 *Id.*, 562. Compare, also, *Van Zant v. People*, 2 *Id.*, 168; and *Exonise*, 23.

23. **Punishment, in general**. Every person convicted of any misdemeanor, a punishment for which is not prescribed, shall be punished by imprisonment in a county jail, not exceeding one year, or by fine not exceeding \$250, or by both. 2 *Rev. Stat.*, 697, § 40.

See, also, **CRIMES, CRIMINAL LAW, INDICTIONMENT**, and titles there referred to.

MISNOMER.

1. **Defendant's name**. Where the surname recited in an obligation varies from that in the subscription, by a slight misspelling,—*e. g.*, *Hinsdall* and *Hinsdale*,—the obligor may be sued by the name subscribed alone, without an *alias dictus*. *Supreme Ct.*, 1805, *Meredith v. Hinsdale*, 2 *Cai.*, 862.

2. **A misspelling**, which, according to the pronunciation of the language, does not vary the sound, is not a misnomer,—*e. g.*, *Petrie* for *Petrie*. *Supreme Ct.*, 1805, *Petrie v. Woodworth*, 3 *Cai.*, 219.

3. **A middle name or initial** is no part of a name, and may be disregarded. The law

knows only of one Christian name. [*Co. Litt.*, 3, a; 1 *Ld. Raym.*, 562; *Vin.*, tit. *Misnomer*, c. 6, pl. 5 & 6.] *Supreme Ct.*, 1809, *Franklin v. Talmadge*, 5 *Johns.*, 84; 1824, *Roosevelt v. Gardinier*, 2 *Cow.*, 468; 1841, *Milk v. Christie*, 1 *Hill*, 102.

4. **The addition of senior, or junior**, is mere matter of description, and forms no part of the name. It is a casual and temporary designation. *Supreme Ct.*, 1811, *People v. Collins*, 7 *Johns.*, 549. To the same effect, *Ct. of Errors*, 1838 [citing, also, 1 *Salk.*, 7; 10 *Mass.*, 308], *Fleet v. Youngs*, 11 *Wend.*, 523.

5. Where a man is known with the addition of junior, the omission of that addition in an indictment under the act of 1779 (which forfeited the property of those who adhered to the enemies of the State—proceedings under which are more liberally construed than ordinary proceedings), is not, in a collateral proceeding, conclusive that he was not intended. *Supreme Ct.*, 1804, *Jackson v. Prevost*, 2 *Cai.*, 164.

6. **Patentee of lands**. Where a patent for lands was granted to David H., without any words of description to identify him; and a subsequent statute was passed, declaring that Daniel H. was the patentee intended, and that the land should be vested in him in the same manner as if he had been named in the patent;—*Held*, that even if the original patent were void by reason of the misnomer, the land would have remained in the State; and the statute amounted to a legislative grant, supplying the place of a patent. *Supreme Ct.*, 1813, *Jackson v. Stanley*, 10 *Johns.*, 133.

7. Where the alleged mistake was in the *surname*,—*viz.*, *Houseman* for *Hosmer*,—and there were, in fact, two persons, each answering to one of the names, and capable of accepting the patent;—*Held*, that the mistake could not be inquired into. It would be allowing parol evidence to vary a written instrument. The proper remedy is to vacate the grant by *scire facias*. *Supreme Ct.*, 1815, *Jackson v. Hart*, 12 *Johns.*, 77; and see *Jackson v. Boneham*, 15 *Id.*, 226.

8. Where a patent was issued to *Moses Minner*, and plaintiffs claimed under *Moses Miner*,—*Held*, that as it did not appear that there had been in the army any man by the name of *Minner*, it must be considered a mere misspelling of the name, which could not affect the identity of the person; nor was it

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such a difference in the spelling as to make it a distinct name. *Supreme Ct.*, 1818, Jackson v. Boneham, 15 *Johns.*, 226.

9. The record, upon authority of which a patent issued to William Patterson, described the soldier for whom it was intended, as a private in H.'s regiment. A subsequent deed described the grantor therein as William Patterson, late a private in H.'s regiment, but was signed William Petterson. *Held*, that it not having been shown that there was any soldier in that regiment by the name of Patterson, the evidence of identity was, *prima facie*, sufficient. *Supreme Ct.*, 1828, Jackson v. Cody, 9 *Cov.*, 140.

10. **Conveyance.** The word junior is no part of a name, but is merely descriptive of the person. Its omission from the name of a grantee is merely presumptive evidence that the grantee was the father, and not the son, where both bear the same name. And the presumption may be rebutted by showing that the grantor intended to convey to the son by the name and description contained in the deed. [Holt, 4; 6 *Mod.*, 198; 7 *Johns.*, 549; 10 *Mass.*, 208.] *Chancery*, 1848, Padgett v. Lawrence, 10 *Paige*, 170.

11. **Nonsuit.** Where, in a suit against two defendants, in assumpsit, in which one is arrested and the other returned not found, it appears on the trial that the defendant not brought in is misnamed in the declaration, as being called John instead of George, the plaintiff will be nonsuited for the variance. [4 *T. R.*, 611.] *Supreme Ct.*, 1837, Waterbury v. Mather,* 16 *Wend.*, 611.

12. **Motion.** That Grantis, or Quartus, for Gerardus, is a misnomer for which proceedings may be set aside on motion. *Supreme Ct.*, 1825, Mann v. Carley, 4 *Cov.*, 148.

13. Misnomer must be pleaded and is not ground of motion. *Rule of 1825, Ib.*, 156.

As to **Disregarding** and amending, see **AMENDMENT**.

As to the proof of **Identity**, see **EVIDENCE**.

As to errors in the names of **Legatees**, see **LEGACY**.

As to the names of **Parties** in contracts, see **CONTRACTS**, 15-21.

MISSIONARY SOCIETIES.

Organization, powers, liabilities, &c., of. *Laws of 1848*, 447, ch. 819; 1849, 400, ch. 273; 1853, 948, ch. 487; 1854, 125, ch. 50; 1857, 615, ch. 302; same stat., 2 *Rev. Stat.*, 5 ed., 623-625. Extended to mission and sabbath-school purposes, *Laws of 1861*, ch. 239.

MISTAKE.

[This title relates to the jurisdiction of equity to correct or reform mistakes. The cases relative to the recovery at law of money paid under mistake, are chiefly collected under **MONEY PAID**.]

1. **General rule.** Where, from a defect of the common law, want of foresight of the parties, or other mistake, or accident, there would be a failure of justice, it is the duty of a court of equity to supply the defect, or furnish a remedy, saving always the rights of those who have prior equities. *Chancery*, 1830, Quick v. Stuyvesant, 2 *Paige*, 84.

2. Where it is palpable that actual injustice has been done, through inadvertence and mistake of counsel, although it arose from a misapprehension of the law, or rules of practice, the court will feel bound to relieve the party, if that can be done without prejudice to the rights of other parties; by which is meant, without any loss to them, other than such as may necessarily result from establishing what may be shown to be the rights of the party applying. *N. Y. Superior Ct.*, 1857, Levy v. Joyce, 1 *Bow.*, 622.

3. **Equitable jurisdiction.** A mistake in a deed,—*e. g.*, where it omits one of the courses in the description,—cannot be rectified in an action at law, in which such deed is introduced. Relief can only be had in chancery. *Supreme Ct.*, 1848, Cameron v. Irwin, 5 *Hill*, 272.

4. **A mistake must be proved.** A court of equity cannot reform a written instrument except in a direct suit for that purpose. And it must be alleged and proved that there was accident or mistake in the preparation of the instrument; so that it does not express the true intent of the parties. *Ct. of Appeals*, 1849, Leavitt v. Palmer, 8 *N. Y. (3 Comst.)*, 19.*

* See this case in table of **CASES CRITICISED**, Vol. I., *Ante*.

* Reported below, 5 *Barb.*, 9. See a copy of the trust-deed referred to in the case, 8 *N. Y. Leg. Obs.*, 63.

Mistake of Law.

Foreign Law.

5. A bank, for the purpose of securing a creditor, executed its notes in a form prohibited by law, and at the same time executed a trust-deed which purported to be collateral to the notes, and contained no reference to the original liability. *Held*, that the deed could not be sustained as security for the original liability. There was no mistake in preparing it. It was just what the parties intended, a security for the notes. That mode of securing the debt being illegal, the court could not make a new contract for the parties. *Id.*

6. Mistake of law. Every person is bound to know the law; and, where there is no mistake as to facts, but only as to the legal consequences, there can be no ground for relief. *Chancery*, 1815, *Shotwell v. Murray*, 1 *Johns. Ch.*, 512; *S. P.*, 1822, *Storrs v. Barker*, 6 *Id.*, 166.

7. Whether relief may not be granted when there is a mutual mistake as to the law. *Champlin v. Laytin*, 6 *Paige*, 189; 18 *Wend.*, 407.

8. If, in any case, chancery can relieve against a mistake in law, where the defendant has been guilty of no fraud or unfair practice, it can only be where defendant has in fact lost nothing by the mistake, and where the parties can be restored substantially to their former situation. *Chancery*, 1838, *Crosier v. Acer*, 7 *Paige*, 187.

9. Where the parties make just such an instrument as they intend to make, a mere error, common to both, as to its legal effect, will not, in the absence of fraud, surprise, &c., authorize the correction of instrument in court of equity. *Supreme Ct.*, *Sp. T.*, 1850, *Arthur v. Arthur*, 10 *Barb.*, 9.

10. A mistake as to the legal effect and operation of an instrument is not, in general, ground for reforming it. Courts do not relieve from acts done under a full knowledge of the facts, though under mistake of law. This rule prevails, especially in cases of compromises and of family arrangements. *Supreme Ct.*, *Sp. T.*, 1848, *Dupre v. Thompson*, 4 *Barb.*, 279; affirmed, on other grounds, 8 *Id.*, 587; *S. P.*, 1850, *Gilbert v. Gilbert*, 9 *Id.*, 582.

11. A will cannot be corrected upon the ground that the testator was mistaken as to its effect. Thus, where one who had made a will devising lands to his children as tenants in common, afterwards deeded a share to one

son, in the belief that the grant would revoke the devise as to him,—*Held*, that the court could not give effect to the error so as to make the grant a revocation of the devise. *Supreme Ct.*, *Sp. T.*, 1850, *Arthur v. Arthur*, 10 *Barb.*, 9.

12. One who had made a will devising land to his wife, afterwards exchanged it for other land, and the wife joined in his deed; they both supposing that the land acquired in exchange would be substituted and passed by the will, which was retained unaltered. *Held*, after the death of testator, that the mistake being one of law, equity could not grant the widow relief. *Supreme Ct.*, *Sp. T.*, 1850, *Gilbert v. Gilbert*, 9 *Barb.*, 582.

13. Statute. One who was threatened with a prosecution for a penalty for running the gate of a plank-road, paid money in compromise. The payment was made and received under the mistaken assumption that a section giving the penalty demanded had been incorporated into the Statute of Plank-roads. *Held*, that it was not a case of pure mistake of law, but rather of mistake of fact as to the contents of the statute. *Supreme Ct.*, 1851, *Pitcher v. Turin Plank-road Co.*, 10 *Barb.*, 486.

14. Foreign law. Ignorance of a foreign law is ignorance of fact; and in respect to this rule, the statute laws of one State of the Union are to be deemed, in another State, foreign law. *Supreme Ct.*, 1850, *Bank of Ohilliothe v. Dodge*, 8 *Barb.*, 238.

15. Hence, where a corporation of another State has advanced money there upon a draft of a banking association of this State, which draft was void by a statute of this State, not known to the officers of such corporation, it may recover back the money paid, as money paid under a mistake of fact. *Id.*

16. Remedy under the Code. In an action to recover damages for the breach of a covenant against incumbrances, the defendant may show, under the Code of Procedure, by way of defence, that the incumbrance referred to as constituting the breach of the covenant, was, by mistake, omitted to be excepted from its operation. And as defendant, in such action, cannot have affirmative relief upon his answer, a cross-action to obtain a reformation of the covenant, and in the mean time to stay proceedings in the action for damages, is proper. *Ct. of Appeals*, 1851, *Haire v. Baker*, 5 *N. Y.* (1 *Seld.*), 357.

Sufficiency of Proof.

Quantity of Lands.

17. That since the Code, a plaintiff claiming under a defective deed, and showing sufficient grounds for reforming it, may have the same remedy as if he had brought two actions; one to reform the instrument, and the other to enforce it as reformed. *Ct. of Appeals*, 1858, *Laub v. Buckmiller*, 17 *N. Y.* (3 *Smith*), 620; 1860, *Bartlett v. Judd*, 21 *N. Y.* (7 *Smith*), 200; affirming *S. C.*, 23 *Barb.*, 262.

18. Sufficiency of proof. To entitle a party to be relieved from a contract, on the ground of mistake, the proof of mistake should be clear and positive. *Ct. of Errors*, 1841, *Marvin v. Bennett*, 26 *Wend.*, 168; affirming *S. C.*, 8 *Paige*, 812. *Chancery*, 1817, *Souvery v. Arden*, 1 *Johns. Ch.*, 240; *Lyman v. Mutual Ins. Co.*, 2 *Id.*, 680; affirmed, 17 *Johns.*, 373; *Getman v. Beardsley*, 2 *Johns. Ch.*, 274; *Gillespie v. Moon*, *Id.*, 585; 1828, *Phoenix Fire Ins. Co. v. Gurnee*, 1 *Paige*, 278. *V. Chan. Ct.*, 1839, *Fishell v. Bell*, *Clarke*, 87.

19. A compromise of a litigated claim will not be set aside on the ground that the party entered into it under mistake, or concealment of fact, unless it appears that the sacrifice submitted to is greater than would have been made had the party been in possession of all the facts. *N. Y. Superior Ct.*, 1849, *Currie v. Steele*, 2 *Sandf.*, 542.

20. Executory contract. A party who has contracted to pay money,—*e. g.*, an insurer,—must avail himself of any right to resist the demand on the ground of mistake, at the time when payment is claimed. If he pays the money, having knowledge or means of knowledge which would enable him to detect and expose the mistake, he cannot afterwards recover back the money paid, on the ground the contract was entered into through mistake. *Supreme Ct.*, 1858, *Mutual Life Ins. Co. of N. Y. v. Wager*, 27 *Barb.*, 354.

21. A vendee of land may have relief against his contract, where he was induced to enter into it by material representations on the part of the vendor which are false in point of fact. It is not necessary to show fraud, but equity will relieve on the ground of mistake. *Ct. of Errors*, 1823, *Rosevelt v. Fulton*, 2 *Cov.*, 129.

22. A vendee bought land under representations made in good faith by the vendor that it contained a valuable coal-mine. Held, that, on its turning out that there was no such coal-mine, the vendee was entitled to relief, not-

withstanding the representations were made in good faith, and notwithstanding the contract provided for an abatement of the consideration in case the mine should fail. *Id.*

23. The object of the vendee was to obtain a farm for raising early vegetables for the city market. He purchased a farm, without actual knowledge of its character, upon representations by the vendor, who knew the purpose for which he wished it, that there was no earlier land anywhere about. In fact, however, the land was not of that character. Held, that he was not entitled to a rescission of the contract. *Supreme Ct.*, 1843, *Taylor v. Fleet*, 4 *Barb.*, 95.

24. The grounds upon which, in general, equity will decree the rescission of a contract for the sale of real estate, upon the ground of mistake,—considered. *Id.*

25. Mistake as to quantity. Where a specified tract of land is sold for a sum in gross, the boundaries of the tract control the description of the quantity it contains; and neither party can have a remedy against the other for an excess or deficiency in the quantity; unless such excess or deficiency is so great as to furnish evidence of fraud or misrepresentation. But this rule does not apply to a case where the mistake is in the boundaries of the tract sold, and not in the quantity of acres it contains; nor where the deficiency is not in the thing described, but in the ability of the defendant to convey the thing described. *Supreme Ct.*, 1847, *Voorhees v. De Meyer*, 2 *Barb.*, 87.

26. Where the boundaries of lands are pointed out by the vendor to the purchaser, but in the written contract of sale, and in the deed executed in pursuance of it, the description is made, by mistake, to include land not within such boundaries, the deed may be corrected, on the application of the vendor, so as to correspond with the boundaries actually pointed out. It is no answer to such application, that the description in the contract and deed was made in accordance with the instructions of the vendor, where it appears that both he and the vendee believed the description to correspond with such boundaries. *Ct. of Appeals*, 1852, *Johnson v. Taber*, 10 *N. Y.* (6 *Seld.*), 819.

27. There is no absolute rule that equity cannot relieve against a contract for the sale of land upon the ground of mere mistake as

Number of Acres.

Whole Lot Conveyed.

to the quantity, even where the description of the land conveyed is by metes and bounds, and is qualified by the words "more" or "less." The contract may be rescinded on the vendee's application, where there is a mistake in quantity so considerable as to show conclusively that the contract would not have been made but for the mistake. *Ot. of Appeals*, 1856, *Belknap v. Sealey*, 14 *N. Y. (4 Kern.)*, 148.

28. Where the premises were represented as containing eight acres, and were chiefly valuable for subdivision and sale as city lots, but there proved to be only four acres within the bounds conveyed,—*Held*, that the vendee was entitled to be relieved from the contract, and to have judgment for repayment of money paid upon the price. *Id.*

29. Number of acres. A deed bounded one side of the lands conveyed upon the lands of H., and described the quantity as 67 acres, "more or less." Both parties acted under a mistaken supposition that the fence between the grantor and H. was on the true line, whereas it was so far upon the land of H. that the quantity actually conveyed was less than 40 acres instead of 67. But there were no misrepresentations by the grantor. *Held*, that the grantee had no remedy. *Supreme Ct.*, 1858, *Northrop v. Sumney*, 27 *Barb.*, 196.

30. The parties contracted for the sale of a farm described as "the farm now in possession" of the vendor, "containing 96 acres, more or less," under a mutual belief that it was of that extent, for \$60 per acre. Before delivering the deed, the vendor discovered that the farm contained only 86 acres; but the deed as delivered described the farm as containing 96. *Held*, that the vendee was not entitled to defend the payment of the purchase-price, on account of the mistake as to quantity. *Ot. of Appeals*, 1852, *Faure v. Martin*, 7 *N. Y. (8 Seld.)*, 210.

31. The vendor represented the lot as having so many feet front, and contracted to sell it as lot No. 1, &c., but declined warranting the quantity, and described it in the deed by boundaries, without distances, as containing more or less;—*Held*, that the vendee could not have the deed reformed, on the ground of mistake. *Ot. of Errors*, 1841, *Marvin v. Bennett*, 26 *Wend.*, 169; affirming *S. C.*, 8 *Paige*, 812.

32. A vendor agreed to sell lot No. 11, supposing at the time that it contained 148½

acres, but in fact, owing to an error of the surveyor, it really contained but 100 acres; by reason of which error the vendor was unable to make a good title to the whole quantity of land. On a bill for a specific performance,—*Held*, that it was a case of mutual mistake, in relation to the quantity of land contained; and a decree was made, directing a specific performance of the contract by the vendor, so far as he was able to perform the same, and providing for an abatement from the purchase-money on account of the deficiency in the quantity of the land. *Supreme Ct.*, 1847, *Voorhees v. De Meyer*, 2 *Barb.*, 87.

33. Appurtenant premises. On a sale of land, &c., in possession of the defendants, under an execution against them, the sheriff's deed, by mistake, did not include the whole premises advertised and sold; the sheriff taking his description from the original deed of the bulk of the premises, and omitting to include some small appurtenant lots subsequently conveyed to defendants. The parties, however, all supposed the deed contained the whole, and the purchaser bid and paid accordingly. The defendants were enjoined from prosecuting ejectment-suits to recover the parcels not included in the deed to the purchaser, and were ordered to execute a release to the purchaser. *Chancery*, 1819, *De Riemer v. Cantillon*, 4 *Johns. Oh.*, 85.

34. Whole lot conveyed. A trustee, by mistake, deeded the whole lot, instead of a certain portion of it, and the grantee, knowing the mistake, made valuable improvements on the part not intended to be conveyed. A reconveyance was decreed after seven years acquiescence; and nothing allowed to the grantee for improvements. *Chancery*, 1817, *Gillespie v. Moon*, 2 *Johns. Oh.*, 585.

35. Where the vendee contracted with an agent for a parcel of land, part of which was not owned by the principal, and the principal by mistake executed a deed for the whole,—*Held*, that the vendee should not be restrained from suing on the covenants in the deed. He had paid what he agreed and intended to pay for the whole premises, and was entitled to recover back, on the covenants, part of his consideration-money. *Chancery*, 1832, *Ran-kin v. Atherton*, 8 *Paige*, 143.

36. The owner of the northeast corner of a lot of land sold the same, but by mistake conveyed to the purchaser the northwest corner

Dedication.**Sheriff's Deed.**

of the lot, which belonged to another person; and the purchaser afterwards sold the same land to the complainants in payment of an antecedent debt, but made the same mistake in his conveyance to them. Upon the discovery of the mistake, the grantor and grantee in the first deed joined in a deed to the complainants for the northeast corner of the lot, for the purpose of correcting the error in the former deeds. *Held*, that the complainants were entitled to the land in equity, in preference to the defendants, who had purchased in the same, after notice of the mistake, under a judgment recovered against the original vendor after the giving of the first deed, but before the giving of the deed in which the error was committed. *Chancery*, 1837, *Gouverneur v. Titus*, 6 *Paige*, 347; affirming S. C., 1 *Edw.*, 477.

37. Where the contract was to sell and purchase a gore of land, which both parties supposed to exist, when in fact there was none, the vendee can have no remedy in chancery, but must resort to his action at law. *Chancery*, 1844, *Morse v. Elmendorff*, 11 *Paige*, 277.

38. The husband and wife entered into a written contract for the sale of land, held in the right of the wife, but such contract was not acknowledged by the wife. The husband and wife afterwards, in attempting to carry the contract into effect, conveyed to the purchasers, by mistake, another lot, in which the wife had no interest. The wife afterwards died, leaving an infant daughter her heir-at-law. *Held*, that as the contract was not legally binding upon the wife, the court could not compel her daughter to convey to the purchaser; but that the purchaser was entitled to a decree against the husband, to reform the deed, so as to convey to such purchaser his interest, as tenant by the curtesy, in the lot which he had contracted to convey; and to a decree that he should procure a conveyance of the interest of the heir-at-law of his wife, or pay to the purchaser his damages by reason of such defect of title. *Chancery*, 1843, *Knowles v. McCamly*, 10 *Paige*, 342.

39. **Dedication.** The vendor had done acts amounting to a dedication of the land to the purposes of a street, but mistaking the legal effect of such acts, he assured the vendee that he had not done any thing which would prevent his claiming the full value of the land if

it should be taken for a street. The vendee purchased in ignorance of the acts which made the dedication. *Held*, that he was entitled to relief against his bond and mortgage for the purchase-money. *Chancery*, 1836, *Laytin v. Champlin*, 6 *Paige*, 189; affirmed, 18 *Wend.*, 407.

40. **Supplying words of inheritance.** A soldier, entitled to a lot of land as a military bounty, in 1785, before the patent issued, by agreement, sold the lot to S., and bound himself to execute a conveyance; S. sold and assigned the lot, bond, &c., in 1789, to V., who, in 1790, by indorsement, sold and assigned the same, and all his right, title, and interest in the land, &c., to C., to whom he delivered the original bond and agreement and discharge of the soldier, and the patent issued in his name. *Held*, that although, for want of words of inheritance, the assignment, in law, transferred only an estate for life; yet, as it was clearly the intention of the parties to convey the whole estate, a trust-estate in fee was to be considered as created and conveyed; and the court would, therefore, decree an adequate legal conveyance in fee, according to the intention of the parties. *Chancery*, 1821, *Higinbotham v. Burnet*, 5 *Johns. Ch.*, 184.

41. **Defective partition**, by commissioners to admeasure dower, aided, on the ground of accident, under peculiar circumstances. *Douglas v. Viele*, 8 *Sandf. Ch.*, 439.

42. **Bona-fide purchaser.** A mistake in a deed to a trustee may be corrected, notwithstanding a subsequent conveyance to the *cestui que trust*. Such conveyance not being founded on any new consideration, the grantee therein is not entitled to protection as a *bona-fide* purchaser. *Chancery*, 1853, *Le Roy v. Platt*, 4 *Paige*, 77.

43. **Grantor who executes a deed without reading it**, not allowed to impeach it. *Jackson v. Oroy*, 12 *Johns.*, 427.

44. **Sheriff's deed.** That a sheriff's deed may be reformed on the ground of mistake. *Ct. of Appeals*, 1860, *Bartlett v. Judd*, 21 *N. Y. (7 Smith)*, 200; affirming S. C., 23 *Barb.*, 262.*

45. In an action to recover possession of

* Compare *Mason v. White*, 11 *Barb.*, 173, and opinion in Supreme Court, in *Laub v. Buckmiller*, 17 *N. Y. (8 Smith)*, 620.

Redemption.

land which plaintiffs claimed by virtue of a sheriff's deed, the defendant set up that the premises in question were, in fact, excepted by the sheriff at the sale, and that the exception was omitted from the deed by mistake, and he prayed by his answer a reformation of the deed. *Held*, that the deed should be reformed in accordance with the facts. *Id.*

46. Redemption. The owner of an equity of redemption having offered to redeem, the sheriff computed the amount due; and the owner, relying entirely upon that computation, paid the amount, and took a receipt. It was found that, by error in the computation, the amount paid was too small. *Held*, that equity had power to relieve the party redeeming against the consequence of the mistake; and that he might maintain a bill against a party subsequently pretending to redeem, to remove the cloud on his title. *Supreme Ct., Sp. T., 1850, Hall v. Fisher, 9 Barb., 17.**

47. Lease. Twelve or fifteen years after a lease was executed, it was discovered to vary from the survey and map made at the same time. Plaintiff's agent had notice of this, but no claim was made until fifty-one years after the lease was executed. *Held*, that the parties were concluded by the possession [3 Johns., 270], and it was not necessary that the mistake in the lease should be reformed. *Supreme Ct., 1814, Jackson v. Hogeboom, 11 Johns., 168.*

48. By mistake, a clause that the rent should stop if the building should be destroyed by fire, was omitted in the lease; and the building was so destroyed. The lessor was enjoined from suing for subsequent rent, and the lease ordered to be cancelled. *Chancery, 1884, Gates v. Green, 4 Paige, 855.*

49. It was the understanding between the parties to a lease, that a certain alley should be used in common, but by mistake this provision was not inserted in the lease. Subsequently the lessor, on a further consideration, granted the use of the alley to the lessee for the residue of the term, but omitted to provide that such use should continue during a renewal of the lease to which the lessee was entitled. *Held*, that the original lease might be reformed, or the new one made to conform

Sale of Patent.

to the actual agreement. *Supreme Ct., 1855, Newcomb v. Ketteltas, 19 Barb., 608.**

50. Surety's undertaking. Where a bond given by a surety is invalid, chancery cannot reform it so as to render the surety liable, even though it was his intention to bind himself. The Statute of Frauds requires an agreement in writing to bind a surety. And if he has not executed a valid agreement under the statute, the court cannot compel him to do so. *Chancery, 1848, Ontario Bank v. Mumford, 2 Barb. Ch., 596.* To nearly the same effect is, 1840, Phelps v. Garrow, 8 Paige, 822.

51. A bill against a guardian and his surety may be sustained as against the surety, notwithstanding the bond was taken in the name of the People instead of the infant. The court has power to correct the mistake, and hold the party according to his original intention. *Chancery, 1815, Wiser v. Blachly, 1 Johns. Ch., 607.*

52. Assessment. When, as between grantor and grantee, or landlord and tenant, relief may be granted against an assessment unexpectedly imposed. *Murray v. Graham, 22 Wend., 559; reversing S. C., 6 Paige, 622; Cram v. Munro, 1 Edw., 128.*

53. Mortgage. A mortgagor having died intestate, the mortgagee made a further loan to the heir, and cancelled the mortgage, and took a new one from the heir for the whole amount. The personal assets proved insufficient for the payment of the general debts. The court presumed mistake of fact, and reinstated the first mortgage, as against the general creditors seeking a sale for the payment of their debts. *Supreme Ct., Sp. T., 1847, Hyde v. Tanner, 1 Barb., 75.*

54. Partition. Where, in partition, the master reports against a judgment as a lien, in consequence of a mistake in a transfer of it to the claimant, the holder may be let in to prove the mistake. *Supreme Ct., 1847, Horton v. Buskirk, 1 Barb., 421.*

55. Policy of insurance.—how may be reformed. *Phoenix Fire Ins. Co. v. Gurnee, 1 Paige, 278.*

56. Sale of Patent. Chancery has jurisdiction to set aside a sale of a patent-right, upon the ground of mutual mistake,—e. g., where the machine exhibited is not covered

* That the redemption is valid in such a case notwithstanding the mistake, see *Hall v. Fisher, 1 Barb. Ch., 53; 8 Id., 687.*

* Compare *Greason v. Ketteltas, 17 N. Y. (8 Smith), 491.*

Mistake.

Mock Auctions.

Moneyed Corporations.

by the patent. *Chancery*, 1880, *Burrall v. Jewett*, 2 *Paige*, 184.

57. **Sale of bills.** An agent transferred bills of his foreign principal, in exchange for notes, to B., who took them to remit abroad, both being ignorant of the failure of the principals, which rendered them worthless for that purpose. *Held*, that B. was entitled to rescind the contract, on the ground of mutual mistake. *Supreme Ct., Sp. T.*, 1848, *Leger v. Bonaffe*, 2 *Barb.*, 475; *S. C.*, less fully, 6 *N. Y. Leg. Obs.*, 285.

58. **Correcting judgment.** The general equitable power of the Supreme Court over judgment upon confession, does not extend so far as to enable it, merely upon motion, to relieve against a mistake in the agreement upon which such a judgment has been entered. *So held*, where, in consequence of a mistake in the original agreement, the judgment entered was for less than the parties really intended to secure. *Supreme Ct., Sp. T.*, 1847, *Chapin v. Clemitson*, 1 *Barb.*, 811.

59. **Tax.** An excessive tax was imposed on a railroad company, in consequence of a mistake committed by its president in returning a statement of its capital to the assessors. *Held*, that as the mistake could not be corrected without depriving the town and county officers of certain allowances which had been made to them by the board of supervisors, the court could not interfere. *Chancery*, 1884, *Mohawk & Hudson R. R. Co. v. Clute*, 4 *Paige*, 884.

60. **"Tons."** The parties to a contract for the sale or purchase of iron, intended to contract for a certain number of tons gross weight (2240 lbs.), at a specified price by the ton, but in reducing the contract to writing the term "tons" only was used, without any thing appearing upon the face of the contract to show that any other than statute tons of 2,000 lbs. avoirdupois were intended. *Held*, that the party injured might file a bill to reform the written contract so as to make it conform to the actual intent of the parties. *Chancery*, 1841, *Many v. Beekman Iron Co.*, 9 *Paige*, 188.

61. But when defendant's answer showed that, in contracting, he intended statute tons, and that he had partially performed the contract without any knowledge that complainant was ignorant of the statute, the preliminary injunction was dissolved. *Chancery*, 1847, *Hall v. Reed*, 1 *Barb. Ch.*, 500.

MOCK AUCTIONS.

Fraud by means of, punishable. *Laws of 1858*, 219, ch. 188.

MONEYED CORPORATIONS.

1. It shall not be lawful for the directors of any moneyed corporation—1. To make dividends, except from the surplus profits arising from the business of the corporation; 2. To divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital-stock of the corporation; or to reduce such capital-stock, without the consent of the Legislature; 3. To discount or receive any note or other evidence of debt, in payment of any instalment actually called in and required to be paid, or with the intent of providing the means of making such payment; 4. To receive or discount any note or other evidence of debt, with the intent of enabling any stockholder to withdraw any part of the money paid in by him on his stock; 5. To apply any portion of the funds of their corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock; 6. To receive any such shares in payment or satisfaction of any debt due to their corporation, except as hereinafter provided; 7. To receive from any other stock corporation, in exchange for the shares, notes, bonds, or other evidences of debt of their own company, shares of the capital-stock of such other corporation, or notes, bonds, or other evidences of debt, issued by such other corporation; 8. To make any loans or discounts, if the corporation have banking powers, by which the whole amount of the loans and discounts of the company shall be made to exceed three times its capital-stock, then paid in, and actually possessed; 9. To make any loans or discounts to the directors of such corporation, or upon paper upon which such directors, or any of them, shall be responsible, to an amount exceeding in the aggregate one-third of the capital-stock of such corporation actually paid in and possessed; but no securities taken for any such loan or discount shall be held invalid. 1 *Rev. Stat.*, 589, § 1.

2. The restrictions imposed by 1 *Rev. Stat.*, 589, § 1, upon moneyed corporations, are binding, not alone upon the directors of the company as individuals, but upon the corporation itself. The object of the Legislature was to prevent the corporation from doing any of the acts prohibited in this section of the statute. And the term *directors* is used for the corporation itself, or as the board or body exercising the corporate franchises, by whom or under whose direction or authority alone these violations of the statutes could ever occur. *Chancery*, 1887, *Bank Commissioners v. Bank of Buffalo*, 6 *Paige*, 497.

3. **Receiving dividend.** If a dividend is

Restrictions on the Powers of Directors.

made from capital instead of surplus profits, a stockholder is not estopped by having received his proportion of it in ignorance of the wrong. *Supreme Ct.*, 1844, *Gaffney v. Colvill*, 6 *Hill*, 567.

4. **Accepting a surrender of stock**, in payment of securities held by the corporation as a part of their capital, is a fraud upon stockholders and creditors, and a withdrawal of capital within 1 *Rev. Stat.*, 589, § 1, subd. 2,—authorizing a decree of dissolution. *Chancery*, 1848, *Johnson v. Bush*, 8 *Barb. Ch.*, 207; and see *Nathan v. Whitlock*, 9 *Paige*, 152; affirming *S. O.*, 3 *Edw.*, 215.

5. **Assignment in exchange for stock**. A banking association being insolvent, transferred to one of its directors certain State bonds in exchange for shares of its own stock. *Held*, that if such an association might be deemed a moneyed corporation within the statute, the transaction was illegal and void under 1 *Rev. Stat.*, 589, and that the receiver might reclaim the bonds for the benefit of the creditor. *Ct. of Appeals*, 1850, *Gillet v. Moody*, 8 *N. Y. (3 Comst.)*, 479.

6. **Sale of stock on credit**. Subdivision 3 of section 1 of this statute,—which forbids the directors of any moneyed corporation to discount or receive any note “in payment of any instalment actually called in and required to be paid, or with the intent of providing the means of making such payment,”—refers to an original subscriber for stock, and to the payment of the sum so subscribed. The object of this statute is, to require an actual cash payment of the whole subscription; and subdiv. 4 is designed to prevent the withdrawal of any part of it, by discounting any note of such stockholder, with intent to enable him to withdraw it. It is not unlawful for a bank to sell, on credit, shares of its stock which it may have previously purchased, or to take a note for the amount, payable at the expiration of the stipulated credit. *N. Y. Superior Ct.*, 1857, *U. S. Trust Co. v. Harris*, 2 *Bow.*, 75.

7. **Intent to discount**. That merely receiving notes with intent to enable stockholders to withdraw capital, is not a violation of the statute, which will sustain a private action. There must be a discount, as well as a receipt of such a note. *Supreme Ct.*, 1844, *Gaffney v. Colvill*, 6 *Hill*, 567.

8. **Computation of profits for purposes of**

dividend. Effect of losses. 1 *Rev. Stat.*, 590, §§ 2-5.

9. **Proceedings on stock pledged**, when loan is not paid. 1 *Rev. Stat.*, 591, § 6.

10. **Conveyances to the use of moneyed corporation**. The provision of 1 *Rev. Stat.*, 591, § 7,—declaring conveyances, assignments, and transfers of any effects, for the use, benefit, or security of a moneyed corporation, void, unless made directly to the corporation,—does not apply to foreign corporations; and the provision of 2 *Id.*, 457, § 2,—that if a foreign corporation do any act forbidden by the laws of this State to be done by a home corporation, “it shall not be authorized to maintain any action founded on such act,”—merely debars it from maintaining an action founded on the conveyance, but leaves it good for other purposes. *Supreme Ct.*, 1850, *Wright v. Douglass*,* 10 *Barb.*, 97.

11. A transfer of shares to A., as the president of a banking association, is not void by reason of the provision of 1 *Rev. Stat.*, 591, § 7, which requires every assignment to a moneyed corporation to be made to the corporation directly by name. By the provisions of the general banking law, an assignment to the president, as such, is an assignment to the association itself by name. *N. Y. Superior Ct.*, 1854, *Leavitt v. Fisher*, 4 *Duer*, 1.

12. **Authority for making transfer**. No conveyance, assignment or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such corporation, of any of its real estate, or of any of its effects, exceeding the value of one thousand dollars; but this section shall not apply to the issuing of promissory notes, or other evidences of debt, by the officers of the company, in the transaction of its ordinary business; nor to payments in specie or other current money, or in bank-bills, made by such officers; nor shall it be construed to render void any conveyance, assignment or transfer, in the hands of a purchaser for a valuable consideration, and without notice. 1 *Rev. Stat.*, 591, § 8.

13. The provision of 1 *Rev. Stat.*, 591, § 8, only extends to such moneyed corporations as are by their charters subject to the management of a board of directors, trustees, or other officers. [See 6 *Hill*, 370.] *Supreme Ct.*, 1845, *Gillet v. Campbell*, 1 *Den.*, 520.

14. A mutual insurance company is a moneyed corporation, within 1 *Rev. Stat.*, 591.

* Reversed on other grounds, *Ct. of Appeals*, 1858, 7 *N. Y. (3 Seld.)*, 584.

Transfers of Assets, how Authorized.

Supreme Ct., Sp. T., 1853, *Hill v. Reed*, 16 *Barb.*, 280. See *infra*, 24, 31.

15. Payment of debt. A transfer by the president of a mutual insurance company of a premium note of more than \$1,000, in payment of a loss to an insured, who takes such note and surrenders his policy, without notice of any want of authority in the president, is not a violation of 1 Rev. Stat., 591, § 8, although the transfer was not authorized by a resolution of the board of trustees. *Ct. of Appeals*, 1850, *Howland v. Myer*, 8 *N. Y.* (3 *Comst.*), 290; affirming *S. O., sub nom. Aspinwall v. Meyer*, 2 *Sandf.*, 180.

16. A judgment held by a bank, and by it transferred by assignment, on its being paid, is not a part of the effects of the bank requiring a resolution of the board of directors to authorize the assignments, under 1 Rev. Stat., 591, § 8. *Ct. of Appeals*, 1854, *Eno v. Crooke*, 10 *N. Y.* (6 *Seld.*), 60.

17. Evidence of vote. An assignment of property of a corporation stated that the corporation had caused its seal to be affixed and the assignment to be signed by the president, and its execution to be attested by the secretary. The secretary proved its execution before a commissioner of deeds, for the purpose of having it recorded, testifying that the corporate seal was affixed by authority of the corporation. *Held, prima-facie* evidence that the assignment was authorized by a vote of the board, as required by the statute. *Chancery*, 1848, *Johnson v. Bush*, 3 *Barb. Ch.*, 207.

18. Who is purchaser. Every person who, for any consideration that the law judges to be valuable, has acquired, directly or indirectly, a legal or equitable title or interest, by an assignment or transfer from a moneyed corporation, is to be deemed a purchaser within the meaning of the statute; and within this definition, every assignee of a bond and mortgage, whether the assignment is made to him directly, or to a trustee for his benefit and security, and whether it is made absolutely or as collateral security, is plainly included. *N. Y. Superior Ct.*, 1849, *Palmer v. Yates*, 3 *Sandf.*, 187.

19. The indorsee of a note exceeding \$1,000, indorsed to him by the president of an insurance company, is presumed to be a bona-fide purchaser, without notice of the fact that the transfer was unauthorized by a previous resolution of the board of directors (1 Rev. Stat.,

591, § 8); and the burden of proving such notice is on the party alleging it. *N. Y. Superior Ct.*, 1849, *Caryl v. McElrath*, 3 *Sandf.*, 176; and see *Palmer v. Yates, Id.*, 187.

20. Purchaser without notice. A transfer of assets to trustees to secure the payment of bonds about to be issued to raise money, is valid, though not authorized by a previous resolution of the directors, if the purchasers of the bonds so secured had no notice in fact of the want of such previous resolution. The exception in section 8, saving transfers in the hands of a purchaser for a valuable consideration and without notice, shows that it was not intended to make the transfer, unsupported by a resolution, absolutely void. The holder, whether he takes directly from the officers of the corporation or from a third person, may always show, in support of his title, that he purchased for value and without notice. *Ct. of Appeals*, 1857, *Curtis v. Leavitt*, 15 *N. Y.* (1 *Smith*), 9; and see *Leavitt v. Blatchford*, 17 *N. Y.* (3 *Smith*), 521.

21. An assignment and delivery of bonds and mortgages, in trust to secure certain bonds of the corporation proposed to be issued as the foundation of a loan, though unauthorized by any previous resolution of the board of directors, becomes effectual, by virtue of the saving clause of the statute, the moment the bonds of the company, intended to be secured by it, come to the hands of a holder for value and without notice. *N. Y. Superior Ct.*, 1849, *Palmer v. Yates*, 3 *Sandf.*, 187.

22. Officer deemed to have notice. A transfer of over \$1,000 worth of promissory notes, by a cashier to a director, without a previous resolution of the directors, authorizing the same, is void, for the director is chargeable with notice as an officer of the bank, and cannot be a bona-fide purchaser. *So held*, where there was some evidence also of actual notice. *Ct. of Appeals*, 1855, *Gillet v. Phillips*, 13 *N. Y.* (3 *Kern.*), 114.

23. The president of an insurance company took, to satisfy a claim due him, notes belonging to the company, with their indorsement, but without any resolution on the part of the directors. Held, that the transfer was in violation of the statute and void, and he could not recover on the note. *Supreme Ct., Circuit*, 1857, *Marsh v. Brett*, 16 *How. Pr.*, 95.

24. Ratification. An assignment, though made without the previous resolution of the

Assignments by.

Liability of Officers.

board of directors required by 1 Rev. Stat., 591, § 8, may be ratified and made valid by a subsequent resolution. *N. Y. Superior Ct.*, 1849, *Palmer v. Yates*,* 3 *Sandf.*, 187. To the same effect, *Ct. of Appeals*, 1857, *Curtis v. Leavitt*, 15 *N. Y.* (1 *Smith*), 9.

25. Recoupment. Where the transfer is unauthorized, and the purchaser has notice, he is not, in an action by the receiver of the corporation to avoid the sale and recover the property transferred or its proceeds, entitled to recoup or be allowed the consideration paid by him to the bank. *Ct. of Appeals*, 1855, *Gillet v. Phillips*, 13 *N. Y.* (8 *Kern.*), 114.

26. Assignment by insolvent. Transfers, &c., by a moneyed corporation, which is or contemplates insolvency, with intent of giving preference,—void. 1 *Rev. Stat.*, 591, § 9.

27. Intent essential. Payment or transfer made by a corporation, even when actually insolvent, is not to be deemed void as made with intent to prefer a particular creditor, unless the intent, as well as the insolvency, is alleged and proved. *Ct. of Appeals*, 1857, *Curtis v. Leavitt*, 15 *N. Y.* (1 *Smith*), 9, 109, 188, 198.

28. Thus where a moneyed corporation was in great danger of insolvency, if not actually insolvent, but its officers had an honest and intelligent expectation that it would be able to go on with business and pay all its debts,—*Held*, that a pledge and transfer of assets, consisting of bonds and mortgages received from subscribers in payment for capital-stock, to secure the payment of bonds about to be issued, to raise money upon, was valid, for the reason that there was no intent to prefer any particular creditor. *Ib.*; and see *Leavitt v. Blatchford*, 17 *N. Y.* (8 *Smith*), 521.

29. *It seems*, that a conveyance or security made for the purpose of procuring advances of money, and not to secure existing creditors, is not void within section 9. *Ct. of Appeals*, 1857, *Curtis v. Leavitt*, 15 *N. Y.* (1 *Smith*), 9.

30. Creditors without notice. Payment and transfers of property to creditors made by a moneyed corporation when actually, though not avowedly, insolvent, or in contemplation of insolvency, followed by insolvency, with

intent to give a preference, are void under 1 *Rev. Stat.*, 591, § 9, even though the party receiving the transfer has no knowledge of the pecuniary condition of the company. No distinction is made by the statute between actual and avowed insolvency, nor between creditors receiving with and those receiving without knowledge of insolvency. *Ct. of Appeals*, 1854, *Brouwer v. Harbeck*, 9 *N. Y.* (5 *Seld.*), 589; reversing *S. O.*, 1 *Duer*, 114. Followed, *N. Y. Superior Ct.*, 1858, *Hoyt v. Sheldon*, 8 *Bow.*, 267.

31. Insurance company. A transfer by an insurance company after their insolvency, though ratified by their receiver, of a note, to one who before such insolvency made a loan to the company, in pursuance of an arrangement by which it was agreed that he should at all times be furnished with collateral security,—is void by the statute relating to moneyed corporations. Such of the provisions of the Revised Statutes relating to moneyed corporations as can be applied to insurance companies, must be so applied. *N. Y. Superior Ct.*, 1850, *Furniss v. Sherwood*, 3 *Sandf.*, 521.

32. Agreement previous to insolvency. The fact that the agreement was made by the company, when solvent, and at the time the debt was incurred, cannot alter the case. *Ib.*

33. Assignment pending suit. Assignment by an insolvent corporation after suit commenced,—*Held*, void under 1 *Rev. Stat.*, 591. *Leavitt v. Tylee*, 1 *Sandf. Ch.*, 207.

34. Liability of officers. Under 1 *Rev. Stat.*, 591, § 10,—which declares that “every director” who violates the preceding provisions shall be personally liable to the creditors and stockholders to the full extent of any loss they may respectively sustain,—any one or more of the directors may be sued; but if one director is sued for any act which could not have been done by him alone, the declaration must allege that he had the necessary concurrence of others. *Supreme Ct.*, 1844, *Gaffney v. Colvill*, 6 *Hill*, 567.

35. Directors also guilty of misdemeanor,—when chargeable with notice,—effect of insolvency,—and the liability of directors and stockholders. 1 *Rev. Stat.*, 591, §§ 11–18.*

36. Annual statement required. 1 *Rev. Stat.*, 592, §§ 19–25.

* But compare *Gillet v. Phillips*, 13 *N. Y.* (8 *Kern.*), 114. See, also, *Cleveland's Banking L. of N. Y.*, 814, where it said that in an unreported case (*A. V. Chan. Ct.*, 1846, *Blunt v. Hanna*), the contrary was held.

* Repealed by the act of 1880, 73, ch. 71, except in its application to corporations then in existence.

Elections in Moneyed Corporations.**Bond.**

37. A certificate of deposit. A certificate of a corporation, not having banking powers, to the effect that a certain sum had been deposited with it, to be paid at the end of twenty years, with semi-annual interest, if issued upon a loan, is a violation of 1 Rev. Stat., 600, § 4, which forbids corporations, not having banking powers, to discount or issue bills, &c. *Ct. of Appeals*, 1852, *N. Y. Life Ins. & Trust Co. v. Bebee*, 7 *N. Y.* (3 *Seld.*), 864.

As to the **Banking powers** of corporations, see **BANKING**.

38. Requisites to commencing business. 1 *Rev. Stat.*, 595, §§ 29-31.

39. Elections, regulation of, and proceedings in respect thereto. 1 *Rev. Stat.*, 596-598.

40. Election of less than full board. The charter fixed the number of directors, and made a majority a quorum. At an election, a number, one less than the full number, were elected; and the former directors considering the election null, ordered a new one, and resolved to hold over meanwhile. *Held*, that the first election was valid, and superseded the whole of the former board; and therefore the court should, on application, under 1 *Rev. Stat.*, 2 ed., 600, set aside the new election and order an election of one director. *Supreme Ct.*, 1840, *Matter of Union Ins. Co.*, 22 *Wend.*, 591; and see *People v. Jones*, 17 *Id.*, 81.

41. Inspectors. Where the charter expressly prohibits directors from being inspectors, the provision of the Revised Statutes that no person shall be an inspector in a corporation of which he is a director or officer, is not applicable; and an officer who is not a director may be inspector. *Supreme Ct.*, 1889, *Matter of Chenango County Mutual Ins. Co.*, 19 *Wend.*, 635.

42. Time of voting. Where the time for keeping the election open is not fixed, the exercise of a fair discretion on the part of the inspectors will not be reviewed. *Id.*; and see *Matter of Mohawk & Hudson R. R. Co.*, *Id.*, 135.

43. Illegal votes. The election will not be vacated because illegal votes were cast, if they were not challenged; nor then, if the successful party would have been successful if all the illegal votes are rejected. *Supreme Ct.*, 1889, *Matter of Chenango County Mutual Ins. Co.*, 19 *Wend.*, 635.

44. It seems, that no oath or affidavit is required under §§ 39-41, unless the vote is challenged. *Id.*

45. The intentional neglect of the directors of a moneyed corporation, in violation of a positive provision of its act of incorporation, to hold an annual election, authorizes the court to close its affairs under 2 *Rev. Stat.*, 464. *Chancery*, 1838, *Ward v. Sea Ins. Co.*, 7 *Paige* 294.

46. Redress respecting elections. The provision of 1 *Rev. Stat.*, 2 ed., 600, §§ 57, 58,—that if any person shall conceive himself aggrieved by an election or any proceeding concerning an election of directors or officers in any such corporation, he may apply to the Supreme Court for redress, who may proceed in a summary way, &c., and make such order and grant such relief as circumstances and justice shall require,—was intended merely to give a more summary remedy for previously recognized wrong. It does not authorize the court to proceed merely to confirm an election *quia timet*. There must be a party aggrieved, and no party can be deemed aggrieved in respect to a corporate office, till it is withheld from the legal incumbent. *Supreme Ct.*, 1840, *Matter of Union Ins. Co.*, 22 *Wend.*, 591.

47. The court will not, on an application under 1 *Rev. Stat.*, 2 ed., 600, redress the inaction but only the *erroneous proceedings* of the officer. *Id.*

48. Definitions. Moneyed corporations, and other terms of the statute, defined. 1 *Rev. Stat.*, 598.

Consult, also, **Corporation**, and the various other classes of corporations there referred to.

MONEY PAID.

1. Money payment necessary. In general, an action for money paid will not lie, unless the plaintiff has actually paid money. *Supreme Ct.*, 1811, *Cumming v. Hackley*, 8 *Johns.*, 202; 1849, *Moyer v. Shoemaker*, 5 *Barb.*, 819.

2. Bond. Thus where plaintiff had given his bond for the payment of a debt due from defendant, but had not paid the debt,—*Held*, that the action could not be maintained. *Supreme Ct.*, 1811, *Cumming v. Hackley*, 8 *Johns.*, 202.

Mere Liability.

3. **Mere liability.** Where fees are awarded to be paid, by one of the parties, to the arbitrators, the other party cannot recover them, in an action on the award, without showing that he has made actual payment. A mere liability to pay will not give a right of action. *Supreme Ct.*, 1817, *Platt v. Smith*, 14 *Johns.*, 868.

4. **Property received as money.** Where property—*e. g.*, land—is received as money, and the debt discharged, it is deemed equivalent to a payment of money for the purpose of sustaining an action for money paid. *Supreme Ct.*, 1827, *Ainalie v. Wilson*, 7 *Cow.*, 662; 1829, *Bonney v. Seely*, 2 *Wend.*, 481.

5. **Request necessary.** If an officer, having an execution, or warrant, without demanding the amount from the defendant, and, without his request, pays it over to the plaintiff, he cannot recover from defendant the money paid. *Supreme Ct.*, 1808, *Jones v. Wilson*, 3 *Johns.*, 484; 1813, *Beach v. Vandenburg*, 10 *Id.*, 861; 1817, *Overseers of Walkill v. Overseers of Mamakating*, 14 *Id.*, 87; S. P., 1811, *Reed v. Pruyn*, 7 *Id.*, 426.

6. But where no objection was made to the evidence, a demand and request may be presumed, in support of the verdict. 1811, *Menderback v. Hopkins*, 8 *Johns.*, 436.

7. — or promise. So where a collector of taxes voluntarily pays the amount of defendant's tax to the treasurer, without request, or subsequent promise to repay, no action is maintainable. *Supreme Ct.*, 1818, *Beach v. Vandenburg*, 10 *Johns.*, 861; 1817, *Overseers of Walkill v. Overseers of Mamakating*, 14 *Johns.*, 87.

8. A railroad company agreed to carry plaintiff's goods for so much per ton. He paid money for the weighing. There being no proof of an agreement that the company should weigh (though they had previously been accustomed to do so), it was *Held*, that plaintiff could not recover back his money paid. *Supreme Ct.*, 1852, *Johnson v. Cayuga & Susquehanna R. R. Co.*, 11 *Barb.*, 621.

9. **Where several are liable** on a contract, and money is paid on it by another at the request of one of them, all are liable for money paid. *Supreme Ct.*, 1838, *Tradesmen's Bank v. Astor*, 11 *Wend.*, 87.

10. **Payment on negotiable paper.** Where an indorsee has paid up the whole note, and become the legal owner of it, he can either

Payment on Negotiable Paper.

sue the indorser upon the note, or for money received, or for money paid. *Supreme Ct.*, 1848, *Baker v. Martin*, 8 *Barb.*, 684.

11. Where a subsequent indorser has made a partial payment upon the note, although he cannot sue the prior indorser upon the note, he may recover from him the amount paid, as money paid to his use. *Supreme Ct.*, 1828, *Butler v. Wright*, 20 *Johns.*, 887. *Op. of Errors*, 1830, *Wright v. Butler*, 6 *Wend.*, 284.

12. If judgment is had against the maker and indorsers of a note, an indorser who has paid part of it may recover the amount paid from the maker, as money paid to his use. *Supreme Ct.*, 1850, *Dygert v. Gros*, 9 *Barb.*, 506.

13. To authorize a recovery by a subsequent indorser against prior indorsers, of the amount paid on the note, as money paid for the defendants, it must appear in some legal way that the money was paid for their use. This may be either by showing that demand was made and due notice served on the prior indorsers, so as to charge them; or by showing that the payment was made upon their request, &c. *Supreme Ct.*, 1853, *Barker v. Cassidy*, 16 *Barb.*, 177.

14. An indorser, who, after the maker had been discharged in insolvency, the holder being a petitioning-creditor, paid the amount to the holder,—*Held*, not entitled to recover the amount from the insolvent. *Supreme Ct.*, 1819, *Lynch v. Reynolds*, 16 *Johns.*, 41.

15. Defendant applied to plaintiff for advice how to draw a sum of money from abroad; and, following the advice given, drew a bill of exchange in favor of plaintiff, who indorsed and negotiated it. The bill being returned protested, plaintiff had to pay damages, &c. *Held*, that plaintiff having acted in good faith, as the agent of defendant, was entitled to recover the damages, &c., paid by him, as money paid to the use of defendant. *Supreme Ct.*, 1814, *Ramsay v. Gardner*, 11 *Johns.*, 439.

16. The plaintiffs, of New York, instructed the defendants, of London, to purchase certain goods, and authorized them to draw for the prices on W., at *sixty and ninety days*; defendants drew at *four months*, and W. accepted, but failed before the maturity of the bill; and plaintiffs' agent in London, being ignorant of defendants' want of authority to draw such a bill, and in order to prevent defendants attaching property of plaintiffs in London, paid

Exchange Notes.

Liens on Vessel.

them the bill;—*Held*, that plaintiffs could recover back the money. *N. Y. Superior Ct.*, 1829, *Potter v. Everett*, 2 *Hall*, 252.

17. If an agent procure plaintiff's indorsement of his own bill, for the accommodation of the principal, to whose use the money raised on it is applied, plaintiff, on taking up the bill, may have an action against the principal for money paid to his use. *Supreme Ct.*, 1844, *Allen v. Coit*, 6 *Hill*, 818.

18. **Exchange notes.** Where two persons make and exchange notes, neither can maintain an action for money paid on his own note, against the other. *Supreme Ct.*, 1846, *Wooster v. Jenkins*, 3 *Den.*, 187.

19. **Joint parties.** Where a subsequent indorser has paid a note on which there are several prior indorsers, he cannot maintain a joint action against such indorsers to recover the amount of his payment, as money paid. *Supreme Ct.*, 1858, *Barker v. Cassidy*, 16 *Barb.*, 177.

20. Where a bill of exchange was drawn by several, one of whom joined as surety for the others, who procured the bill to be discounted before acceptance, for their own benefit, and the drawee, with knowledge of these facts, accepted and paid the bill without funds of any of the drawers in his hands;—*Held*, that he might recover the amount against all the drawers as money paid to their use. *Ct. of Errors*, 1845, *Suydam v. Westfall*, 2 *Den.*, 205.

21. **Rights of surety.** Where a surety pays the amount of judgment against his principal, but the judgment is afterwards reversed, the surety cannot maintain an action against the plaintiff in the judgment, to recover back the money paid. The implied promise to repay money collected on a judgment afterwards reversed, does not arise in favor of a surety, in such a case, but in favor of the principal debtor; the money advanced by the surety being deemed the money of the principal at the time of its application. The surety must seek his remedy against the principal. *Ct. of Appeals*, 1859, *Garr v. Martin*, 20 *N. Y.* (6 *Smith*), 306; reversing *S. C.*, 1 *Hill*, 358.

22. **Taxes.** Where a widow, in order to relieve her own share of premises, a part of which has been assigned her as her dower, from a tax or assessment, is obliged to pay the whole amount charged on the entire premises, she may recover from the heir-at-law, or his grantee, his just share or proportion of the

amount paid, with interest. *N. Y. Superior Ct.*, 1858, *Graham v. Dunigan*, 2 *Bow.*, 516.

23. The defendants conveyed to the plaintiffs certain lands, by a deed containing a covenant for *quiet enjoyment*. Previous to the sale, a part of the lands had been returned to the comptroller, and sold by him for unpaid taxes. On the last day for the redemption of the lands, the plaintiffs paid the amount of such taxes, and the charges, into the comptroller's office, and redeemed the lands from sale. *Held*, that the payment having been made voluntarily, and without any request on the part of the defendants, and there having been no eviction, no action would lie to recover from defendants the amount paid. *Supreme Ct.*, 1854, *McCoy v. Lord*, 19 *Barb.*, 18.

24. A party whose property is subject to distress for taxes, or who is personally liable therefor, may discharge the tax in default of a person who ought to pay it, and recover the amount from the latter. *So held*, in favor of a landlord who paid taxes which the tenant was bound to pay as between them. *N. Y. Com. Pl.*, 1858, *Lageman v. Kloppenburg*, 2 *E. D. Smith*, 126.

25. **Distress.** If the property of a third person is distrained and sold by the landlord for rent, the owner may buy it, and recover the amount bid as money paid to the use of the tenant. *Supreme Ct.*, 1831, *Wells v. Porter*, 7 *Wend.*, 119.

26. **Repairs.** A landlord paid money for repairs of the building, upon an agreement by the tenant that he would reimburse him, if it should be settled that he was not bound, as landlord, to make the repairs. *Held*, that upon the lease the landlord was not bound to repair, and that he might recover the sum expended, from the tenant, upon his promise. *N. Y. Superior Ct.*, 1854, *Howard v. Doolittle*, 3 *Duer*, 464.

27. **Mortgage.** The mortgagee assigned the mortgage, upon a bargain to sell it for the amount due, and, by mistake, a small payment was omitted in the computation, which was charged against the assignee on his foreclosure;—*Held*, that the assignee could recover the amount from the mortgagee. *Supreme Ct.*, 1829, *Burr v. Veeder*, 3 *Wend.*, 412.

28. **Liens on vessel.** Money paid by a vendee of a vessel, with covenant against incumbrances, to relieve her from demands upon which she might be seized.—recoverable from

Insurance.**Payee of Agent.**

the vendor. *Sisson v. Stevenson*, 7 *N. Y. Leg. Obs.*, 255.

29. Insurance. A purchaser of goods, who effects insurance upon them intermediate the sale and the delivery, has no claim upon the seller to be reimbursed for the premium paid, although the goods may have been, in law, at the risk of the seller during the period covered by the insurance. *N. Y. Com. Pl.*, 1857, *Orguerre v. Luling*, 1 *Hill.*, 383.

30. The agent of C. effected insurance for him, but kept the money advanced by C. for paying the premium, and substituted his own note, indorsed for his accommodation by defendant. The policy was afterwards transferred to plaintiff. A loss happened, which was paid to the plaintiff, less the amount of the note, which was delivered to plaintiff without indorsement. *Held*, that he could not recover the amount of the note, as money paid to defendant's use. *Supreme Ct.*, 1804, *Coulon v. Green*, 2 *Cai.*, 153.

31. Goods sold. Defendant sold plaintiff goods in bales, knowing that they were intended for the Mexican market, and by mistake the quantity was over-estimated, and by reason of the invoice furnished by defendant, plaintiff paid, in Mexico, an excess of duties, which that government refused to refund;—*Held*, that while defendant was liable for the difference of price between the actual and estimated quantity, he was not liable for the excess of duties and expenses. *Ct. of Errors*, 1846, *Hargous v. Ablon*, 3 *Den.*, 406.

32. Money paid. Where plaintiff, on a sale to a firm, took the note of one partner for the price, and transferred it, and paid a judgment obtained thereon by the indorsee, against himself and the maker,—*Held*, that he could not maintain an action against the firm for money paid, the other partner being liable only to him for goods sold. *Supreme Ct.*, 1845, *Peters v. Sanford*, 1 *Den.*, 224.

MONEY RECEIVED.

1. Nature of the action. The action for money had and received is an equitable action, and as a general rule, the question is, to which party does the money justly belong. *Supreme Ct.*, 1846, *Buel v. Boughton*, 2 *Den.*, 91.

2. Thus, where the maker of a note omitted, by mistake, to make his note payable with interest, as it ought to have been, and the payee transferred it, and the maker paid the amount with interest to the new holder, all three supposing that it bore interest;—*Held*, that the maker could not recover back the interest. *Id.*

3. Promise implied. Where a person receives the money of another, and applies it to his own use, the law implies a promise to repay it. *Supreme Ct.*, 1808, *Dumond v. Carpenter*, 3 *Johns.*, 183.

4. Advances. Where one advances money to another, to be applied by him in an adventure for their common benefit, and the latter appropriates it to another purpose, the party advancing it may recover it back, as money received to his use. *Supreme Ct.*, 1825, *McNeilly v. Richardson*, 4 *Cow.*, 607.

5. Severing joint demand. When several persons are engaged in a joint transaction, the proceeds of which are received by a third person, who promises to pay each partner his respective proportion, in an action against him by one of the partners for his proportion, he cannot object that there are others jointly concerned, but must pay, according to his promise. *Supreme Ct.*, 1805, *Bunn v. Morris*, 3 *Cai.*, 54.

6. One who seeks to recover a portion of a compensation or reward which has been awarded to and received by another, must show that he performed a part of the service for which it was paid, and also some rule of law by which it can be apportioned. *Supreme Ct.*, 1835, *Waddell v. Morris*, 14 *Wend.*, 76.

7. Thus, where a United States marshal, under an order of court, received a compensation, wholly discretionary with the court, for the custody of certain jewels under seizure,—*Held*, that his predecessor could not recover a portion of it upon the ground that he had had the custody of them for a part of the time. *Id.*

8. Buying note. One who has voluntarily agreed to pay, and has paid more than the face of a note, upon purchasing it, cannot recover back the excess. It is valid as a gift. *Supreme Ct.*, 1839, *Eddy v. Stanton*, 21 *Wend.*, 255.

9. Payee of agent. Where an agent or servant applies money of his employer, in his hands, to discharge a debt of a third person, the employer may recover it from the payee,

Set-off.**Advance Wages.**

as money received to his use, if the payee received it with knowledge of the facts. *So held*, where the payment was to a clerk of court, in discharge of a judgment upon conviction for violating an ordinance. *Supreme Ct.*, 1842, *Amidon v. Wheeler*, 8 *Hill*, 137.

10. Set-off. Defendant undertook, with B. & W., to collect a demand due to them, and apply the proceeds to pay certain debts due from them, and hold the balance subject to their order. B. & W. afterwards gave an order in favor of the plaintiff. *Held*, that defendant having received the money, plaintiff could maintain an action as for money received to plaintiff's use; and that it was not competent to defendant to set off a demand which he had against B. & W. *Supreme Ct.*, 1815, *Weston v. Barker*, 12 *Johns.*, 276.

11. Negotiable paper. If the maker of a note indorsed after it is overdue, paid it before such transfer, but has neglected to set up such payment in bar of an action by the indorsee, he cannot afterwards sue the payee for money received. *Supreme Ct.*, 1812, *Loomis v. Pulver*, 9 *Johns.*, 244; *S. P.*, 1816, *Batley v. Button*, 13 *Id.*, 187.

12. A. remitted £500 to B., in London, to pay a bill for the same sum, drawn by his attorney C. on B., pursuant to an agreement between them. The bill having been presented for payment before the funds had reached the hands of B., it was returned protested. Afterwards, another bill for £112, drawn also by C., as attorney of A., in favor of D., was presented to B., who accepted and paid it out of the £500, which had in the mean time come to his hands;—*Held*, that though the £500 were placed in the hands of B. for a specific purpose, yet C. had no right of action against D., to recover back the money paid to him, but must look to the other parties to rectify the mistake, if any was made. *Supreme Ct.*, 1812, *Dey v. Murray*, 9 *Johns.*, 171.

13. Defendant transferred, with guaranty, to plaintiff, a note of S., and subsequently settled a judgment obtained thereon by plaintiff, in the name of the payee, and also debts due to himself from S., and took notes of S. for the whole amount, and collected them as they became due;—*Held*, that he was responsible, as for money had and received, to plaintiff for the amount of the judgment. *Supreme Ct.*, 1826, *Tucker v. Ives*, 6 *Cow.*, 193.

14. An indorser of a bill paid the amount

to the holder, without the latter having made demand upon the acceptor, and brought suit to recover the amount paid from the drawer, as money paid for him, and as money received by him to plaintiff's use. *Held*, that an action could not be maintained. The drawer was no more liable in the form of action adopted than he would have been in an action upon the bill. *Supreme Ct.*, 1800, *Munroe v. Easton*, 2 *Johns. Cas.*, 75.

15. The holder of a note may, at common law, recover against a remote indorser, as for money had and received. That he holds the note as security, or that the defendant received no money on parting with it, is no objection to the recovery. *N. Y. Superior Ct.*, 1847, *Hays v. Phelps*, 1 *Sandf.*, 64.

16. An executor cannot recover back money paid by the decedent to the defendant on a mortgage made by the decedent, on the ground that the mortgage was without consideration. *Supreme Ct.*, 1848, *Gilleland v. Failing*, 5 *Den.*, 308.

17. Where an executor, who was in embarrassed circumstances, but owning a lot upon which he wished to erect a dwelling-house, applied to the defendant to advance him money for that purpose, upon a good and collectable bond and mortgage belonging to the estate of his testator; and the defendant, after deducting a large sum from the mortgage-debt, by way of bonus, and requiring a personal guaranty of payment, advanced the money to the executor, and took an assignment of the securities, with full knowledge of the use to which the money was to be applied by the executor, but without making any inquiry as to the situation of the estate or the pecuniary circumstances of the executor;—*Held*, that the defendant was bound to refund to the persons interested in the personal estate of the testator the amount of the bond and mortgage, with interest. *Sacia v. Berthoud*, 17 *Barb.*, 15.

18. Insurance of vessel. A part-owner of a vessel who had agreed to procure her insured, and had received the insurance-money,—*Held*, liable, under the circumstances, to his co-owner for the latter's proportion of the money. *Burrows v. Turner*, 24 *Wend.*, 276.

19. Advance-wages. The owner of a vessel paid money in advance to the seamen, and they gave it to defendant as an indemnity for his undertaking with the owner that they

Vessel Lost.

would not desert. The seamen having deserted, the owner brought suit to recover back the advance-wages; there being no valid agreement to charge the defendant as a surety. *Held*, that the action could not be sustained as an action for money received to plaintiff's use. *Supreme Ct.*, 1816, *Dodge v. Lean*, 18 *Johns.*, 508.

20. Vessel lost. Where defendant sold plaintiff a passage-ticket upon the steamer N., and plaintiff paid the price, both parties being ignorant of the fact that the steamer had then already been lost at sea,—*Held*, that plaintiff was entitled to recover back the money paid. *Supreme Ct.*, 1858, *Bonsteel v. Vanderbilt*, 21 *Barb.*, 26.

21. As a general rule, where freight is paid in advance for the carriage and delivery of goods, but the voyage is lost, by shipwreck, &c., the shipper is entitled to recover back the money paid for freight. *Supreme Ct.*, 1808, *Watson v. Dwykinck*, 3 *Johns.*, 385.

22. Where, however, the agreement was, that the ship-owner, in consideration of freight paid immediately, should permit the shipper to proceed, and go in his vessel as a passenger, and to load on board certain goods for transportation,—*Held*, that the receiving on board was the consideration, and that the ship-owner was not liable to refund. *Id.*

23. Chattel destroyed. Where a purchaser of chattel property makes a partial payment of price, and the property is afterwards destroyed, so as to put it out of the power of the vendor to perform the contract on his part, by delivering it, the purchaser may recover back the payment. *Supreme Ct.*, 1828, *Murray v. Richards*, 1 *Wend.*, 58.

24. A surety who has paid the creditor, supposing himself subrogated thereby, in respect to ostensible securities, may, after discovering that the creditor had made a secret agreement with the debtor, by which the securities had been rendered valueless, maintain an action against the creditor to recover back the amount paid. *Ct. of Appeals*, 1857, *Chester v. Bank of Kingston*, 16 *N. Y. (2 Smith)*, 386.

25. A bank discontinued a suit against the makers and indorsers of a promissory note discounted by it, upon receiving a bond, by three of the parties to the note, for payment. This bond was delivered under a secret agreement that the bank would endeavor to collect

Omitting to credit Payments.

the amount secured thereby from the plaintiffs in this action, who were, in fact, only secondarily liable, the primary obligation being upon the obligors in the bond and the other parties to the note for which it was given. The plaintiffs being ignorant of this condition, afterwards paid a judgment recovered against them by the bank for the same debt, and the bond was thereupon transferred to them by the bank. *Held*, that the bond having, by virtue of the condition on which it was delivered, become satisfied when the bank obtained payment from the plaintiffs, the latter were, in equity, entitled to recover back the amount paid upon the judgment. *Id.*

26. Corporate bonds. One who, in the capacity of agent of a corporation, has sold bonds issued by the corporation, and received the money therefor, cannot resist an action by the corporation for money had and received, on the ground that the issue and sale of the bonds by the corporation was unauthorized by law. *Supreme Ct.*, 1856, *Mayor, &c., of Auburn v. Draper*, 23 *Barb.*, 425.

27. An overseer of highways is not liable to an action to recover back moneys collected by him in payment of an assessment levied by the commissioners of highways. *Supreme Ct.*, 1806, *Potter v. Bennis*, 1 *Johns.*, 515.

28. Liability of agent. Where a debtor delivers money to one acting merely as his agent, with instructions to pay it to his creditor, no action lies, at the suit of the creditor, for money had and received. To sustain such an action an express promise by the agent must be shown. *Supreme Ct.*, 1852, *Bigelow v. Davis*, 16 *Barb.*, 561.

29. As a marshal has no authority to receive the money upon an estreated recognizance until execution is placed in his hands, money voluntarily paid by the surety upon his recognizance, without suit, may be recovered back, if the recognizance is void, at any time before it has been accounted for to the government. *Supreme Ct.*, 1847, *Corlies v. Waddell*, 1 *Barb.*, 355.

30. Omitting to credit payments. W. commenced proceedings against S., under the mechanics' lien law, and recovered a judgment by default, without giving S. credit for certain payments he had made. *Held*, that S. might maintain an action against W. to recover back the amount of his payments. [16 *Mass.*, 306; 6 *Id.*, 14; 17 *Id.*, 394; 4 *Pick.*, 228; 11 *Johns.*,

Liability of Partners.

441; 8 Id., 470; Phil. on Ev.; Cow. & H., 882. *Contra*, 1 N. H., 88; 1 Ala., 108; 11 Id., 695.] This was not a matter adjudicated in the lien proceedings. When defendant W. received the payment, there was an implied agreement on his part that they should be credited, on his account, against the plaintiff. In omitting to make the application he was chargeable with bad faith. The plaintiff was not bound to defend the mechanics' lien suit, merely to see that defendant did what he had thus agreed to do. *Supreme Ct.*, 1858, *Smith v. Weeks*, 26 *Barb.*, 468.

31. Two partners received goods for sale on commission from the plaintiff. Subsequently they dissolved partnership, and one continued the business, and made sales of plaintiff's goods, and received the proceeds, and having paid over a part, failed in business, leaving a balance unpaid. *Held*, that both partners could be made liable for the balance, by a complaint on their original contract or undertaking to sell plaintiff's goods on commission, and account and pay over proceeds, alleging a breach of that contract in refusing to pay over the proceeds. *Ct. of Appeals*, 1857, *Briggs v. Briggs*, 15 *N. Y.* (1 *Smith*), 471.

32. Whether the retiring partner could have been made liable in an action for money received,—*Query?* *Ib.*

33. The sum paid to a witness, on serving a subpoena, for one day's attendance and for mileage, cannot be recovered back by the party paying it, unless the witness has failed, without a reasonable excuse, to attend the court in obedience to the subpoena. If the cause is settled or put off, the witness is not bound to refund, although he is excused from attending. *Supreme Ct.*, *Sp. T.*, 1851, *Ford v. Monroe*, 6 *How. Pr.*, 204; *S. C.*, 10 *N. Y. Leg. Obs.*, 155.

34. A master whose servant was seduced, transferred the right of action to her father, by a sealed instrument, and a judgment being recovered by the father in his name, acknowledged satisfaction. *Held*, that he was liable to the father for the amount of the judgment. *Supreme Ct.*, 1840, *Stanton v. Thomas*, 24 *Wend.*, 70.

35. Gaming. Money paid for lottery or raffle may be recovered back. 2 *Rev. Stat.*, 665, §§ 25, 32.

36. One who places money in the hands of a broker to indemnify him for any losses which

Parol Contract for Sale of Lands.

may accrue upon the sale of stock, which the broker is to make for him on time, in violation of 1 *Rev. Stat.*, 710, § 6, may recover it back if the broker has not paid it over, without notice of the illegality, or not to pay. *Chancery*, 1836, *Gram v. Stebbins*, 6 *Paige*, 124.

37. Compounding felony. Money paid for the purpose of compounding or settling a supposed felony, cannot be recovered back. *Supreme Ct.*, 1858, *Daimouth v. Bennett*, 15 *Barb.*, 541.

38. Illegal contract. Where money is paid upon an illegal contract,—*a. g.*, a contract void for maintenance,—both parties being in equal fault, it cannot be recovered back. *Supreme Ct.*, 1826, *Burt v. Place*, 6 *Cow.*, 481; 1829, *Best v. Strong*, 2 *Wend.*, 819.

39. Void contract. Money paid upon a contract which is void, not for illegality, but for want of mutuality, is recoverable as money had and received to the use of the party paying it. *So held*, of money paid upon an agreement for the purchase of land. *Ct. of Appeals*, 1850, *Eno v. Woodworth*, 4 *N. Y.* (4 *Comst.*), 249.

40. A parol contract for sale of lands, although so far void that the law will not enforce it, is not immoral nor illegal. Money paid by the vendee may be recovered back if the vendor refuses to perform; but cannot be where he is ready and willing to do so. [Citing many cases.] *Supreme Ct.*, 1854, *Collier v. Coates*, 17 *Barb.*, 471.

41. Where one who has agreed by parol to sell land, rescinds his contract, the other party may maintain an action to recover back money paid by him upon account of the purchase. *Supreme Ct.*, 1809, *Gillet v. Maynard*, 5 *Johns.*, 85.

42. On a parol agreement for the exchange of lands, void by the Statute of Frauds, the plaintiff delivered to the defendant the promissory note of a third person as a pledge; and the defendant received payment of the note. *Held*, that the plaintiff might recover the amount from the defendant, as money received to his use. *Supreme Ct.*, 1818, *Rice v. Peet*, 15 *Johns.*, 503.

43. Where the contract was for the sale of land in Pennsylvania, and it did not appear that the contract, though by parol, was void by the law of that State,—*Held*, that the money could not be recovered back. *Supreme Ct.*, 1847, *Abell v. Douglass*, 4 *Den.*, 805.

Sale of Goods.

Set-off.

44. Sale of goods. Where a vendor of goods rescinds the contract for the failure of the vendee to call for them within the time limited, the latter is entitled to recover back any payments he has made upon the price. *Supreme Ct.*, 1815, *Raymond v. Beamard*, 12 *Johns.*, 274.

45. Offer to restore. When a party seeks to recover back money paid upon a contract, upon the ground it is void, or has been rescinded, he must offer to restore whatever he has received under the contract. [2 *Barb.*, 145; 2 *Hill*, 288; *Id.*, 390; 3 *Greenl.*, 80; 1 *Den.*, 69; 4 *Id.*, 554; *Obit. Contr.*, 678, 752; 5 *East*, 449; 4 *Mass.*, 502; 15 *Id.*, 820.] And it makes no difference that what he has received is valueless to the defendant. *Supreme Ct.*, 1849, *Moyer v. Shoemaker*, 5 *Barb.*, 319.

46. Thus before a vendee can recover back the consideration paid for land sold under covenant of warranty, on the ground of failure of title, he must tender a reconveyance. *Id.*

47. Demand, when necessary. One who has received money standing in the position of a trustee,—*e. g.*, a collecting agent,—is in general not liable to an action for money received, until demand is made or some breach of trust or duty committed. *Supreme Ct.*, 1844, *Walrath v. Thompson*, 6 *Hill*, 540.

48. It is not necessary that plaintiff, in an action for money received to his use, should make a demand before suit, where it was the duty of the defendant to have remitted the money. *Ct. of Appeals*, 1856, *Stacy v. Graham*, 14 *N. Y.* (4 *Kern.*), 492.

49. So held, where defendant received money upon an order drawn by plaintiff's agent, upon a promise that upon drawing the money, he would, after paying a debt due to himself, remit the balance to the use of plaintiffs. *Id.*

50. Where money is paid by mistake, notice of the mistake and demand of repayment, before suit to recover it back, are not necessary; the party receiving money paid under a mistake of facts, is not a bailee or trustee, nor does his duty to return arise upon request. *Supreme Ct.*, 1821, *Utica Bank v. Van Gieson*, 18 *Johns.*, 485.

51. An assignee cannot maintain an action to recover moneys received to the use of his assignor,—*e. g.*, a surplus collected by a creditor of the assignor, upon collateral securities held by him,—without first giving notice of the assignment, and making a demand. *Su-*

preme Ct., 1840, *Sears v. Patrick*, 28 *Wend.*, 528.

52. Money paid under mistake. Money paid by one party to another, under a mutual mistake of facts, in respect to which both were equally bound to inquire, may be recovered back. *Supreme Ct.*, 1829, *Franklin Bank v. Raymond*, 3 *Wend.*, 69; *Burr v. Veeder*, *Id.*, 412; 1838, *Wheadon v. Olds*, 20 *Id.*, 174; 1841, *Canal Bank v. Bank of Albany*, 1 *Hill*, 287. *Ct. of Appeals*, 1850, *Bank of Commerce v. Union Bank*, 3 *N. Y.* (3 *Comst.*), 230.

53. What is mistake of fact. A debtor gave a bond and warrant for an amount alleged to be due, without any statement of items being furnished him, and afterwards made payments beyond what was really due; the fact being that a note, which formed a part of the debt, was erroneously dated, and excessive interest was computed against him in consequence. *Held*, he could recover back his excess of payment, as money paid under mistake. That he had means of knowing the true date of the note made no difference, since he had no notice that interest had been computed by the apparent date. *Supreme Ct.*, 1828, *Waite v. Leggett*, 8 *Cow.*, 195.

54. Statute. One who was threatened with a prosecution for a penalty, for running the gate of a plank-road, paid money in compromise. The payment was made and received, under the mistaken assumption that the section giving the penalty demanded had been incorporated into the statute of plank-roads. *Held*, that it was not a case of pure mistake of law, but that the party was entitled to recover back the money paid. *Supreme Ct.*, 1851, *Pitcher v. Turin Plank-road Co.*, 10 *Barb.*, 436.

55. Foreign law. Ignorance of a foreign law is ignorance of fact; and, in respect to this rule, the statute laws of one State of the Union are to be deemed, in another State, foreign laws. *Supreme Ct.*, 1850, *Bank of Chillicothe v. Dodge*, 8 *Barb.*, 238.

56. Hence, where a corporation of another State has advanced money there upon a draft of a banking association of this State, which draft was void by a statute of this State, not known to the officers of such corporation, it may recover back the money paid, as money paid under a mistake of fact. *Id.*

57. Set-off. To entitle a party to recover back money paid on the ground of mistake of

Negotiable Paper.

Tax.

fact, the mistake must relate to the demand itself. An omission, through mistake, to insist upon a set-off, is not enough. *Supreme Ct.*, 1829, *Franklin Bank v. Raymond*, 8 *Wend.*, 69.

58. The holder of a note drawn payable to order transferred it, without indorsement (omitted through inadvertence), to a bank. The maker, not knowing that the note had not been indorsed, paid the note to the bank at maturity, thereby losing a demand against the holder, which he might have set off had he known the note was unindorsed. *Held*, he could not recover back the money, as paid under mistake. *Id.*

59. Negotiable paper. The drawer of a bill of exchange paid the first of the set to an indorser, not knowing that the indorsee had already received payment of the bill, upon the second of the set, from the drawee. *Held*, that the drawer could recover back the money from the indorser, as paid under a mistake of fact. *Supreme Ct.*, 1811, *Durkin v. Cranston*, 7 *Johns.*, 442.

60. Payment of a note under peculiar circumstances,—*Held*, made under mistake, and recoverable. *Watson v. Cabot Bank*, 5 *Sandf.*, 428; *Merchants' Bank v. McIntyre*, 2 *Id.*, 431.

61. Forged paper. The general rule is, that money paid under a mistake of fact may be recovered back. An exception arises where the acceptor of a bill has paid it, not knowing that it is a forgery. This exception does not apply, however, where a person paying a bill for honor, has done so without an opportunity to see it before payment made. In such case he may recover back his money, as paid under a mistake. *Ct. of Appeals*, 1850, *Godard v. Merchants' Bank*, 4 *N. Y.* (4 *Comst.*), 147; affirming *S. C.*, 2 *Sandf.*, 247.

62. A partner drew, in the name of his firm, a bill upon the plaintiff, payable to the order of B., and having forged the name of B. as indorser, presented the bill to a bank, had it discounted, and applied the proceeds to his private use. The cashier of the bank indorsed the bill and transmitted it to the defendants for collection, and the plaintiff accepted and paid it to the defendants. After discovering that the payee's indorsement was forged, he sued to recover back the money so paid. *Held*, that the action could not be maintained. The payee, being a stranger to the transaction, and having no interest in the draft, his

indorsement was not necessary to transfer a good title to the party discounting the paper, or to entitle such party to receive the money. The plaintiff had a right to charge the amount paid against the drawers, or to maintain an action against them for money paid to their use. *Ct. of Appeals*, 1847, *Coggill v. American Exchange Bank*, 1 *N. Y.* (1 *Comst.*), 113.

63. A draft upon a bank drawn payable to the order of B., and purporting to be indorsed by B., was paid by the bank. They subsequently discovered the indorsement to be a forgery. *Held*, they were entitled to recover back the money, as paid upon an instrument to which the party receiving the payment had no title. It made no difference that the party receiving the money acted as a mere agent; the agency not having been disclosed. *Supreme Ct.*, 1841, *Canal Bank v. Bank of Albany*, 1 *Hill*, 287.

64. Altered paper. When a bill of exchange, originally genuine, has been fraudulently altered, and is paid by the drawee in good faith and without means of detecting the alteration by the appearance of the bill, the drawee may recover the amount paid from the drawer, as money paid under a mistake of fact. *Ct. of Appeals*, 1850, *Bank of Commerce v. Union Bank*, 3 *N. Y.* (3 *Comst.*), 280.

As to recovering back payments made upon negotiable paper on the faith of Forged indorsements, see, also, *BILLS, NOTES, AND CHECKS*, 453, 572-580.

65. Spurious stock. Money paid upon the purchase of stock where both parties believe the certificates to be genuine, but they are in fact spurious, may be recovered back. But this rule does not apply where one holding stock by way of pledge, transfers it to a creditor of the pledgor, upon the order of the pledgor, and on receiving the amount of his demand. *Ct. of Appeals*, 1859, *Ketchum v. Bank of Commerce*, 19 *N. Y.* (5 *Smith*), 499.

66. Tax. Where the owner of real estate which had been sold for taxes, but regularly redeemed from the sale, under a mistaken representation of the purchaser that he had received a conveyance which had become absolute, purchases his title of the latter, the price paid may be recovered back as money paid by mistake. This is not a case of money paid under a mistaken idea of legal obligation, but of a supposed purchase of a subject-matter which, contrary to the belief of both parties,

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has no existence. *Ct. of Appeals*, 1854, *Martin v. McCormick*, 8 *N. Y. (4 Seld.)*, 881.

67. Assessment. A municipal corporation undertook, by means of an assessment and sale, to create in themselves a certain interest in lands; and believing they had done so, sold the supposed interest to plaintiff. But it turned out that the assessment was void, and no interest had ever vested in them. *Held*, that plaintiff was entitled to recover back his consideration paid, on the ground the thing sold had never had an existence. It was not necessary to show fraud. Nor was the case within the rule that on failure of title the purchaser is confined to the remedy afforded by his covenants. *Supreme Ct.*, 1857, *Gardner v. Mayor of Troy*, 26 *Barb.*, 428.

68. The plaintiff received notice from a municipal corporation that his lots were assessed for improvements, and that unless payment was made steps would be taken to collect. He accordingly paid the assessment, but subsequently ascertained that the assessment was really upon other lots than his. *Held*, a payment under mistake of fact, and that although the notice contained a reference to the corporation maps and records, which, if examined, would have disclosed the error, yet the plaintiff could recover it back. *N. Y. Com. Pl.*, 1855, *Allen v. The Mayor, &c., of New York*, 4 *E. D. Smith*, 404. Compare *Cram v. Munro*, 1 *Edw.*, 128.

69. Land conveyed. A vendee of lands cannot, after delivery of the deed and payment of the consideration, maintain an action for money received, against the vendor, to recover back a part of the consideration, on the ground of a deficiency in the quantity of the land conveyed. The only relief in such a case is in equity. *Supreme Ct.*, 1808, *Howes v. Barker*, 3 *Johns.*, 508.

70. Compromise. The defendant in an action to recover dower, paid money for a release of dower. He subsequently found a deed made 30 years before, in which the widow had joined, releasing her dower, and sued to recover back the money, as paid under mistake of fact. *Held*, that as it appeared the widow had acted in good faith in receiving the compromise, the payment was not recoverable, under the circumstances. *Supreme Ct.*, 1828, *Mowatt v. McLellan*, 1 *Wend.*, 178.

71. Excess of duties. The plaintiffs sold goods to the defendant for a price from which

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the duties were to be deducted. In the bill which they rendered to the defendant, they deducted for duties \$894.25, instead of \$699.40, which was the amount properly chargeable. The bill so rendered was paid by the defendant, and the plaintiffs afterwards discovering their mistake, brought suit for the difference between the sums of \$894.25 and \$699.40, as a balance due to them upon the sale. *Held*, that the rule of law that money paid under a mistake of law cannot be recovered, was not applicable, and that the settlement between the parties being founded upon an erroneous calculation of the amount due, was no bar to the plaintiffs' recovery. *N. Y. Superior Ct.*, 1854, *Renard v. Fiedler*, 8 *Duer*, 818.

72. Clear proof requisite. One who seeks to recover money paid under mistake, is held to clear proof of a mistake. *Supreme Ct.*, 1807, *Elting v. Scott*, 2 *Johns.*, 157. *N. Y. Com. Pl.*, 1855, *Taylor v. Beavers*, 4 *E. D. Smith*, 215; and see *Mutual Life Ins. Co. v. Wager*, 27 *Barb.*, 354.

73. Voluntary payments. Money voluntarily paid to a person authorized to receive it, and without misrepresentation or mistake, cannot be recovered back. *Ct. of Appeals*, 1855, *New York and Harlem R. R. Co. v. Marsh*, 12 *N. Y. (2 Kern.)*, 808. *N. Y. Superior Ct.*, 1849, *Fleetwood v. City of New York*, 2 *Sandf.*, 475. *Supreme Ct., Sp. T.*, 1855, *Lowber v. Selden*, 11 *How. Pr.*, 526.

74. Where a party pays money, having at the time full knowledge or means of knowledge of the facts upon which the demand is founded, he cannot afterwards recover it back upon the ground that the claim was not valid. *Supreme Ct.*, 1824, *Clarke v. Dutcher*, 9 *Cow.*, 674; 1828, *Mowatt v. Wright*, 1 *Wend.*, 855; 1846, *Supervisors of Onondaga v. Briggs*, 2 *Den.*, 26; 1848, *Wyman v. Farnsworth*, 8 *Barb.*, 369.

75. Money paid by insurers upon a policy, cannot be recovered back on the ground of fraud, mistake, &c., by which they were induced to enter into the policy, if they had knowledge or means of knowledge at the time of making the payment which would have enabled them to resist the demand. *Supreme Ct.*, 1858, *Mutual Life Ins. Co. of N. Y. v. Wager*, 27 *Barb.*, 854.

76. Plaintiff crossed a river on the ice, and toll being demanded of him for a bridge company, under color of its charter, he paid it, and sued to recover it back. *Held*, a volun

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tary payment, and that he should have stood back on the ground of usury, except as to the usurious excess. *Mumford v. American Life Insurance & Trust Co.*, 4 N. Y. (4 Comst.), 468.

77. Voluntary payments not recoverable back on the ground of usury, except as to the usurious excess. *Mumford v. American Life Insurance & Trust Co.*, 4 N. Y. (4 Comst.), 468.

78. Duress of goods. A common carrier refused to deliver valuable property intrusted to him for transportation until his freight was paid. The owner protested against the charge as excessive, but finally paid it to obtain the property, and sued to recover it back. *Held*, that the payment was not to be deemed voluntary [2 *Strange*, 915; 3 *Dougl.*, 695; 4 *Johns.*, 240; 1 *Esp.*, 84; 2 *Id.*, 722; 7 *Barn. & C.*, 73; 3 *Mees. & W.*, 649; 7 *Greenl.*, 184; 2 *Sandf.*, 475; 9 *Johns.*, 201, 370], and that the action could be maintained. *Ct. of Appeals*, 1854, *Harmony v. Bingham*, 12 N. Y. (2 *Kern.*), 99.

79. Where the debtor in an execution, which is issued upon a judgment already satisfied, pays the execution to prevent his goods from being sold under it, he may recover back the money, as money received. Such a payment is not voluntary. *Supreme Ct.*, 1836, *Wisner v. Bulkley*, 15 *Wend.*, 321.

80. There is no rule which confines a party from whom payment of illegal costs has been exacted by duress of goods, to an application to the particular court in which the suit was pending, for redress. He may sue in any court of competent jurisdiction. *Supreme Ct.*, 1812, *Clinton v. Strong*, 9 *Johns.*, 370.

81. Lands. A municipal corporation had levied certain assessments upon land, and had assumed to sell the land for non-payment. The owner claimed that the assessment was void, but paid the money necessary to redeem, under protest, and sued to recover it back. *Held*, that the payment was to be deemed voluntary. There was no mistake. And the rule which allows a payment under protest, in case of duress of goods, is grounded on the perishable nature of the property, and does not apply to real property. *N. Y. Superior Ct.*, 1849, *Fleetwood v. City of N. Y.*, 2 *Sandf.*, 475. See, to nearly same effect, *Supreme Ct.*, *Sp. T.*, 1854, *Rector, &c., of Trinity Church v. Mayor, &c.*, of N. Y., 10 *How. Pr.*, 188.

82. Plaintiff's farm was about to be sold on execution. Defendant bid it in, on a parol

agreement with plaintiff to reconvey on payment by plaintiff of defendant's advance, with a reasonable compensation. Defendant refused to reconvey unless plaintiff would pay \$300 above his advance. Plaintiff paid this, to procure a reconveyance, but sued to recover it back, as an excessive charge. *Held*, that the payment must be deemed voluntary, and could not be recovered. The agreement resting in parol, plaintiff had no remedy to enforce it; but stood in the relation of a purchaser from defendant, and must pay whatever he saw fit to exact. *Supreme Ct.*, 1809, *Hall v. Shultz*, 4 *Johns.*, 240; S. P., 1817, *Sherrill v. Crosby*, 14 *Id.*, 358.

83. A collector of taxes called at the office of a railroad company, and demanded payment of a tax levied upon them. He was authorized to receive payment, but was not authorized by law to use compulsory means of collection in the county where his demand was made. The treasurer, with knowledge of all facts, paid the tax. *Held*, that the payment must be deemed voluntary, and that no action could be maintained to recover it back, notwithstanding the tax was void. *Ct. of Appeals*, 1855, *N. Y. & Harlem R. R. Co. v. Marsh*, 12 N. Y. (2 *Kern.*), 808.

84. Corporate shares. Plaintiff bought shares of corporate stock from B., but the company refused to permit a transfer upon the books until plaintiff should pay a debt due them from B., the vendor. He paid the money, and sued to recover it back. *Held*, it could not be deemed a voluntary payment; but was one made, in some measure, under compulsion, and he could recover. *Supreme Ct.*, 1802, *Bates v. N. Y. Ins. Co.*, 3 *Johns. Cas.*, 238.

85. Excessive fees. An excess of costs paid to an attorney, on the settlement of a suit, without taxation, the payment being necessary to prevent the prosecution of the suit and the accumulation of further costs, may be recovered back. Payment of fees illegally demanded, is not treated as a voluntary payment. *Ct. of Appeals*, 1847, *Britton v. Frink*, 3 *How. Pr.*, 102. *Supreme Ct.*, 1836, *Moulton v. Bennett*, 18 *Wend.*, 586.

86. Where a marshal refused to deliver up a vessel without payment of fees which he had no lawful authority to exact,—*Held*, that the fees paid might be recovered back. *Supreme Ct.*, 1812, *Clinton v. Strong*, 9 *Johns.*, 370.

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87. So illegal fees, exacted by a keeper of public records, as a condition of allowing them to be inspected, may be recovered back. The payment is not to be deemed voluntary. *N. Y. Com. Pl.*, 1853, *Townshend v. Dyckman*, 2 *E. D. Smith*, 224.

88. The collector of customs exacted from the owners of a vessel the payment of a fee that was not legally chargeable, as a condition of granting her a clearance. *Held*, that the money might be recovered back from the collector individually, notwithstanding he had paid it over to the government before suit commenced. Notice to an agent not to pay over money is not requisite where the payment is compulsory, and not made expressly for the use of the principal. [1 Taunt., 359.] *Supreme Ct.*, 1812, *Ripley v. Gelston*, 9 *Johns.*, 201; *S. P.*, 1825, *Frye v. Lockwood*, 4 *Cow.*, 454.

89. **Judgment.** Money which has been collected under a regular judgment, cannot be recovered back in a new suit, upon the ground that evidence has since been discovered of a good defence which existed before the judgment. *Supreme Ct.*, 1812, *White v. Ward*, 9 *Johns.*, 232; 1828, *Walker v. Ames*, 2 *Cow.*, 428.

90. One who has suffered a recovery for damages, in too large amount, through omission to set up the proper grounds of defence, cannot recover back the money. *Supreme Ct.*, 1832, *Dey v. Dox*, 9 *Wend.*, 129.

91. Where a judgment has been reversed, money previously collected upon it may be recovered back, notwithstanding a new trial has been ordered. *Supreme Ct.*, 1833, *Sturges v. Allis*, 10 *Wend.*, 355; 1840, *Maghee v. Kellogg*, 24 *Id.*, 82.

92. **An attorney** collected the amount due on a judgment, by execution, and settled with his client by giving him credit for the amount upon a prior indebtedness; the attorney thus retaining the money. The judgment was subsequently reversed on appeal, and the appellant then brought suit against the attorney to recover back the amount. *Held*, that the action could not be maintained. The settlement between the attorney and client was equivalent to a payment by the attorney to the client, and a repayment by the client to the attorney. Until the reversal of the judgment, the client had a good title to the money, and could use it in paying his debt to his attorney.

Ct. of Appeals, 1850, *Langley v. Warner*, 3 *N. Y. (3 Comst.)*, 327; reversing *S. C.*, 1 *Sandf.*, 209; *S. P.*, 1828, *Mowatt v. McLellan*, 1 *Wend.*, 178.

MORTGAGE.

[This title presents the law of mortgage, particularly with reference to real property. Mortgages of personal property are the subject of another article under the title of *CHattel Mortgages*. The titles *CONTRACTS*, *DEED*, and *BOND*, should be consulted for a further discussion of general principles applicable to those classes of instruments, and illustrations of the interpretation and effect of peculiar provisions. *RECORDING* and *FORECLOSURE*, as well as mortgages to the *LOAN COMMISSIONERS*, are subjects of separate articles; and *REDEMPTION* and *SUBROGATION* are further considered under their respective titles. The rules respecting *PARTIES*, *PLEADINGS*, and *EVIDENCE* in mortgage cases, are also considered under those several heads.]

I. WHAT CONSTITUTES A MORTGAGE.

II. VALIDITY, AND INTERPRETATION.

III. RIGHTS OF THE PARTIES.

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IV. ASSIGNMENTS, AND THE RIGHTS OF ASSIGNEES.

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1. *In general.*2. *Liability of one who assumes another's mortgage.*3. *Land the primary fund.*4. *Order in which several parcels should be charged.*5. *Release of part of the premises.*6. *Liability of heirs and devisees.*

VI. PRIORITY OF MORTGAGES.

VII. PAYMENT AND SATISFACTION.

I. WHAT CONSTITUTES A MORTGAGE.

1. **That a parol agreement to give a mortgage to third persons who advance the pur-**

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chase-money, does not give them an equitable lien. *Supreme Ct.*, 1858, *Marquat v. Marquat*,* 7 *Hov. Pr.*, 417.

2. **Deposit of title-deeds.** An advance of money, and finding the borrower's title-deeds in the lender's possession, presumptively establishes an equitable mortgage. [9 *Ves.*, 115; 12 *Id.*, 401, 403; 17 *Id.*, 230; 1 *Bro. C. O.*, 279, n.; *Id.*, 370, n.; 14 *Ves.*, 606; 2 *Hovend. Supp. to Ves.*, 104; 2 *V. & B.*, 79, 88.] *A. V. Chan. Ct.*, 1844, *Rockwell v. Hobby*, 2 *Sandf. Ch.*, 9.

3. The lien or equitable mortgage created by a deposit of the deed with the grantor, after delivery, by way of security, cannot be set up at law as a legal estate. [1 *Johns. Cas.*, 114; 12 *Johns.*, 418.] *Supreme Ct.*, 1830, *Jackson v. Parkhurst*, 4 *Wend.*, 369.

4. **Assignment by purchaser.** A. and B. having made an agreement for the conveyance of 248 acres of land, B., the purchaser, assigned it to C., his creditor, to the extent of 100 acres, to secure a debt payable at a future time, and subsequently sold the contract to third parties, who took it with notice of C.'s right. *Held*, that C. was an equitable mortgagee, and might maintain an action, before his debt was due, to prevent a transfer to a *bona-fide* purchaser. He might ask for satisfaction of his debt; and, his debt having become due pending suit, the decree might provide for satisfaction. *Ct. of Appeals*, 1858, *Northrup v. Cross*, *Seld. Notes*, No. 3, 15.

5. The owner of the land is a necessary party to such suit. *Id.*

6. **Party-wall.** Where A. & B. owning adjoining lots, agreed that B. might build a party-wall, A. covenanting to pay B. one half of the expense of erecting it, as soon as A. should build upon his lot, or lease, or sell it, and after B. built the wall, A. sold his lot subject to the payment,—*Held*, that the covenant to pay was purely personal, and did not create an equitable lien upon the land. *V. Chan. Ct.*, 1840, *Curtiss v. White*, *Clarks*, 389.

7. **Absolute deed with defeasance.** A conveyance of real property, though absolute on its face, if made with a defeasance which renders it merely a security for a debt, is a mortgage. *Ct. of Errors*, 1823, *Clark v. Hen-*

ry, 2 *Cow.*, 824; affirming *S. C.*, *sub nom. Henry v. Davis*, 7 *Johns. Ch.*, 40.

8. A deed, absolute on its face, but intended as security for a debt, though registered as a deed, is valid and effectual as between the parties, as a mortgage, where rights of third persons are not prejudiced. *Chancery*, 1822, *James v. Johnson*,* 6 *Johns. Ch.*, 417.

9. An assignment of a lease, accompanied with a bond, executed at the same time, reciting the assignment, and stating it to have been made to secure the payment of a sum of money to the assignee, and to be reassigned on payment of the money,—*Held*, a mortgage. *Supreme Ct.*, 1809, *Jackson v. Green*, 4 *Johns.*, 186.

10. An absolute conveyance and a defeasance bearing the same date,—*Held*, a mortgage. *Supreme Ct.*, 1818, *Peterson v. Clarke*, 15 *Johns.*, 205.

11. That a sealed grant of land for the term of one year, on rent, and conditioned to be void on payment of a certain sum, with a covenant to pay it, is a mortgage. *Chancery*, 1828, *Elliott v. Pell*, 1 *Paige*, 263.

12. An absolute conveyance accompanied by a lease to the grantor, with a covenant to reconvey on the payment of certain moneys,—*Held*, a mortgage. *Supreme Ct.*, 1829, *Brown v. Dean*, 8 *Wend.*, 208.

13. A conveyance by a debtor to his creditor, who gave back a writing by which he promised to sell the land and pay over any surplus that might be after paying the debt and incumbrances,—*Held*, a mortgage. *Supreme Ct.*, 1831, *Palmer v. Gurnsey*,† 7 *Wend.*, 248.

14. Defendant borrowed of plaintiff a sum of money to be repaid in two years, and conveyed land to him on an agreement that defendant was to occupy a part of the premises, for that time, at a nominal rent, that plaintiff was to have the rents of the other part, and that upon being repaid, he would reconvey;—*Held*, a mortgage. *Supreme Ct.*, 1832, *Roach v. Cosine*, 9 *Wend.*, 227.

15. A conveyance in fee, with a condition that, if the grantor should pay certain legacies charged upon other lands sold and conveyed

* Reversed on the other points, *Ct. of Appeals*, 1855, 12 *N. Y.* (2 *Kern.*), 336.

* Reversed on the question of merger, *Ct. of Errors*, 1823, *sub nom. James v. Morey*, 2 *Cow.*, 246.

† Questioned in *Cooper v. Whitney*, 3 *Hill*, 95; *Baker v. Thrasher*, 4 *Den.*, 493.

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by the grantor to the grantee, then the deed should be void, is a mortgage. [4 Johns., 186; 15 Id., 205, 555; 2 Johns. Ch., 182; 6 Id., 417; 7 Id., 40; 2 Cow., 195, 824; 8 Wend., 208.] *Supreme Ct.*, 1885, *Stewart v. Hutchins*,* 18 *Wend.*, 485.

16. The owner of land, after giving two successive mortgages upon it, assigned to the second mortgagee his interest in still other and prior mortgages, and at the same time conveyed the land to him by an absolute deed, taking back a written stipulation, to the effect that the mortgagee would sell the land in parcels, and apply the avails thereof and of the bonds and mortgages to the two mortgages executed by the grantor, and that he was to be at liberty to perfect the title by foreclosure of the assigned mortgages, and retain the expenses thereof. The grantee foreclosed his own mortgage in equity, and bid in and took possession of the premises. *Held*, that the whole transaction was a mortgage, and not a mere trust, and contemplated a nominal foreclosure; and that the mortgagee was entitled to file a bill to foreclose the grantor's equity of redemption remaining after the first foreclosure. *Chancery*, 1848, *Parsons v. Mumford*, 8 *Barb. Ch.*, 152.

17. Mortgage distinguished from conditional sale. A mere agreement to reconvey the premises within a limited period, upon the repayment of the consideration-money, or any other sum, where there is no subsisting debt or continuing liability of the grantor for the payment of the money, either express or implied, is not sufficient to convert such a conditional sale into a mortgage. [19 *Wend.*, 518; 2 *Edw.*, 188.] *Chancery*, 1840, *Holmes v. Grant*, 8 *Paige*, 243.

18. A mortgagee, holding also some unsecured demands against the mortgagor, advanced to him money, making the whole amount \$2,500, and cancelled all the securities, upon the latter giving him an absolute deed of the land; and they at the same time executed an agreement by which he leased the land to the latter for five years, for the interest on the whole amount, and the latter covenanted to improve the land each year to the amount of \$50, and the former covenant-

ed to convey, at the end of the five years, for \$2,800, with a reasonable time to pay the amount, or at any time within the term, on receiving a part in hand and the residue in a reasonable time; and he took the indorsed note of the latter for \$200 as security, to be void if the amount of \$2,800 was realized from the land at the end of the five years. *Held*, that this was a mortgage, and usurious. The absence of personal liability of the grantor is a strong but not decisive fact in favor of the transaction being a sale. [Reviewing many cases.] The intention to make a conditional sale must be clearly proved, or necessarily implied from attending circumstances, or the general rule authorizing a redemption will not be departed from. *A. V. Cham. Ct.*, 1843, *Brown v. Dewey*, 1 *Sandf. Ch.*, 56. Followed, 1846, *Barton v. May*, 8 *Id.*, 450.

19. A. granted to B. in fee, for \$7,000, and B., by another instrument, leased to A. for one year, and covenanted to reconvey to him for \$8,000, at A.'s election, within the year. *Held*, an absolute sale, with a conditional agreement for a reconveyance. Where there is no debt or loan, an agreement to resell does not change an absolute conveyance into a mortgage. [2 *Edw.*, 188; 2 *Ball & B.*, 274; 2 *Sch. & L.*, 898; 1 *Vern.*, 268; *Vin. Abr. Mort. U.*, 8; 7 *Cranch*, 218; 4 *Kent*, 144; *Sugd. on V.*, 228; 1 *Pow. on M.*, 180.] *Supreme Ct.*, 1888, *Glover v. Payn*, 19 *Wend.*, 518.

20. A conveyance, in consideration of the discharge of previous debts, with an agreement that the purchaser shall convey to the vendor, upon his paying a specified sum, at the end of one year, together with the value of the improvements made in the mean time,—*Held*, an agreement of sale and repurchase, and not a mere mortgage. *Chancery*, 1837, *Robinson v. Cropsey*, 6 *Paige*, 480; affirming *S. C.*, 2 *Edw.*, 188.

21. Where a creditor, having a demand to about the value of the land, received a conveyance of it from the debtor in discharge of the debt, giving him, as a separate transaction, a stipulation, that if he could find a purchaser in a year he should have all the purchase-money beyond the debt and interest,—*Held*, that the transaction was not a mortgage. *Chancery*, 1840, *Holmes v. Grant*, 8 *Paige*, 243.

22. A debtor conveyed absolutely to his

* Affirmed, *Ct. of Errors*, 1848, 6 *Hill*, 143; the opinion, which is not reported, concurring substantially with the view of the Supreme Court.

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creditor in payment of the debt, the creditor covenanting to convey on the request of the former, within the year, retaining only a certain amount of the debt and interest, and that if the land should not be so sold within the year, he would pay the debtor such further sum for it as might be awarded by arbitrators,—*Held*, not a mortgage, but a sale; and therefore proof of usury in the consideration was not admissible to avoid it. *Supreme Ct.*, 1847, *Baker v. Thrasher*, 4 *Den.*, 498.

23. Where a deed, absolute on its face, was accompanied by a simultaneous agreement between the parties, for the resale and conveyance of the premises to the grantor, on the payment of a certain sum at a specified time,—*Held*, that as it appeared that the grantor was indebted to the grantee, under a building contract not fully performed, and the parties expected the indebtedness to increase, the conveyance must be deemed a mortgage. *N. Y. Superior Ct., Sp. T.*, 1858, *Hall v. Van Cleave*, 11 *N. Y. Leg. Obs.*, 281.

24. A conveyance to one who agreed to pay off incumbrances and to reconvey on being repaid,—*Held*, not a mortgage. *Chancery*, 1832, *Grimstone v. Carter*, 8 *Paige*, 421.

25. When the owner of a bond and mortgage made by a third person applies to another to make a loan on the security thereof, who refuses to do so, but purchases them at less than their face, and takes a transfer, which recites a sale at a sum named, and conveys them in pursuance thereof, the transaction will not be treated as being in effect a mortgage, merely because the purchaser gives his covenant to the vendor to resell them to the latter within a time named, and on conditions specified. In the absence of all evidence of the inadequacy of the consideration paid, and of any personal liability of the vendor to refund, in any event, the money received as the price of the transfer, the covenant will be treated as a conditional sale. *N. Y. Superior Ct.*, 1856, *Quirk v. Rodman*, 5 *Duer*, 285.

26. — distinguished from trust. A conveyance reciting an indebtedness as executor and guardian, and conveying property in trust,—*Held*, not a mortgage, but an executed trust. *Chancery*, 1840, *Eckford v. De Kay*, 8 *Paige*, 89.

27. A peculiar transaction, by which a corporation were to advance their credit and receive back the advance with interest, and

with a conveyance of land, which was to be reconveyed to the borrower on his refunding,—*Held*, a mortgage, in distinction from a trust. *Supreme Ct.*, 1849, *Farmers' Loan & Trust Co. v. Carroll*, 5 *Barb.*, 618.

28. A conveyance by a debtor to his creditors, expressed to be in trust,—1st, to allow the grantor to remain in possession; 2d, on payment of the indebtedness to convey to his use; and 3d, in default of payment to sell a public or private sale, and pay the debt, repaying the surplus,—is a mortgage; and under the statute (1 *Rev. L.*, 374, §§ 5, 6; 2 *Rev. Stat.*, 545) directing the manner in which mortgaged premises shall be sold by virtue of a power, the sale must be at public auction after notice, to bar the right of redemption. *Ct. of Appeals*, 1855, *Lawrence v. Farmers' Loan & Trust Co.*, 18 *N. Y. (3 Kern.)*, 200, 642.

29. — from pledge. Defendant, without consideration, executed his bond and mortgage to a broker, conditioned for the payment of \$1,000 in three years, with annual interest, and delivered it to him, as broker, to procure a loan thereon for him. The broker lent him \$200, and afterwards \$300, and then gave him a receipt for the mortgage, stating that he had advanced \$500 upon it, and agreeing to assign or satisfy it upon the payment of that sum with interest;—*Held*, that the mortgage was, in the hands of the broker, a mere pledge, and that the sum he had advanced was payable immediately. *Supreme Ct.*, 1858, *Tompkins v. Tysen*, 16 *Barb.*, 456.

30. That which distinguishes a mortgage from other securities is the condition, that if the debt, which it is given to secure, be paid at a day specified, the conveyance is to be void, or if not, that it becomes, as a conveyance, absolute at law, though subject in equity to the right of redemption. [2 *Bl. Com.*, 157; 1 *Pow. on Mort. by Cov.*, 4, n. B; 109, n. D; *Co. Litt.*, §§ 205, 382, a.] This is implied in the term "mortgage." [*Litt.*, § 382, lib. 8, ch. 5; *Co. Litt.*, 205, a.] The transfer by a lessee to his lessor of the leasehold estate, as a security for the payment of money by a day specified, and also for future advances, is a mortgage, and not a surrender, of the lease. *N. Y. Com. Pl.*, 1854, *Breese v. Bange*, 2 *E. D. Smith*, 474.

31. Mortgage of a mortgage. Where the holder of a mortgage assigns it to a third per-

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son, as security for a less sum than the amount due thereon, with power to collect such sum, covenanting that it is due, and would be paid, the assignment is only a mortgage. It is a mortgage of the power of sale as well as of the debt, and the assignee may foreclose under the statute in his own name; and if a third person should purchase, he would obtain absolute title. But if such assignee purchases for himself, he takes merely an equity of redemption as against the assignor to him of the mortgage. *Chancery*, 1828, *Slee v. Manhattan Co.*, 1 *Paige*, 48. *S. P., Ct. of Appeals*, 1857, *Hoyt v. Martense*, 16 *N. Y. (2 Smith)*, 231.

32. Where a purchaser of land gave his notes on an agreement that the vendor might resell if they were not paid, and after judgment against him on the notes he discovered that the resale had been had, and the lands bought in by the vendor; but instead of applying for leave to plead the resale, he submitted to a reference, in which he was credited with the proceeds as payment *pro tanto* of the notes; — *Held*, that he was concluded by the judgment, and a motion to amend, for the purpose of setting forth the resale, was denied. *Supreme Ct., Sp. T.*, 1852, *Davis v. Garr*, 7 *How. Pr.*, 311.

33. Parol evidence admissible to prove an absolute deed to be a mortgage. *Clark v. Henry*, 2 *Cow.*, 324; *Slee v. Manhattan Co.*, 1 *Paige*, 48; *Whittick v. Kane*, *Id.*, 202; *Van Buren v. Olmstead*, 5 *Id.*, 9; and see EVIDENCE.

34. Reconveyance unnecessary. A purchaser of land joined with his vendor in a deed to defendant, who gave back a bond, conditioned to reconvey upon the payment of a certain sum. *Held*, a mortgage; and that payment of the sum extinguished defendant's interest without any reconveyance. *Supreme Ct.*, 1828, *Lane v. Shears*, 1 *Wend.*, 433.

35. Defeasance to third person. When an absolute deed and a defeasance are executed at the same time and recorded, they constitute a mortgage, although the defeasance is given to another person than the grantor in the deed. The statute (1 *Rev. Stat.*, 746, § 8) makes no distinction as to who receives the defeasance. *V. Chan. Ct.*, 1840, *Weed v. Stevenson*, *Clarke*, 166.

36. Bond to indemnify. That if A. and B. mortgage lands owned by them in severalty, B.'s bond to A., conditioned to pay the whole

debt, and to indemnify him, is an equitable mortgage, and may be recorded. *N. Y. Superior Ct.*, 1851, *Hoyt v. Doughty*, 4 *Sandf.*, 462.

37. Bona-fide purchaser without notice of defeasance. If a conveyance is absolute on its face, though it be a mortgage as between the parties, a bona-fide purchaser from the mortgagee, who has actually paid the purchase-money, will be protected. The mortgagor's remedy is against the mortgagee. *Chancery*, 1828, *Whittick v. Kane*, 1 *Paige*, 202; 1832, *Grimstone v. Carter*, 3 *Id.*, 421.

38. An absolute deed, intended as a mortgage, whether the defeasance is in writing or not, should be recorded as a mortgage, and if recorded as a deed only, the mortgagee is not protected against subsequent bona-fide mortgagees or purchasers. *Chancery*, 1829, *White v. Moore*, 1 *Paige*, 551.

39. An assignment of a contract for the purchase of land, under an agreement to reassign on payment of the debt, is a mortgage; and the assignor has an equitable right to redeem. If the assignee sells it to a bona-fide purchaser without notice, the equity of redemption, instead of remaining an incumbrance on the land in the hands of the bona-fide purchaser, attaches upon the money received by the mortgagee on the sale. [1 *Paige*, 202.] *Chancery*, 1829, *Brookway v. Wells*, 1 *Paige*, 617.

40. Purchaser with notice. Where an absolute deed is intended only as a mortgage, a subsequent purchaser with notice, has no greater interest than the equitable mortgagee had. *Chancery*, 1845, *Williams v. Thorn*, 11 *Paige*, 459.

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41. Law of place. The principle that title to real estate can only be acquired or lost according to the law of the place where it is situated, applies to mortgages as well as to absolute conveyances. [1 *Pick.*, 81.] *Chancery*, 1828, *Hosford v. Nichols*, 1 *Paige*, 220.

42. Mortgage pending suit. Where, pending a suit for partition, a mortgage is taken with knowledge of the suit, the purchaser at the partition sale takes the estate free from its lien. *Chancery*, 1829, *Sears v. Hyer*, 1 *Paige*, 483.

43. Omission to file. A mortgage of both real and personal property being void as to

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the personal property under the statutes relating to fraudulent conveyances, for not being filed, and for want of an actual and continued change of possession,—is wholly void, as against a subsequent judgment-creditor of the mortgagor, and cannot avail as to the real property. *A. V. Chan. Ct.*, 1845, *Goodhue v. Berrien*, 2 *Sandf. Ch.*, 630.

44. Fraudulent mortgage. A mortgage given without consideration by one against whom a suit is pending, with intent to defeat the collection of any judgment that might be recovered against him, and on an agreement that it should be enforced or cancelled as he might direct, is wholly void; and a *bona-fide* purchaser for value has no greater rights than the mortgagee, unless he purchased on the faith of representations made by the mortgagor. [2 *Johns. Ch.*, 441; 15 *Mass.*, 204.] *Supreme Ct.*, *Sp. T.*, 1858, *Westfall v. Jones*, 23 *Barb.*, 9.

45. A wife bought land and gave back a mortgage for purchase-money; but her husband did not join in it. *Held*, a valid lien in equity as against one who had purchased with notice, and subsequent to the mortgage. *V. Chan. Ct.*, 1839, *Hatch v. Morris*, 8 *Edw.*, 313.

46. A husband who was present at the execution of a mortgage, by his wife, of his personal property, and assented to the execution,—*Held*, as effectually bound by the mortgage as if executed by himself. It was in effect his mortgage. *Ct. of Appeals*, 1858, *Edgerton v. Thomas*, 9 *N. Y.* (5 *Seld.*), 40.

47. A devisee in fee in remainder may mortgage, though the estate is subject to a power of sale. *Supreme Ct.*, 1839, *Matter of John and Cherry Streets*, 19 *Wend.*, 659.

48. Tenant for life. That a mortgage in fee by a tenant for life, binds his life-estate. *Ct. of Errors*, 1826, *Sinclair v. Jackson*, 8 *Cow.*, 548.

49. Mortgage by grantee of power. A mortgage executed by tenant for life having power to lease, or by married woman by virtue of beneficial power, binds the power and any subsequent estate created in its execution. 1 *Rev. Stat.*, 733, §§ 90, 91.

50. Adverse possession. Owner may mortgage notwithstanding an adverse possession. 1 *Rev. Stat.*, 739, § 148.

51. Ancient mortgage by one under 25 years of age. That no one but the mortgagor can object that his mortgage, given in 1818, was irregular because he was not then twenty-five years old.* It is a personal privilege.

Supreme Ct., 1851, *Ingraham v. Baldwin*,* 12 *Barb.*, 9.

52. Loan commissioners. Where one of two commissioners for loaning the United States deposit fund, having moneys of the fund in his hands, executed a mortgage to the commissioners therefor, and entered it in the index at a place and as of a number as if it were made many years before. *Held*, that though the mortgage was a valid lien as against the mortgagor, as against subsequent incumbrancers who were not chargeable with notice of the lien, the mortgage was void, for the reason that it had neither been executed in such a manner as to make it a valid mortgage under the provisions of the loan act, nor recorded as an ordinary mortgage. *Supreme Ct.*, *Sp. T.*, 1854, *N. Y. Life Ins. & Trust Co. v. Staats*,† 21 *Barb.*, 570.

53. Corporation. The charter of a corporation required that mortgages taken by it should not be made payable in a shorter time than one year. A mortgage taken by it, on making a loan, was made payable in one year from the date thereof, but the loan was not made until after the date which the instrument bore. *Held*, that the statute was to be regarded as a part of the contract, and that the mortgage was payable in one year from the time the loan was made and the mortgage delivered. *A. V. Chan. Ct.*, 1846, *Farmers' Loan and Trust Co. v. Perry*, 3 *Sandf. Ch.*, 389.

54. After the directors of a corporation had been, by a vote of the stockholders, pursuant to the charter, divested of all authority except to close its concerns, they issued new obligations of the company and took a mortgage therefor. *Held*, that the mortgage was void. *A. V. Chan. Ct.*, 1846, *Green v. Seymour*, 3 *Sandf. Ch.*, 285.

55. Though a mortgage to the president of a banking association, given for stock subscription, is null, if the association was not organized under the statute; if, after due organization, the subscriber receives the stock, and pays interest on the mortgage, a redelivery may be inferred. *A. V. Chan. Ct.*, 1848, *Valk v. Orandall*, 1 *Sandf. Ch.*, 179.

56. Mortgages to building associations

* Affirmed on other points, *Ct. of Appeals*, 1858, 9 *N. Y.* (5 *Seld.*), 45.

† Affirmed on the sole ground that the record was not constructive notice, *Ct. of Appeals*, 1858, 17 *N. Y.* (8 *Smith*), 469.

* See 2 *Rev. Stat.*, 545, § 1.

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sustained. *Citizens' Mutual Loan Association v. Webster*, 25 *Barb.*, 268; *Franklin Building Association v. Mather*, 4 *Abbotts' Pr.*, 274. Compare *Melville v. American Benefit Building Association*, 38 *Barb.*, 108.

57. Description of party. In a foreclosure action, the complaint alleged that the mortgage was executed and delivered to one P., that he was since deceased, and that his wife, having been qualified as his executrix, had duly assigned the same to the plaintiff; that it was owned and held by him by virtue of the assignment. The answer denied that the mortgage was owned by the plaintiff, by virtue of the assignment, or that he was the lawful owner of it. On the trial the plaintiff produced a mortgage in which the mortgagee was named as "P., acting administrator of the estate of D." *Held*, that evidence on behalf of the defendants to show that the mortgage was taken to secure a debt due to the estate of D., and therefore that the executrix had no title to it, was admissible. *Supreme Ct.*, 1858, *Renand v. Censelyea*, 7 *Abbotts' Pr.*, 105; reversing *S. C.*, 5 *Id.*, 346.

58. Mortgage for purchase-money to third person. Where land is sold, and a mortgage for the purchase-money is given by the purchaser to a third person, by the direction of the vendor, the latter is to be regarded in equity as the real mortgagee. *Supreme Ct., Sp. T.*, 1847, *Cunningham v. Knight*, 1 *Barb.*, 399.

59. Mortgage without having received deed. Where one holding an executory contract to purchase lands, made an arrangement with the vendor's agent to receive a deed for them as soon as it could be executed, and without waiting for the deed gave a mortgage for the price and left it with the agent, and the vendor executed and returned to the agent the deed to be delivered, but the mortgagor never called for it,—*Held*, that the mortgagor could not insist that the mortgage was void for want of consideration. Under such circumstances, so far as the mortgagor is concerned, it is immaterial whether there has been a delivery of the deed or not, unless it be shown that the mortgage was only to become effective upon the delivery of the deed. *Ct. of Appeals*, 1852, *Farmers' Loan & Trust Co. v. Curtis*, 7 *N. Y. (8 Seld.)*, 466.

60. Consideration. Mortgage enforced by foreclosure, though it appeared that defendants never received the money, but that it was ap-

propriated by their attorney. *Watson v. Campbell*, 28 *Barb.*, 421.

61. A mortgage to secure future advances is valid, and need not express that it is so intended, but it must exhibit the extent of the lien intended to be created. [Reviewing many cases.] A subsequent mortgage for a debt will take precedence over it, as to advances thereafter made, but only from the time of the execution of such subsequent mortgage, and not from the time it was agreed upon, though the first mortgagee knew of the intention to execute it. *A. V. Chan. Ct.*, 1844, *Craig v. Tappin*, 2 *Sandf. Ch.*, 78.

Consult, also, CHATTEL MORTGAGE.

62. A mortgage for a definite sum may stand for the advances subsequently made, up to the specified amount; but it cannot be held to secure that sum fully, and be subsequently extended by a parol agreement to a further additional sum. [Reviewing many authorities.] *N. Y. Superior Ct.*, 1856, *Townsend v. Empire Stone Dressing Co.*, 6 *Duer*, 208.

63. Uncertainty. A subsequent incumbrancer, who looks at the record, is entitled to all the information which the parties to a mortgage can reasonably impart. He is entitled to know the real extent or amount of the debt which the mortgage is given to secure. A mortgage, conditioned in general terms to indemnify against all liabilities, &c., is void as against creditors. *Supreme Ct.*, 1857, *Youngs v. Wilson*, 24 *Barb.*, 510.

64. Forgery. A mortgage purporting to be acknowledged by the mortgagor, and which had been recorded,—*Held*, a forgery by reason of peculiar appearance, and on circumstantial evidence. *Taylor v. Crowninshield*, 5 *N. Y. Leg. Obs.*, 209.

65. Recital of bond. Where a mortgage recites a bond of the same date and condition, if there was in fact no bond, the mortgage is not therefore invalid. *A. V. Chan. Ct.*, 1845, *Goodhue v. Berrien*, 2 *Sandf. Ch.*, 680.

66. Effect of misrecitals of the bond, in the mortgage. *Jackson v. Bowen*, 7 *Cow.*, 13.

67. Seal. *It seems*, that the common-law rule that a seal imports a consideration, has not been so far altered by 2 *Rev. Stat.*, 406, § 77, as to enable a mortgagor of real estate to apply to a court of equity to cancel the mortgage upon the ground of a want or a failure of consideration. The permission given by the statute to rebut the presumption of

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consideration arising from the seal, is confined to cases where there is an action brought upon the instrument itself, or where the instrument is made the foundation of a set-off. [5 Den., 308.] *Supreme Ct., Sp. T., 1855, Calkins v. Long, 22 Barb., 97.*

68. Power of sale. Where the condition of the bond and mortgage makes the debt payable by instalments, a power to sell upon thirty days' default of payment of any instalment, and to retain the whole debt from the proceeds of the sale, does not make the whole debt due upon such a default. Such authority, to retain for the whole debt, is to be limited to the case of a statute-foreclosure. *Chancery, 1838, Holden v. Gilbert, 7 Paige, 208.*

69. A mortgage given by defendant to the plaintiffs to secure certain monthly payments to be made by him, as a member of the association, contained a provision to the effect that, if default should be made "in the said monthly payments for the space of six months after they or any of them should become due," it should be lawful for the association to advertise and sell the mortgaged premises at public auction, according to the statute.

Held, that this provision was not to be limited to sale by advertising under the statute, but was an extension of the term of credit so as to preclude the bringing of an action within the six months, to foreclose the mortgage. *N. Y. Superior Ct., Sp. T., 1856, Second American Building Association v. Platt, 5 Duer, 675.*

70. A mortgage of the right and interest of the mortgagor does not pass after-acquired interest. *Supreme Ct., 1858, Watson v. Campbell, 28 Barb., 421.*

71. Particular property. Where a railroad company executed a mortgage upon its railroad, "constructed and to be constructed," and upon all the railways, rails, &c., and real estate then owned by said company, or which should thereafter be owned by them, and all lands used and occupied, or which might thereafter be used and occupied, for railways, depots, or stations, with all buildings erected, or which might thereafter be erected thereon; — *Held*, that the mortgage embraced, and was a valid lien upon, all the property therein described, whether the same was then owned by the company, or was acquired subsequently, for the purpose of its railroad. In equity, a grant of particular lands, to be acquired *in futuro* is valid, and takes effect as a specific

lien upon the lands, as soon as they are acquired. [Citing many authorities.] The route of the road having been determined in this case before the mortgage was recorded, the strip taken for the purpose may be deemed particular land within the rule. *Supreme Ct., Sp. T., 1857, Seymour v. Canandaigua & Niagara Falls R. R. Co., 25 Barb., 284; S. C., 14 How. Pr., 581.*

72. Description of premises. A mortgage, after describing the premises, excepted from them such village lots as were or might be laid out by the mortgagor, not exceeding fifty acres. *Held*, that the fifty acres were included in the mortgage, subject to the election and appropriation of the mortgagor, to be made in a reasonable time, and that if not made before suit brought, the exception must be deemed to be waived. *Chancery, 1823, Albany Ins. Co. v. Lansing, 7 Johns. Ch., 142.*

73. A mortgage to secure the delivery of specific articles, their value being liquidated, is equivalent to one for the payment of money; and may be foreclosed under the statute, by virtue of the power of sale. *Supreme Ct., 1831, Jackson v. Turner, 7 Wend., 458.*

74. Sale of the land for taxes, &c., mortgages, how affected by. *Laws of 1855, 796, ch. 427, § 76-82; same stat., 1 Rev. Stat., 5 ed., 987.*

75. A mortgage in terms, payable in a year from the date, is payable in one year from its delivery. *So held*, where the mortgage was given under a statute requiring such mortgage to be for not less than one year. *A. V. Chan. Ct., 1846, Farmers' Loan & Trust Co. v. Perry, 8 Sandf. Ch., 339.*

76. The charter of a corporation required the interest on mortgages taken by them to be made payable annually. A mortgage was dated in July, 1837, and the interest was payable yearly on November 1, in each year. *Held*, that as the word "yearly" must be rejected, in order to make the interest payable on the first day of July, 1838, the first November after the date must be disregarded as a day of paying interest, making the first interest payable in November, 1839. *Ct. of Appeals, 1850, Clowes v. Farmers' Loan & Trust Co., 8 N. Y. Leg. Obs., 249; S. C., less fully, 8 N. Y. (8 Comst.), 470. A. V. Chan. Ct., 1846, Farmers' Loan & Trust Co. v. Perry, 8 Sandf. Ch., 339.*

77. A mortgage payable generally, may be foreclosed at once, and without any demand

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of the debt. Commencing foreclosure under the statute is equivalent to a demand. *Supreme Ct.*, 1849, *Gillett v. Balcom*, 6 *Barb.*, 870.

78. A mortgage payable "at or before" a day certain, may be paid immediately; the mortgagor cannot be required to keep the money and pay interest until the day specified in the mortgage. [25 *Eliz.*, Sir F. Moore's R., 122, case 266; 16 *Vin. Abr.*, 276; *Oro. Eliz.*, 14, 78; 8 *Wood's Conv.*, 105, *Dubl. ed.*, 1792, *Bonds, G.*] *Supreme Ct.*, 1889, *Matter of John and Cherry Streets*, 19 *Wend.*, 659.

As to mortgages to secure circulation of Banks, see *BANKING*, 205.

As to Implied covenants, see *COVENANT*, 105.

As to matters affecting Other contracts in common with mortgages, see *CONTRACTS*, and *DEED*, and titles there referred to.

As to mortgages to the United States loan commissioners, see *LOAN COMMISSIONERS*.

III. RIGHTS OF THE PARTIES.

1. In General.

79. Effect of partition. Where a mortgage was given of an undivided share in a tract of land, and on partition, a share, including the premises mortgaged, was allotted in severalty to the mortgagor,—*Held*, that the mortgage was to be considered as attached to the part so allotted, and covered his whole interest therein. *Supreme Ct.*, 1818, *Jackson v. Pierce*, 10 *Johns.*, 414.

80. Where new leases are regarded as a continuance of the original term, as in the case of church leases, a mortgage of the leasehold premises attaches to a continuance of the lease. *A. V. Chan. Ct.*, 1845, *Gibbes v. Jenkins*, 8 *Sandf. Ch.*, 180.

81. New parcel. Where the owner of mortgaged land annexes to it another parcel, and erects a building partly upon each, the parcel annexed does not thereby become part of the mortgaged premises. And though the circumstances are such that bidders on a foreclosure-sale might be misled into the belief that the strip was parcel of the mortgaged premises, title to it does not, *at law*, pass by the sale. *N. Y. Superior Ct.*, 1849, *Lawrence v. Delano*, 8 *Sandf.*, 838.

82. Covenants. That a mortgage is an assignment to the mortgagee of the covenants running with the land, so far as may be neces-

sary for the security of the debt. *Chancery*, 1887, *Varick v. Briggs*, 6 *Paige*, 323.

83. Mortgagor cannot release covenant. After a covenantee gives a mortgage, since it transfers the legal seizin, he cannot release the covenant. *Supreme Ct.*, 1817, *Kane v. Sanger*, 14 *Johns.*, 89. Compare, however, *infra*, 98.

84. Relief against, for defect in title. A purchaser of land who has paid part, and gives his bond and mortgage for the residue of the purchase-money, and is in undisturbed possession of the premises, will not, in the absence of fraud, be relieved from the payment of the bond, or proceedings on the mortgage, on the mere ground of a defect in the title, but must seek his remedy on the covenants in his deed. [*Coop. Eq.*, 308.] *Chancery*, 1817, *Abbott v. Allen*, 2 *Johns. Ch.*, 519. Approved, *V. Chan. Ct.*, 1887, *Leggett v. McCarty*, 8 *Edw.*, 124. To the same effect was *Bumpus v. Platner*, 1 *Johns. Ch.*, 218.

85. Where the mortgagor is in quiet possession under a deed from the mortgagee, with covenant of seizin and of warranty, he cannot resist a foreclosure upon the ground that the title may be bad or defective; he must pay the mortgage-debt, and take his remedy on the covenants, should he ever be disturbed. [1 *Johns. Ch.*, 218; 2 *Id.*, 519.] The fact that there may now be a decree *in personam* for the deficiency upon the foreclosure-sale, does not affect the rule. [8 *Edw.*, 124.] *Ct. of Errors*, 1841, *Edwards v. Bodine*, 26 *Wend.*, 109.

86. A court of equity will not interfere to prevent the enforcement of a mortgage given for purchase-money, until after the mortgagor's eviction. It will not where there are no covenants of title, because, in such case, relief cannot be granted, even after eviction; and it will not where there are covenants, because it can only interfere to prevent circuity of action; and this principle does not apply until after eviction. [Citing many cases.] Moreover, such interference before eviction would be varying the contract of the parties. *N. Y. Superior Ct.*, 1849, *Platt v. Gilchrist*, 8 *Sandf.*, 118. *S. P.*, *V. Chan. Ct.*, 1841, *Griffith v. Kempshall*, *Clarke*, 571.

87. The condition of a mortgage given for purchase-money stated that the title to a part of the premises was in dispute, and that the mortgagee had agreed to give a good title, and stipulated that if he had failed to do so when

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the first payment became due on the mortgage, the mortgagor might retain from the mortgage-moneys whatever sums he should have to pay to obtain a good title and possession of the disputed part of the premises. *Held*, that the covenant in the mortgage to give a good title, was not a condition precedent to the payment of the mortgage, for it went only to a part of the consideration. *Supreme Ct.*, 1854, *Pepper v. Haight*, 20 *Barb.*, 429.

88. The defendants, after having conveyed land, accepted a conveyance from a third party for the purpose of removing a cloud on their title; and subsequently procured their grantees to give a mortgage of the land as security for defendant's own debt. *Held*, that they could not resist the mortgage on the ground that the title, which they had acquired after they had conveyed, was paramount. *Supreme Ct.*, 1855, *Griswold v. Atlantic Dock Co.*, 21 *Barb.*, 225.

89. Application of money to incumbrances. The grantee with warranty, of a portion of a tract of land mortgaged by his grantor, cannot maintain a bill for the application to the prior mortgage of the money due upon his mortgage given for purchase-money, upon an allegation of the insolvency of his grantor, when the residue of the land which is to be first resorted to is of sufficient value to meet the prior mortgage. *V. Chan. Ct.*, 1839, *Hoag v. Rathbun*, *Clarke*, 12.

90. Rent. The mortgagor rented the land, agreeing that the rent should be applied to the payment of the elder of two mortgages executed by him, and, by a foreclosure-sale under that mortgage, it was satisfied, without recourse to the rent. *Held*, that the rent must be applied on the junior mortgage. *V. Chan. Ct.*, 1847, *Hunt v. Townsend*, 4 *Sandf. Ch.*, 510.

91. A sale or lease of part of the premises, by the mortgagee, before foreclosure, does not prejudice the mortgagor's right of redemption, nor the mortgagee's right to foreclose. *Ct. of Errors*, 1823, *Wilson v. Troup*, 2 *Cow.*, 195; affirming *S. O.*, 7 *Johns. Ch.*, 25.

92. Where the land escheated, and an action for it being brought by the People against the mortgagor in possession, he gave notice of it to the mortgagee, who refused to defend,—*Held*, that the mortgagor might confess judgment, and then take title from the People. *Supreme Ct.*, 1830, *Jackson v. Marsh*, 5 *Wend.*, 44.

93. Mortgagee not bound by covenant. A mortgagee, before entry under his mortgage, is not bound, as an assignee of the mortgagor, by a covenant running with the land. [4 *Johns.*, 41; 5 *Wend.*, 603.] *Chancery*, 1831, *Morris v. Mowatt*, 2 *Paige*, 586.

94. If a wife mortgages her property, as security for the husband's debt, she is entitled, in equity, to have his interest in the land, as tenant by the curtesy initiate, first sold and applied in its extinguishment. Or if it is most for the interest of all parties that the estates of both husband and wife should be sold together, the whole premises may be sold, and the value of the husband's interest may be ascertained on the principle of annuities. *Chancery*, 1832, *Neimcewicz v. Gahn*,* 3 *Paige*, 614.

95. Mortgage by a husband and wife, for debt of a husband upon lands owned partly by him and partly by her, decreed to be satisfied first out of his share; though the mortgage provided that the surplus was to be paid to the husband. *Supreme Ct.*, 1854, *Vartie v. Underwood*, 18 *Barb.*, 561.

96. A husband and wife executed a mortgage of the husband's land for his debt, and a mortgage of the wife's land as collateral to it; and the mortgagee bought the husband's equity of redemption in his land, and paid him in money. *Held*, that the wife's land was *pro tanto* discharged, and that the price might be taken as the measure of relief. *V. Chan. Ct.*, 1844, *Wheelwright v. Depeyster*, 4 *Edw.*, 232.

97. Insurance. Where a mortgagee, after recovering judgment against the insurer of the mortgaged premises, in the name of the mortgagor, enforced payment of his debt by the mortgage,—*Held*, that the mortgagor was entitled to be subrogated to the judgment. *Ct. of Errors*, 1836, *Robert v. Traders' Ins. Co.*,† 17 *Wend.*, 631.

98. Default. Where the condition of a mortgage, payable in instalments, provides that upon any default the whole principal should become due, the court cannot relieve the mortgagor against a foreclosure for the

* Affirmed, on other points, *Ct. of Errors*, 1833, 11 *Wend.*, 812.

† See this case commented on in *Grosvenor v. Atlantic Fire Ins. Co.*, 17 *N. Y.* (3 *Smith*), 391; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, *Id.*, 401.

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whole upon such default. [7 Paige, 179.] *V. Chan. Ct.*, 1840, *Crane v. Ward*, *Clarke*, 393.

99. Not even where the mortgage was given by husband and wife for the husband's debt. *V. Chan. Ct.*, 1843, *Hale v. Gouverneur*, 4 *Edw.*, 207.

100. If the husband's curtesy initiate is clearly inadequate to pay the debt, it need not be sold first, but the whole property may be sold upon foreclosure. *Id.*

As to **Relieving** against the default, see, also, **FORECLOSURE**, 119-127.

101. **Collateral mortgage.** Where a mortgage was given as collateral to another mortgage, but was by its terms sooner payable, and the principal mortgage was inadequate security,—*Held*, that the mortgagee was not bound to exhaust his remedy upon the principal mortgage before resorting to the other mortgage, though the latter was on land which was the only resource of a subsequent creditor. *A. V. Chan. Ct.*, 1844, *Westervelt v. Haff*, 2 *Sandf. Ct.*, 98.

102. **Husband and wife, mortgagee.** A widow married, having first had her property settled to her own use; and the heir of land in which she had a dower-right executed a mortgage to her, and, after default, she and her husband entered and kept possession, and the heir executed another mortgage to her, and she and her husband assigned the mortgage to her trustee, and retained the possession, and the trustee gave no notice to the heir;—*Held*, that the husband was mortgagee *jure mariti*, and that his entry must be considered as made under his mortgage, and that the heir was entitled to an account of the rents and profits in the suit of the trustee. *A. V. Chan. Ct.*, 1846, *Hanley v. Carroll*, 3 *Sandf. Ct.*, 801.

103. **Fixtures, &c.** That, as between mortgagor and mortgagee, every thing attached to the freehold, or growing in the soil, in the absence of any express provision to the contrary, will pass to the purchaser or mortgagee as a part of the realty. [6 Cow., 665; 15 Mass., 152.] *Supreme Ct., Sp. T.*, 1849, *King v. Wilcomb*, 7 *Barb.*, 263.

104. That whatever is annexed to the freehold, and would pass as between vendor and vendee, will pass as between mortgagor and mortgagee [6 Cow., 665; 15 Mass., 159]; and the mortgagee may have an injunction to restrain a waste impairing his security. *V. Chan. Ct.*, 1838, *Robinson v. Preswick*, 3 *Edw.*, 246.

105. **A mortgage by a lessee** of his leasehold premises covers his fixtures for manufacturing purposes. [20 Wend., 636.] *A. V. Chan. Ct.*, 1845, *Day v. Perkins*, 2 *Sandf. Ct.*, 359.

106. **Several mortgages.** The plaintiff executed two mortgages for the purchase-money, at the same time, for different sums; one to S., payable in instalments, the first of which became due in two years; and one to C., the first instalment of which became due in one year; and it was agreed by the three that S.'s mortgage should be the first lien. S.'s mortgage was assigned to C., who foreclosed it under the statute, and the land sold for more than enough to satisfy it. *Held*, that C. was entitled to retain the amount of the other mortgage out of the surplus, and that the plaintiff took only the residua. Under the circumstances, the two might be regarded as one instrument, and, in an action for money received, the right so to retain is a good defence. *Supreme Ct.*, 1851, *Barber v. Cary*, 11 *Barb.*, 549.

107. **Crops.** Where defendant, on selling his farm, had reserved the right to sow thirty acres on shares, and subsequently executed a chattel mortgage, conveying all his right, title, and interest to about thirty acres of fallow or wheat on the farm of, &c., and authorizing the mortgagee, in case of default in payment, to take the property, sell the same, &c.,—*Held*, that the mortgage, on its execution, became a lien upon the ground and crop, and bound his right to the use of the land, and the wheat raised under that right. *Supreme Ct., Sp. T.*, 1852, *Shuart v. Taylor*, 7 *How. Pr.*, 251.

108. Growing crops are bound by a mortgage of the land, and pass to the purchaser on a foreclosure, as against the mortgagor or his purchaser, or lessee. [Pow. on Mort., 207-210; 8 Wend., 584.] *Supreme Ct.*, 1846, *Shepard v. Philbrick*, 2 *Den.*, 174; 1849, *Gillett v. Balcom*, 6 *Barb.*, 870. *Chancery*, 1846, *Aldrich v. Reynolds*, 1 *Barb. Ct.*, 613. Compare *Oongden v. Sanford*, *Hill & D. Supp.*, 196.

109. **Timber.** A mortgagee has no lien upon timber cut on the premises in good faith by the mortgagor or his grantees. *Chancery*, 1845, *Ensign v. Colburn*, 11 *Paige*, 508.

110. **Employing mortgagee as agent.** Where a mortgagor gave his mortgagee a power of attorney to sell the mortgaged premises and convey them in fee, he to pay over the surplus, after discharging the mortgage,

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the relation of principal and agent which is created prevents the mortgagee from acquiring the title under his power, without the mortgagor's consent. But with his express consent he may acquire the title, and thereafter neither the mortgagor nor his heirs can redeem. *So held*, where the conveyance was made for the purpose of avoiding costs of foreclosure, and the mortgagor subsequently ratified the transaction. *Ct. of Appeals*, 1858, *Dobson v. Racey*, 8 *N. Y. (4 Seld.)*, 216.

111. Mortgagor's contract. Any contract which may be made by the mortgagor,—*e. g.*, an agreement for a party-wall,—cannot be set up by the mortgagee, or the purchaser on foreclosure, against the one contracting with the mortgagor; any more than it could be set up by such contractor with the mortgagor, against the mortgagee or purchaser, on foreclosure. *Supreme Ct.*, 1853, *Thompson v. Somerville*, 16 *Barb.*, 469.

112. Subrogation. The creditor is entitled, in equity, to the benefit of any collateral securities which the principal debtor has given to the surety, or person standing in the situation of a surety, for his indemnity. Such securities are regarded as trusts for the better security of the debt, and equity will enforce them for the creditor's benefit. [1 *Eq. Cas. Abr.*, 98, K. 5; 9 *Paige*, 492; 11 *Ves.*, 22; 18 *Johns.*, 505; 4 *Kent*, 6 ed., 807; 1 *Stor. Eq.*, §§ 502, 638.] Thus, where M. bought land of V., and gave F. a bond and mortgage as security for his note advanced as security for the purchase-money,—*Held*, that, as the note was not expressly received as payment, the debt against M. continued, and that V. was entitled to the benefit of the bond and mortgage. *Ct. of Appeals*, 1850, *Vail v. Foster*, 4 *N. Y. (4 Comst.)*, 312.

113. Distinct mortgages are not to be consolidated, so as to make up a deficiency in one by a surplus on another. *Chancery*, 1824, *Bridgen v. Carhartt*, *Hopk.*, 284.

114. Alterations. The mortgage is merely a security for the debt; and the only right the mortgagee now has in the land itself, is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid; hence an alteration of the instrument may operate to avoid it. *Chancery*, 1847, *Waring v. Smyth*, 2 *Barb. Ch.*, 119.

Consult ALTERATION OF INSTRUMENTS.

115. Lien on surplus. If mortgaged land is sold under a prior judgment, the lien of the mortgage attaches upon the surplus moneys raised on the sale; and the sheriff has no right to pay them over to the mortgagor, when he has notice of the mortgage. The registry of the mortgage being constructive notice to the purchaser, if he take an assignment of the surplus, in payment of antecedent debts, he takes it charged with the equitable lien of the mortgage. *Chancery*, 1884, *Bartlett v. Gale*, 4 *Paige*, 508.

116. Mortgagee of railroad may purchase the same, on foreclosure or other sale. 1 *Laws of* 1857, 871, ch. 444.

117. Mortgagee of lease may be relieved against ejectment for non-payment of rent. 2 *Rev. Stat.*, 506, § 85.

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118. That a mortgage conveys the legal estate. *Johnson v. Hart*, 8 *Johns. Cas.*, 322; *Jackson v. Chase*, 2 *Johns.*, 84; *Jackson v. Dubois*, 4 *Id.*, 216; *Jackson v. De Lancy*, 18 *Id.*, 535, 558. But compare *Clute v. Robinson*, 2 *Johns.*, 595, where an assignee of a bond and mortgage was held to be an assignee of a mere chose in action; and see *infra*, 120, 121.

119. Trespass. A mortgagor, or his assignee in possession, may maintain trespass against the mortgagee, or a person acting under him. The mortgage is but a security, and the freehold is still in the mortgagor or his assigns. *Supreme Ct.*, 1814, *Runyan v. Mercereau*, 11 *Johns.*, 584.

120. The mortgagor the real owner. A mortgagor in possession is the real owner; the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. [2 *Burr.*, 969; *Doug.*, 680; *Id.*, 455; 1 *H. Bl.*, 117, note; *Doug.*, 114; 1 *East*, 288.] *Supreme Ct.*, 1809, *Jackson v. Willard*, 4 *Johns.*, 41.

121. The mortgagor is deemed seized, and is the legal owner of the land, as to all persons except the mortgagee. *Supreme Ct.*, 1810, *Hitchcock v. Harrington*,* 6 *Johns.*, 290; *Collins v. Torry*, 7 *Id.*, 278; 1818, *Jackson v. Pratt*, 10 *Id.*, 881; 1818, *Coles v. Coles*, 15 *Id.*, 819. *Ct. of Errors*, 1828, *Wilson v. Troup*, 2 *Cow.*, 195; 1830, *Astor v. Hoyt*, 5 *Wend.*, 608; 2 *Paige*, 68. To the same effect, *Supreme Ct.*, 1828 [citing, also, 2 *Cow.*, 195; 11

* Approved, *Orr v. Hadley*, 86 *N. H.*, 575.

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Johns., 534], Lane v. Shears, 1 *Wend.*, 438; 1848, Southworth v. Van Pelt, 3 *Barb.*, 347.

122. A mortgage is an executed contract, and gives a present interest in or to the land, by way of lien upon it. *Supreme Ct.*, 1857, Palmer v. Miller, 25 *Barb.*, 399.

123. A mortgagee before forfeiture has not such an interest in trees, as to maintain trover for such as are cut down by the mortgagor. *Supreme Ct.*, 1818, Peterson v. Clark, 15 *Johns.*, 205.

124. A mortgagee, especially before forfeiture, has no estate in the land, as distinct from the debt, capable of being conveyed, or mortgaged. [4 *Johns.*, 41.] *Chancery*, 1821, Aymar v. Bill, 5 *Johns. Ch.*, 570.

125. A forfeited mortgage is not an outstanding title, within the rule that a stranger may avail himself of it as a defence. It is only a security. [8 *Wend.*, 616.] *Supreme Ct.*, 1884, Jackson v. Myers, 11 *Wend.*, 585; 1844, Raynor v. Wilson, 6 *Hill*, 469.

126. That after forfeiture the legal title is in the mortgagee. *Supreme Ct.*, 1842, Cooper v. Whitney, 3 *Hill*, 95.

127. That a mortgagee is a purchaser, to the extent of his interest in the premises, within the meaning of the term as used in the Statute of Frauds. *Chancery*, 1841, Ledyard v. Butler, 9 *Paige*, 182.

3. Right of Possession.

128. That if the mortgagee, after forfeiture, enters into possession, either by consent of the mortgagor, or by means of legal proceedings, he may defend himself there, at least until his debt is paid. *Supreme Ct.*, 1835, Van Dyne v. Thayer, 14 *Wend.*, 238; 1838 [citing, also, 15 *Wend.*, 248], Watson v. Spence, 20 *Id.*, 260; *Sp. T.*, 1851 [citing, also, 10 *Johns.*, 480], Casey v. Buttolph, 12 *Barb.*, 637; *Gen. T.*, 1858 [citing, also, 7 *Oow.*, 18; 11 *Wend.*, 533; 2 *Barb. Ch.*, 119; 17 *Barb.*, 100], Munro v. Merchant, 26 *Id.*, 883.

129. Where a mortgage gave the mortgagee a right of entry on default; and, after forfeiture, a judgment was obtained on the bond against the mortgagor; and the devisee of the debt entered under a sale upon execution, after an irregular revival of the judgment, and under the mortgage;—*Held*, that the mortgage was a sufficient protection of the possession of the devisee against ejectment by one claiming under the mortgagor. *Ct. of Errors*, 1816,

Jackson v. De Lancy, 18 *Johns.*, 537; affirming *S. C.*, 11 *Id.*, 865.

130. The assignee of a mortgage in possession is protected by the mortgage, though no foreclosure of it is shown. *Supreme Ct.*, 1818, Jackson v. Minkler, 10 *Johns.*, 480.

131. Whether the assignment was usurious or not, is of no moment, he being a *bona-fide* purchaser; and so are the lessees of the assignee protected. *Supreme Ct.*, 1827, Jackson v. Bowen, 7 *Cow.*, 18.

132. The Revised Statutes, though they took away the right to recover in ejectment, after default, have not changed the rule that the mortgagee may protect his possession by the mortgage, when he has obtained possession, by some legal mode other than by an action.* *Supreme Ct.*, 1836, Phye v. Riley, 15 *Wend.*, 248.

133. Under a chattel mortgage providing that the mortgagor might retain possession until default, or demand by the mortgagee,—*Held*, that the mortgagee having taken the property before default, and without demand, the mortgagor might recover possession and damages. *Supreme Ct.*, 1857, Newsam v. Finch, 25 *Barb.*, 175.

4. The Rents and Profits.

134. Where the mortgagee of an insolvent, entered under a devise by him,—*Held*, that as between such mortgagee and other creditors of the decedent, the former was bound to account for the rents and profits, as payment upon the mortgage. *Chancery*, 1831, Chalabre v. Cortelyou, 2 *Paige*, 605.

135. A lessee of the mortgagor, under a lease executed subsequent to the mortgage, is not entitled, as against the mortgagee, to crops growing on the mortgaged premises at the time of foreclosure and sale; and the mortgagee becoming the purchaser, may maintain trespass against the lessee for taking and carrying away the crops. [16 *Johns.*, 292; 18 *Id.*, 487; 6 *Cow.*, 147; Woodf., 237; 11 *Co.*, 51; Dyer, 31, 178; Pow. on Mort., 218, ch. 7; Doug., 21.] *Supreme Ct.*, 1832, Lane v. King, 8 *Wend.*, 584.

136. Unless the rents and profits are pledged to the mortgagee, the owner of the equity of redemption, and not the mortgagee, is entitled

* Questioned in Fort v. Burch, 6 *Barb.*, 60.

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to them until the mortgage-debt becomes due, though the premises are insufficient to satisfy the debt. *Chancery*, 1885, *Bank of Ogdensburgh v. Arnold*, 5 *Paige*, 38.

137. A mortgagee who took possession before foreclosure, required to account for the rents and profits, or a fair cash rent. *Van Buren v. Olmstead*, 5 *Paige*, 9.

138. The owner of the equity of redemption is at law entitled to the rents and profits of the mortgaged premises, until the purchaser under the decree becomes entitled to the possession of the premises. But where the mortgaged premises will probably be insufficient to pay the amount due upon the mortgage, and the person who is personally liable for the mortgage-money is insolvent, the mortgagee, after the mortgage has become due, is in equity entitled to such rents and profits to satisfy the anticipated deficiency; and he may obtain a lien thereon for that purpose by the appointment of a receiver. *Chancery*, 1845, *Astor v. Turner*, 11 *Paige*, 486.

139. The owner of the equity of redemption is entitled to the rents which became due up to the period when the purchaser under the decree of sale becomes entitled to the possession, and this though the tenant himself be the purchaser. *N. Y. Superior Ct.*, 1852, *Olason v. Corley*, 5 *Sandf.*, 447.

140. Eviction by foreclosure. If the mortgagor leases the premises, a foreclosure and sale of the premises under the mortgage are equivalent to an eviction by title paramount, and bar the mortgagor's action for rent. The lessee's possession after foreclosure is not matter of right, and he is not bound to attorn to the purchaser. *Supreme Ct.*, 1846, *Simers v. Saltus*, 3 *Den.*, 214.

141. Pending a foreclosure the owner of the equity of redemption may be required by order to pay an occupation-rent, where the security is inadequate. [1 *Turr. & Russ.*, 455.] *Supreme Ct.*, *Sp. T.*, 1848, *Astor v. Turner*, 2 *Barb.*, 444; *S. C.*, 3 *How. Pr.*, 225.

142. Delay. Where the defendant, in a foreclosure-suit, delays the complainant by an appeal which is decided against him, he may be decreed to account to the complainant for so much of the rents and profits during the delay, as may be necessary to meet a deficiency of the proceeds of the sale to satisfy the mortgage-debt and costs. *Chancery*, 1848, *Bank of Utica v. Finch*, 3 *Barb. Ch.*, 293.

5. Taxes, Insurance, and other Charges.

143. Payments for insurance effected by the mortgagee are not, like taxes, a legal charge; and therefore cannot be added to the mortgage-debt except by special agreement with the mortgagor.* *Chancery*, 1824, *Faure v. Winans*, *Hopk.*, 283.

144. Redemption from tax-sale. Money paid by the mortgagee, to redeem the premises from a tax-sale, becomes part of the mortgage-debt, which may be enforced by foreclosure. *Supreme Ct.*, 1829, *Burr v. Veeder*, 3 *Wend.*, 412. To the same effect, *Chancery*, 1824, *Faure v. Winans*, *Hopk.*, 283. *V. Chan. Ct.*, 1835, *Eagle Fire Ins. Co. v. Pell*, 2 *Edw.*, 681. *Supreme Ct.*, *Sp. T.*, 1853, *Brevoort v. Randolph*, 7 *How. Pr.*, 398. *Supreme Ct.*, 1857, *Kortright v. Cady*,† 28 *Barb.*, 490; *S. C.*, 5 *Abbotts' Pr.*, 558; affirming *S. C.*, 12 *How. Pr.*, 424.

145. Taking a new bond and mortgage from the owner of the land to secure the advances made to pay the taxes,—*Held*, not an extinguishment of the right to add the taxes and assessments to the original mortgage-debt, and hold the original mortgagor liable for a deficiency on a foreclosure-sale. *V. Chan. Ct.*, 1835, *Eagle Fire Ins. Co. v. Pell*, 2 *Edw.*, 681.

146. A street assessment may be added to the mortgage-debt on foreclosure. *Supreme Ct.*, 1843, *Rapelye v. Prince*, 4 *Hill*, 119.

147. A mortgagee's right to redeem mortgaged premises from an assessment is complete as soon as the property is assessed; and if he pay the amount of assessment at any time previous to the expiration of the time for redemption fixed by statute, he acquires a lien therefor as against the mortgagor. [2 *Edw.*, 681, 684; *Hopk.*, 283; 2 *Comst.*, 118.] *Supreme Ct.*, *Sp. T.*, 1853, *Brevoort v. Randolph*, 7 *How. Pr.*, 398.

148. Buying at tax-sale. Although where a mortgagor suffers a tax or assessment on the premises to remain unpaid the mortgagee may be under the necessity of paying it, and so doing may recover the payment from the mortgagor; yet if he suffers the land to be sold for the tax or assessment, and purchases it himself for a term, he cannot claim the amount paid. His right to the land under such purchase must

* Disapproved, as an unjust rule, *Quin v. Brittain*, *Hoffm.*, 353.

† Reversed, on another point, *Ct. of Appeals*, 1860, 21 *N. Y. (7 Smith)*, 343.

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be deemed a consideration for the price paid. *Op. of Errors*, 1828, *Dale v. McEvers*, 2 *Conn.*, 118.

149. Execution paid. Where a mortgagee was compelled, for his own security, to satisfy an execution on a prior judgment in favor of another,—*Held*, that by right of substitution he stood in place of the latter, and was entitled, on a sale of the mortgaged premises, to receive out of the fund the amount of the judgment as well as the mortgage-debt. *Chancery*, 1820, *Silver Lake Bank v. North*, 4 *Johns. Ch.*, 370.

150. That costs of a suit at law on the bond, cannot be recovered under the mortgage. *Chancery*, 1889, *Palmer v. Foote*, 7 *Paige*, 487.

6. Injuries to the Premises.

151. By grantee. The holder of a mortgage cannot recover damages against the grantee of the mortgagor for injuries to the premises, whereby, on a sale, they brought less than the mortgage-debt, unless he shows that by reason of the mortgagor's insolvency, and the inadequate value of the premises, he was actually damnified. *Supreme Ct.*, 1817, *Lane v. Hitchcock*, 14 *Johns.*, 213; 1846, *Gardner v. Heartt*, 8 *Den.*, 232; and see *Yates v. Joyce*, 11 *Johns.*, 136.

152. A mortgagee before forfeiture cannot maintain an action of waste against the mortgagor, for his interest in the land is contingent. *Supreme Ct.*, 1818, *Peterson v. Clark*, 15 *Johns.*, 205.

153. After forfeiture of the mortgage, the mortgagee may have case for any waste of the premises which impairs his security, against the mortgagor, or those in possession under him. It is a necessary remedy for the protection of his right after a forfeiture. *Supreme Ct.*, 1848, *Southworth v. Van Pelt*,* 8 *Barb.*, 847; *questioning Peterson v. Clark*, 15 *Johns.*, 205.

154. Waste. An action on the case will lie by the holder of a mortgage of lands, against the mortgagor or a purchaser from the mortgagor, of the equity of redemption, for acts of waste in taking away fences, and

cutting down and carrying away valuable timber, knowing of the existence of the mortgage and of the insolvency of the mortgagor; and which acts impaired the security. In such case it is not necessary to show that the primary motive of the defendant in committing the wrongful acts, was to injure the plaintiff's security. It is enough that defendant acted with a full knowledge of the circumstances, although primarily with a view to his own emolument. *Op. of Appeals*, 1850, *Van Pelt v. McGraw*, 4 *N. Y. (4 Conn.)*, 110.

155. Timber. Though a mortgagor has a right to cut timber, if he becomes a bankrupt, and is exercising the right in bad faith, he may be restrained by injunction. *Chancery*, 1845, *Ensign v. Colburn*, 11 *Paige*, 508.

156. Repairs. Where the mortgaged premises have been injured otherwise than by waste, equity will not require the mortgagor in possession to repair them at his own expense. *Chancery*, 1820, *Campbell v. Maccomb*, 4 *Johns. Ch.*, 584.

157. Injury by stranger. An action on the case, by the mortgagor, will not lie against a third person, for a mere negligent injury to the land, impairing or destroying his security; but only where the act is done with a fraudulent intention to injure the plaintiff. [11 *Johns.*, 186; 14 *Id.*, 218; 17 *Wend.*, 554.] *Supreme Ct.*, 1846, *Gardner v. Heartt*, 8 *Den.*, 232.

7. Remedies of the Creditor.

A. In General.

158. If a creditor by bond and mortgage obtain judgment on the bond, a sale of the land under the execution is a sale only of the equity of redemption, and the money raised is satisfaction of the mortgage only *pro tanto*, and he may have ejectment against the purchaser, upon the mortgage, if it be not fully satisfied. A creditor by bond and mortgage has three remedies, either and all of which he may pursue until his debt is satisfied. He may bring an action of debt upon the bond, or put himself in possession of the rents and profits by an ejectment, or foreclose the equity of redemption and sell the land. *Supreme Ct.*, 1818, *Jackson v. Hull*, 10 *Johns.*, 481; but see *infra*, 162.

159. An action of covenant does not lie upon an assignment in the nature of a mortgage conditioned for the payment of a sum of

* The doctrine of forfeiture asserted in *Post v. Arnot* (2 *Den.*, 844), on which the court rely in *Southworth v. Van Pelt* as strengthening the plaintiff's right, was overruled in *Kortright v. Cady*, 21 *N. Y. (7 Smith)*, 843.

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money, but without a covenant to pay it. *Supreme Ct.*, 1818, *Salisbury v. Philips*, 10 *Johns.*, 57.

160. Nor upon a mortgage reciting merely that it is given for the purpose of securing payment of a certain sum. *Ct. of Appeals*, 1850, *Culver v. Sisson*, 8 *N. Y. (3 Comst.)*, 264.

161. An action lies upon a mortgage, whether of real or personal property, if expressed to be for the security of an admitted debt. *Supreme Ct.*, 1886, *Elder v. Rouse*, 15 *Wend.*, 218.

162. Sale of equity of redemption, on execution. That a mortgagee ought in equity to be restrained from proceeding, at law, under a judgment upon the bond, to sell the equity of redemption; or be put to his election to foreclose, or to seek other property, or the person of his debtor, for the satisfaction of his debt. *Chancery*, 1816, *Tice v. Annin*, 2 *Johns. Ch.*, 125.

163. Equity of redemption not to be levied on or sold under execution on judgment for the mortgage-debt. 2 *Rev. Stat.*, 368, §§ 81, 82.

164. Where a judgment-creditor takes an assignment of a mortgage as security for the debt secured by the judgment, he is prevented from selling the mortgaged premises to satisfy his judgment. [2 *Rev. Stat.*, 368.] *Chancery*, 1843, *Loomis v. Stuyvesant*, 10 *Paige*, 490.

165. Sale. That real estate mortgaged cannot be sold on default of the mortgagor without a decree on a bill of foreclosure. *Chancery*, 1816, *Hart v. Ten Eyck*, * 2 *Johns. Ch.*, 62.

166. Proceedings of the mortgagee under a power to sell, will not be suspended or delayed, until the several owners of the equity of redemption, in different proportions, have settled the ratable proportion which each is to contribute towards the redemption; though if they pay into court the mortgage-debt, interest, and costs, the suit may be continued against a defendant having an interest in the equity of redemption, to compel him to contribute. *Chancery*, 1819, *Brinckerhoff v. Lansing*, 4 *Johns. Ch.*, 65.

As to the remedy by Foreclosure, see FORECLOSURE.

B. Ejectment.

167. The mortgagee may maintain ejectment against the mortgagor, and all that de-

rive title under him after default. *Supreme Ct.*, 1809, *Jackson v. Dubois*, 4 *Johns.*, 218.

168. Notice to quit. A mortgagor is entitled to notice to quit before ejectment by the mortgagee. No person who holds land by another's consent, for an indefinite period, ought ever to be evicted by ejectment, at the suit of such party, without a previous notice to quit. *Supreme Ct.*, 1806, *Jackson v. Laughhead*, * 2 *Johns.*, 75. Followed, 1809, *Jackson v. Green*, 4 *Id.*, 186.

169. Such notice should be served six calendar months before the declaration. *Supreme Ct.*, 1806, *Jackson v. Laughhead*, 2 *Johns.*, 75; 1826, *Dickenson v. Jackson*, 6 *Cow.*, 147.

170. The necessity of notice to quit exists only as to the mortgagor in possession, and not as to parties between whom there is no privity, —e. g., where a deed and purchase-money mortgage had been cancelled by the parties, and the grantor and mortgagee brought ejectment against a third person who, meanwhile, had entered under a grantee. *Supreme Ct.*, 1806, *Jackson v. Chase*, 2 *Johns.*, 84; and see *Jackson v. Colden*, 4 *Cow.*, 266.

So the grantee of the mortgagor is not entitled to notice to quit. 1809, *Jackson v. Fuller*, 4 *Johns.*, 215; S. P., 1808, *Jackson v. Deyo*, 3 *Id.*, 422.

171. If the mortgagor in possession conveys the premises absolutely, the purchaser is not entitled to notice to quit. *Supreme Ct.*, 1826, *Dickenson v. Jackson*, 6 *Cow.*, 147; and see *Jackson v. Hopkins*, 18 *Johns.*, 487.

172. An assignment of the mortgage does not destroy the privity of the estate, or alter the condition of the mortgagee's tenancy. *Supreme Ct.*, 1821, *Jackson v. Hopkins*, 18 *Johns.*, 487.

173. Attempting to prove that the mortgage is satisfied, does not waive the objection of a want of notice. *Id.*

174. A sale by the mortgagee, under a power in the mortgage, after six months' public notice, pursuant to the statute, is equivalent to notice to quit. *Supreme Ct.*, 1820, *Jackson v. Lamson*, 17 *Johns.*, 800. Followed, 1825, *Jackson v. Colden*, 4 *Cow.*, 266.

175. Day. Waiver. The notice to quit need not (as in case of a tenancy from year to year) fix upon a day corresponding with the

* The decree was reversed, S. C., 1 *Cow.*, 743, 744, &c., but no opinion is reported.

* Denied in *Ellis v. Paige*, 1 *Pick.*, 43.

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date of the mortgage; nor is it waived by a delay of four years in bringing ejectment. *Supreme Ct.*, 1824, *Jackson v. Stafford*, 2 *Cow.*, 547.

176. No action of ejectment to be maintained by mortgagee, &c., for recovery of possession of mortgaged premises. 2 *Rev. Stat.*, 812, § 57.

177. The provisions of the Revised Statutes forbidding ejectment on mortgages, and regulating foreclosure, are to be applied to every defeasible conveyance which, in effect, amounts to a mortgage. *Supreme Ct.*, 1885, *Stewart v. Hutchins*, 18 *Wend.*, 485.

8. The Right to Redeem.

A. In General.

178. Not to be defeated. If a conveyance or assignment is a mortgage in the beginning,—*e. g.*, where an absolute grant is made with an agreement to resell the thing in a certain time at a sum named,—the right of redemption is an inseparable incident, and cannot be restrained or clogged by agreement. That which is once a mortgage is always a mortgage. [1 *Mad.*, 418; 7 *Ves.*, 278; 2 *Cha. Ca.*, 58, 159, 147; 3 *Atk.*, 261; 1 *Vern.*, 8, 88; 1 *P. Wms.*, 268; 1 *Vern.*, 190; 2 *Id.*, 402.] *Ct. of Errors*, 1828, *Clark v. Henry*, 2 *Cow.*, 324; affirming *S. O.*, *sub nom.* *Henry v. Davis*, 7 *Johns. Ch.*, 40. See *MAXIMS*, 188.

179. Extinguishing equity of redemption. The maxim "once a mortgage always a mortgage," is confined to stipulations forming a part of the same transaction, by which the mortgagee attempts, upon the happening of some event or contingency, to render the estate irredeemable; but the mortgagor and mortgagee may, by a subsequent contract, for a fair consideration, extinguish the equity of redemption. *V. Chan. Ct.*, 1886, *Remsen v. Hay*, 2 *Edw.*, 585.

180. Demands beyond the payment of the mortgage-debt, chancery regards with jealousy. *Chancery*, 1815, *Moore v. Cable*, 1 *Johns. Ch.*, 885.

181. So, also, contracts made with the mortgagor to impair or embarrass the right of redemption. *Chancery*, 1816, *Holridge v. Gillespie*, 2 *Johns. Ch.*, 80.

182. Renewed lease. A lessee mortgaged his lease, and subsequently gave up half the land to the mortgagee, the consideration expressed not being in fact paid, and the mort-

gagee took possession and obtained a new lease of the whole premises. *Held*, that the mortgagor was entitled to redeem the renewed lease. The new term comes from the same root, and inures to the benefit of the mortgagor. [3 *Vern.*, 84; 2 *P. Wms.*, 511.] It is a general principle, that if a mortgagee, executor, trustee, tenant for life, &c., who have a limited interest, gets an advantage by being in possession, "or behind the back" of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust. [1 *Ball & B.*, 46; 2 *Id.*, 290, 298.] *Chancery*, 1816, *Holridge v. Gillespie*, 2 *Johns. Ch.*, 80.

183. Such a release being, in effect, without consideration, is no obstacle to the right of redemption. *Id.*

184. After sale. A mortgagor cannot redeem after a sale, nor defeat the sale by a subsequent tender. The sale, even before confirmation, forecloses him. *Chancery*, 1848, *Brown v. Frost*, 10 *Paige*, 243; reversing *S. O.*, *Hoffm.*, 41.

185. After judgment. The right of a defendant to redeem from the sale, on execution against him, within one year, does not extend to the case of a judgment of foreclosure. *Supreme Ct.*, *Sp. T.*, 1854, *North River Ins. Co. v. Snediker*, 10 *How. Pr.*, 810.

186. Lands mortgaged to the State, and sold on execution, may be redeemed by the People. 1 *Rev. Stat.*, 186, § 8.

As to the right to redeem from Sales on execution, see *EXECUTION*.

187. The charter of an insurance company provided, that, in case the company should become the purchaser on the foreclosure of a mortgage of real estate on which it had made loans, the mortgagor should have the right to redeem so long as the estate remained in the hands of the company. *Held*, that the mortgagor could redeem, although the company had, in good faith, contracted to sell the property, and had received part of the purchase-money, and the purchaser had entered. The right of redemption could be divested only by the delivery of a deed of the premises. *Ct. of Errors*, 1841, *Farmers' Fire Insurance & Loan Co. v. Edwards*, 26 *Wend.*, 541; affirming *S. O.*, 21 *Id.*, 467; and overruling *Merritt v. Lambert*, 7 *Paige*, 344. To the same effect, *A. V. Chan. Ct.*, 1889, *Merritt v. Lambert*, *Hoffm.*, 166.

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188. A purchase on the foreclosure by an agent of the company, is a purchase by the company, within the statute. *Id.*

189. **Improvements. Rents and profits.** A mortgagee, or his assignee in possession, on redeeming, is not to be allowed for his improvements in clearing wild land; for this would enable the mortgagee to add to the burden of the redemption [2 Atk., 120; 8 Id., 517; 1 Vern., 816], but he may be allowed for necessary repairs; and he must account for the rents and profits received by him, except such as have arisen exclusively from his own improvements. *Chancery*, 1815, *Moore v. Cable*, 1 *Johns. Ch.*, 385; and see *Boquet v. Coburn*, 27 *Barb.*, 380.

190. Where the purchaser, under a statute-foreclosure, makes valuable and permanent improvements upon the premises, under the belief that he has a good title, and without notice of the existence of a judgment which is a lien upon the equity of redemption, the judgment-creditor applying to redeem, must, in addition to the amount due upon the mortgage, pay the enhanced value of the premises arising from such improvements. [Distinguishing 1 *Johns. Ch.*, 385.] *Chancery*, 1838, *Benedict v. Gilman*, 4 *Paige*, 58.

191. A mortgagee in possession without foreclosure, must, on redemption, account for the net rents and profits, but not for the increased rents or profits arising from his permanent improvements. *Chancery*, 1843, *Bell v. Mayor, &c.*, of N. Y., 10 *Paige*, 49.

192. **Improvements sometimes allowed for.** Though, in general, the mortgagee is not to be allowed to embarrass the right of redemption, by requiring the mortgagor, on redeeming, to pay for improvements, yet, the right to redeem being an equitable and not a legal right, the court will impose equitable conditions upon its exercise. Thus, where valuable and permanent improvements were made in good faith by a person who was, in legal effect, a mortgagee in possession, but who supposed himself to have acquired the absolute title, and such mistake was favored by the omission of the mortgagor, for several years before and after the improvements, to assert any interest in the premises,—*Held*, that the mortgagor, on asking the aid of equity to redeem, must be required to allow the value of the improvements, though it exceeded the rents and profits received. *Ct. of Appeals*,

1858, *Mickles v. Dillaye*, 17 *N. Y.* (3 *Smith*), 80.

193. One who purchased in good faith, and ignorant of the existence of a right to redeem, and made valuable improvements,—*Held*, entitled in equity to be paid for them on a redemption. *Supreme Ct.* (1853?), *Wetmore v. Roberts*, 10 *How. Pr.*, 51.

194. — **repairs.** Improvements made without the consent of the mortgagor, by the mortgagee in possession, are not allowed to him, however substantial and beneficial they may be. Necessary repairs are to be allowed to him, but they must be strictly necessary to continue the thing in the condition in which it was received by him, and not to extend or improve it. [Saxt., 128.] *A. V. Chan. Ct.*, 1840, *Quin v. Brittain*, *Hoffm.*, 358.

195. A tenant for life cannot redeem his estate from a mortgagee in possession, by paying the interest which becomes due from year to year on the mortgage, but he must pay a gross sum, to be computed as though the interest on the amount due were an annuity; and the remainder-man must contribute the residue. *Chancery*, 1848, *Bell v. Mayor, &c.*, of N. Y., 10 *Paige*, 49.

196. That if a mortgagee obtains any advantage, in consequence of his situation as such mortgagee, the mortgagor, coming to redeem, is entitled to it. *Chancery*, 1828, *Slee v. Manhattan Co.*, 1 *Paige*, 48.

197. **Redeeming from foreclosure.** A judgment-creditor or mortgagee, redeeming from the purchaser under a statute-foreclosure, is bound to pay not merely the amount bid, but the amount due upon the mortgage, except perhaps where a third person is the owner of the residue of the mortgage-debt; but not the costs of the foreclosure, for that is inoperative as to him. *Chancery*, 1838, *Benedict v. Gilman*, 4 *Paige*, 58; 1834, *Vroom v. Ditmas*, *Id.*, 526.

For other cases turning on the right to maintain an action to redeem, see **REDEMPTION**.

198. **Stockholder** in railroad and plank-road companies may pay portion of mortgage and be subrogated. *Laws of 1853*, 966, ch. 502.

B. Under the Redemption Laws of 1837-1838.

199. **Mortgagors allowed one year** after sale, under the existing mortgages, to redeem therefrom. *Laws of 1837*, 455, ch. 410; modified,

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and repealed from and after November 1, 1838, by *Laws of 1838*, 261, ch. 266.

200. Under the Laws of 1837, 455,—permitting redemption from mortgage-sales, extended by the Laws of 1838, 261, to judgment-creditors,—a creditor by a judgment which was a lien upon only an undivided portion of the premises could redeem; and a redemption by him was of the whole premises. [5 *Wend.*, 94.] *V. Chan. Ct.*, 1840, *Augur v. Winslow, Clarke*, 258.

201. Several creditors. The owner of land subject to a mortgage, mortgaged it in trust to K., to secure debts due to N. and others, and subsequently assigned the land for the benefit of other creditors. The first mortgage was foreclosed and a sale had, and N. purchased the equity of redemption from the assignees, and redeemed the land from the sale, for his own benefit, under the act of 1837. *Held*, that his redemption did not inure, in equity, to the benefit of other creditors secured by the mortgage in trust to K. *Chancery*, 1843, *Kellogg v. Conner*, 10 *Paige*, 811.

202. The purchaser is entitled, on redemption, to the rents and profits received by him, intermediate the sale and the redemption, beside purchase-money and ten per cent. interest, where the owner of the equity of redemption neglected to give security to prevent his taking possession. *Chancery*, 1842, *Ruckman v. Astor*, 9 *Paige*, 517; *S. C.* below, 8 *Edw.*, 878.

203. Second redemption. The act of 1837,—allowing the redemption of mortgaged premises after sale, as amended by the act of 1838,—gives the assignee or owner of the equity of redemption who redeems, all the title of the purchaser at the sale, and makes no provision for a redemption from him by a prior mortgagee or judgment-creditor. *Chancery*, 1843, *Kellogg v. Conner*, 10 *Paige*, 811.

204. Interest. A tender of principal and ten per cent. interest, under the act of May 12, 1837, allowing redemption under sales of mortgaged premises, will not save interest, at the ordinary rate, from time of tender, where it does not appear that the amount of such tender has been lying idle. *V. Chan. Ct.*, 1839, *Burr v. Stanley*, 4 *Edw.*, 27.

C. Redemption from Mortgages to the State.

205. Premises mortgaged to the State, and sold, under notice or decree, may be redeemed

by mortgagor, his heirs or assigns, within three months, on certain terms. 1 *Rev. Stat.*, 213, §§ 18-15; amended, *Laws of 1836*, 699, ch. 457.

206. Under 1 *Rev. Stat.*, 213, § 18, a part-owner—*e. g.*, an assignee of a part of the premises—may redeem the whole. *Supreme Ct.*, 1880, *Matter of Willard*, 5 *Wend.*, 94. *S. P.*, *V. Chan. Ct.*, 1840, *Augur v. Winslow, Clarke*, 258.

9. Effect of Lapse of Time.

207. Where the mortgagee has never entered, and there has been no foreclosure, and no interest has been paid for twenty years, a mortgage is not a subsisting title. *Supreme Ct.*, 1810, *Collins v. Torry*, 7 *Johns.*, 278; 1815, *Jackson v. Wood*, 12 *Id.*, 242; and see *Jackson v. Hudson*, 3 *Id.*, 375.

208. Where no possession had been taken under a mortgage, nor interest paid, nor steps taken to enforce it, for upwards of nineteen years,—*Held*, that it was not a subsisting outstanding title, and a jury might presume it satisfied. *Supreme Ct.*, 1813, *Jackson v. Pratt*, 10 *Johns.*, 881.

209. Bar to redemption. Possession by the mortgagee for a period short of twenty years, will not bar the equity of redemption; the possession must be an actual, quiet, and uninterrupted possession, for twenty years, that being the period sufficient to toll the right of entry at law. [3 *P. Wms.*, 283; 3 *Atk.*, 818.] *Chancery*, 1815, *Moore v. Cable*, 1 *Johns. Ch.*, 885; *S. P.*, 1828, *Slee v. Manhattan Co.*, 1 *Paige*, 49.

210. The same rule applies to wild lands. *Chancery*, 1815, *Moore v. Cable*, 1 *Johns. Ch.*, 885.

211. Twenty years' possession by a mortgagee, without any account, or acknowledgment of a subsisting mortgage, is a bar to all equity of redemption, unless the mortgagor can bring himself within the proviso in the Statute of Limitations, the construction of which is the same in equity as at law. [Citing many cases.] *Chancery*, 1817, *Demarest v. Wynkoop*, 3 *Johns. Ch.*, 129.

212. A disability to bring the party within the proviso must exist at the time the right first accrues; and the time continues to run notwithstanding a subsequent disability arises. *Id.*

213. But if he meanwhile recognizes the mortgage as a subsisting lien,—*e. g.*, as by

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commencing a statute-foreclosure,—the mortgagor's right to redeem is not barred. *Supreme Ct., Sp. T., 1848, Calkins v. Calkins,* 8 Barb., 305.*

214. Where C. purchased mortgaged premises from B., the mortgagor, in 1816, subject to the lien of the mortgage, and expressly agreed to pay the mortgage;—*Held*, that this agreement was a recognition of the mortgage; and that as twenty years had not elapsed, since such recognition, before the commencement of a suit to foreclose the mortgage, which was in 1832, payment of the mortgage would not be presumed, and one who purchased *pendente lite*, and, fifteen years after the suit commenced, was made a party by supplemental bill, was bound by the recognition. *Supreme Ct., 1856, Harrington v. Slade, 22 Barb., 161.*

215. An assignment of the mortgage, by the mortgagee in possession, is decisive evidence, for the mortgagor, of his right to redeem, notwithstanding the lapse of time. [4 Ves., 478, n. a.; *Id.*, 466, 479; 18 *Id.*, 455, 459.] *A. V. Chan. Ct., 1846, Borst v. Boyd, 3 Sandf. Ch., 501.*

216. The presumption of payment may be rebutted by showing that proceedings were taken meanwhile to enforce the debt, though they may have been irregular; and in computing the period, *it seems*, that a time of war should be deducted, in analogy to the Statute of Limitations. *Supreme Ct., 1814, Jackson v. De Lancey, 11 Johns., 865; affirmed, Ct. of Errors, 1816, 18 Id., 587.*

217. Fraud. That no length of time is a bar to a redemption of a mortgage, where there is fraud in the transaction, or where, by the agreement of the parties at the time, the mortgagee is to enter and keep possession until he is paid out of the profits. *Chancery, 1815, Marks v. Pell, 1 Johns. Ch., 594.*

Consult, also, LIMITATIONS, and EVIDENCE.

IV. ASSIGNMENTS, AND THE RIGHTS OF ASSIGNEES.

218. Transfer of debt. A mortgage is incident to the debt, and in general a transfer of the debt,—*e. g.*, by indorsing a promissory note given for it,—transfers at least an equitable title to the mortgage. *Ct. of Errors, 1802, Johnson v. Hart, 8 Johns. Cas., 822.*

* Affirmed in effect, *Ct. of Appeals, 1859, sub nom. Calkins v. Isbell, 20 N. Y. (6 Smith), 147.*

219. Power of sale is part of the security, and vests in whoever becomes entitled to the money secured. 1 *Rev. Stat., 738, § 133.*

220. Agent's authority. *It seems*, that one purchasing a mortgage from an agent is bound to require the production of his authority; and hence, though a power to assign a mortgage is not required to be recorded, if it has been recorded, he should search the clerk's office for a revocation. *A. V. Chan. Ct., 1840, Williams v. Birbeck, Hoffm., 359.*

221. An agent, in his own name, lent his principal's money on bond and mortgage, and then took a lease of the premises. Subsequently he assigned the bond and mortgage to his principal, who gave notice of the facts to the mortgagor. *Held*, that the latter could not set off subsequently accruing rent against the debt, without showing at least that the rent could not have been collected from the agent. *Chancery, 1836, Wolcott v. Sullivan, 6 Paige, 117; affirming S. Ct., 1 Edw., 399.*

222. Payment with money of third party. Where an agent of A. obtained a loan for him on a mortgage of his farm, and retained out of the loan enough to pay off a prior mortgage, and instead of paying off the prior mortgage used the money for himself, and afterwards paid the prior mortgage with money of B., taking an assignment of the mortgage in blank, which he afterwards filled with the name of B., and indorsed on the bond an agreement that it was not to be enforced against the obligor personally;—*Held*, that the prior mortgage was not satisfied, but might be enforced against the land. *Supreme Ct., 1857, Graves v. Mumford, 26 Barb., 94.*

223. Assignment after satisfaction. A. mortgaged to B., and after the mortgage was in fact satisfied, A. mortgaged to C., and subsequently made a general assignment for the benefit of creditors, and this second mortgage and the assignment were recorded. *Held*, that a third person who took afterwards an assignment of the first mortgage from B. with the concurrence of A., was not to be regarded as a *bona-fide* purchaser without notice, and must be postponed to the second mortgagee and the assignees. *V. Chan. Ct., 1839, Purser v. Anderson, 4 Edw., 17.*

224. Assignment to purchaser under senior mortgage. One who purchases on the foreclosure of a prior mortgage, there being a junior mortgage held by persons not made

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parties to the suit, acquires only a title to the equity of redemption; and, if he takes an assignment of the junior bond and mortgage, he cannot charge the mortgagor or a guarantor thereof, by an action on the bond, until he has exhausted his remedy upon the mortgage. *Chancery*, 1844, *Vanderkemp v. Shelton*, 11 *Paige*, 28; reversing *S. C.*, *Clarke*, 821.

225. Nor can he charge a guarantor, until after execution returned unsatisfied against the mortgagor. *Id.*

226. **Bank's guaranty.** The debtor of a bank, by arrangement with the bank, assigned to a trust company certain instalments of a bond and mortgage; the bank guarantying to the trust company, by an instrument under its corporate seal and the hand of its cashier, the collection of the same, and applied the money received on the assignment to the payment of the debt to the bank. *Held*, that the guaranty was valid, and binding upon the bank. *Supreme Ct.*, 1854, *Talman v. Rochester City Bank*, 18 *Barb.*, 128.

As to Execution and Delivery of assignment, see ASSIGNMENT, 57; DEED, 54.

227. **Payments.** That a mortgagor who makes payments to an assignee, after notice of a prior equity, is not protected in so doing. *Chancery*, 1886, *Evertson v. Evertson*, 5 *Paige*, 644.

228. **Impeaching assignee's title.** The purchaser of land subsequent to a mortgage may resist a foreclosure by an assignee of the mortgage, by impeaching the title of the latter, and if the title be in doubt, the court will order the persons who may perhaps have the title, to be made parties. *V. Chan. Ct.*, 1840, *Kortright v. Smith*, 3 *Edw.*, 402.

229. **Equitable assignment.** A mortgagor obtained money to make up with his own money the sum necessary to pay the mortgage, promising the lender that he should have the same security which the holder of the mortgage had; and he paid the money and procured an assignment of the mortgage to the lender;—*Held*, that the mortgage was a valid security in the hands of the assignee, as against a mortgagee, intermediate to the mortgage and the assignment. *Chancery*, 1840, *White v. Knapp*, 6 *Paige*, 178.

230. **Bona-fide purchaser.** One who executes a bond and mortgage to another, without consideration, or places the same in the hands of the latter, for a particular purpose,

which is not accomplished, will become liable to pay the mortgage-debt to a stranger who advances money or property upon it, if he does any act from which such stranger is authorized to infer that the securities are valid. *A. V. Chan. Ct.*, 1845, *Day v. Perkins*, 2 *Sandf. Ch.*, 859.

231. **Assignment for benefit of one of the debtors.** Where A. and B., on purchasing land, assumed a mortgage thereon, and A. paid his share of the mortgage and conveyed his interest in the land to B., who assumed the payment of the mortgage, which meanwhile had been assigned to a third person for the benefit of A.,—*Held*, that such assignee could enforce the mortgage. Even if A. were to be deemed the real owner, the assignment would not extinguish the mortgage; and B., having assumed it, was estopped from claiming that it was paid. *Supreme Ct., Sp. T.*, 1847, *Cornell v. Prescott*, 2 *Barb.*, 16.

232. **Liability for unauthorized satisfaction.** Where the mortgagee, after he had assigned the mortgage, the assignment not being recorded, assumed to acknowledge satisfaction, without any authority, whereby the assignee lost the security,—*Held*, that whether the act was with a fraudulent intent or not, he must make good the loss. *V. Chan. Ct.*, 1881, *Ferris v. Hendrickson*, 1 *Edw.*, 182.

V. THE EQUITY OF REDEMPTION, AND THE EFFECT OF TRANSFERS THEREOF.

1. In General.

233. **A purchaser under a senior mortgage,** on a foreclosure in which the subsequent mortgagee was not a party, acquires, as against the latter, only the equity of redemption, besides his interest in the premises to the amount of the mortgage-debt. *Chancery*, 1844, *Vanderkemp v. Shelton*, 11 *Paige*, 28.

234. **A wife has an inchoate right of dower** in the equity of redemption of premises conveyed to her husband, and by him, at the same time, mortgaged back to secure the payment of the purchase-money; she is directly and immediately interested in the payment of the mortgage-debt; and so long as the title of the mortgagee has not been made absolute by a foreclosure, which is effectual to cut off that equity, she is entitled to pay the debt, and take dower in the premises; and although she cannot set up a claim to dower, as against

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the mortgagee, to impair or defeat the mortgage, she may avail herself of the right which she has, even at law, as against all others, in any mode not inconsistent with, but in affirmation of, the mortgagee's interest; and in equity may seek a redemption. The only substantial difference between a mortgage for purchase-money and a mortgage for any other debt, as respects the right of dower, is this: the former does not require execution by the wife, to bind her dower; the latter does. In each case there remains vested in the husband an equity of redemption, in which the wife, if she survives the husband, may have dower, and in virtue of which she is entitled to redeem. *N. Y. Superior Ct.*, 1858, *Wheeler v. Morris*, 2 *Bow.*, 524.

235. A foreclosure of the mortgage in the lifetime of her husband, by a suit to which he is a defendant, will not defeat her right to redeem, if she is not also a party. *Id.*

236. Buying twice. Where one bought land at sheriff's sale on judgments junior to a mortgage, and before the time for redemption had expired, bought it again at the sale upon foreclosure of the mortgage; and the sum of his two bids exceeded the value of the land,—*Held*, that the mortgagor or his personal representative was not entitled to any thing more than so much of the full value of the land as remained after satisfying the incumbrances, and that the purchaser was entitled to so much of the surplus as exceeded the value of the land. *Chancery*, 1824, *Matter of Schrugbam*, *Hopk.*, 88.

237. Account. Where the mortgagee is in possession, an assignment of the equity of redemption carries with it, as an incident, the right to an account for the rents and profits, as a set-off on redeeming. *Chancery*, 1842, *Ruckman v. Astor*, 9 *Paige*, 517; reversing *S. C.*, 8 *Edw.*, 378.

238. By taking a conveyance subject to a mortgage, the grantee takes the land subject to it exactly as it is in truth, and is entitled to the benefit of a collateral defeasance, or of previous partial payment. *A. V. Chan. Ct.*, 1843, *Russell v. Kinney*, 1 *Sandf. Ch.*, 84; *S. C.*, 2 *N. Y. Leg. Obs.*, 282.

2. Liability of One who Assumes Another's Mortgage.

239. Where one who has mortgaged land to secure a debt, afterwards sells the equity of

redemption subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage as a portion of the purchase-money, the latter becomes personally liable for the payment of the debt of the former to the holder of the mortgage in the first instance; and if the mortgagor is compelled to pay it, he can recover it from the purchaser of the equity of redemption. In such case the mortgagor and purchaser stand in the relation of principal and surety, the latter as security for the former, to the extent of the mortgage-debt. *Chancery*, 1842, *Halsey v. Reed*, 9 *Paige*, 446; 1844, *Marsh v. Pike*, 10 *Id.*, 595. *A. V. Chan. Ct.*, 1845, *Blyer v. Monholland*, 2 *Sandf. Ch.*, 478. *Ct. of Errors*, 1845, *Ferris v. Crawford*, 2 *Den.*, 595. *Supreme Ct., Sp. T.*, 1847, *Cornell v. Prescott*, 2 *Barb.*, 16. *Ct. of Appeals*, 1852, *Russell v. Pistor*, 7 *N. Y. (8 Seld.)*, 171.

240. Sale of part. And where the mortgagor sells and conveys the equity of redemption of a part of the premises mortgaged, subject to the mortgage, and the purchaser retains enough of the purchase-money to satisfy the mortgage, and agrees to pay it, the same rule prevails, and the premises so sold are primarily chargeable with the payment of the mortgage. *Chancery*, 1842, *Halsey v. Reed*, 9 *Paige*, 446. *Ct. of Appeals*, 1852, *Russell v. Pistor*, 7 *N. Y. (8 Seld.)*, 171.

241. Decree for deficiency. Where the grantee of a mortgagor assumes the mortgage, the mortgagee is entitled to a decree for a deficiency against the grantee, upon the principle that the creditor is entitled to the benefit of the collateral obligations for the payment of the debt which any person, standing in the situation of surety for others, has received for his indemnity, and to discharge him from such payment. [18 *Johns.*, 505; 9 *Paige*, 482.] This, too, is within the equity of the provision of the Revised Statutes authorizing, in a foreclosure-suit, a decree over for the deficiency against a third person who has become responsible for payment of the mortgage-debt. *Chancery*, 1842, *Halsey v. Reed*, 9 *Paige*, 446.

242. Upon such an undertaking on the part of the grantee, he is liable when the mortgage becomes due. It is not a mere agreement of indemnity. *A. V. Chan. Ct.*, 1844, *Rawson v. Copland*, 2 *Sandf. Ch.*, 251.

For other cases on this subject, see **FORECLOSURE**.

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243. Where a purchaser from the mortgagor takes a conveyance subject to the mortgage, and assumes the debt, and the mortgage is foreclosed, a decree over against him for a deficiency, in case the land should not pay the debt, is proper. *Supreme Ct.*, 1851, *Flagg v. Thurber*,* 14 *Barb.*, 196.

244. A grantee who assumes the payment of a mortgage-debt, as a part of the price, though he executes no bond or covenant to pay it, is bound, in equity, to indemnify his grantor against it. [7 *Ves.*, 337; 1 *Sugd. Vend. & P.*, 251.] *V. Chan. Ct.*, 1837, *Dorr v. Peters*, 3 *Edw.*, 132. *S. P.*, *Chancery*, 1842, *Halsey v. Reed*, 9 *Paige*, 446. *Ct. of Appeals*, 1854, *Trotter v. Hughes*, 12 *N. Y. (2 Kern.)*, 74.

245. Purchase without assuming mortgage. A person who purchases and takes a conveyance of land subject to a mortgage thereon, without agreeing to pay such mortgage, only takes the land subject to the charge; and if he neglects to pay off the charge he will lose his land, by the foreclosure and sale, or will only be entitled to the surplus, if any, after paying the mortgage-debt and the expenses of foreclosure. But the mortgagee cannot have any personal claim against him for the deficiency, unless he has made an agreement to pay the mortgage-debt, either with the mortgagee himself or with some one who is legally or equitably bound to pay such debt to the mortgagee. *Chancery*, 1844, *Peabody v. Thomas*, 4 *Ch. Sent.*, 9. *N. Y. Superior Ct.*, 1851, *Tillotson v. Boyd*, 4 *Sandf.*, 516; 1853, *Murray v. Smith*, 1 *Duer*, 412. *Supreme Ct.*, 1859, *Stebbins v. Hall*, 29 *Barb.*, 524; distinguishing *Jumel v. Jumel*, 7 *Paige*, 591; *Ferris v. Crawford*, 2 *Den.*, 595.

246. Successive grants. Where the mortgagor conveys to A., who engages with him to pay the mortgage, and A. conveys to B., who engages with A. to pay it, the mortgagor is, in equity, a surety for A. and B., who are both principal debtors as to him, the latter being primarily and the former secondarily liable for the payment of the debt. *Chancery*, 1844, *Marsh v. Pike*, 10 *Paige*, 595; affirming *S. C.*, 1 *Sandf. Ch.*, 210.

* The decree was modified on appeal, *sub nom.* *Flagg v. Munger*, 9 *N. Y. (5 Seld.)*, 483, *q. v.*, *DRED*, 121, but upon grounds not affecting the principle, but its application in this peculiar case. See, also, *Stebbins v. Hall*, 29 *Barb.*, 524.

247. In such case, after the mortgage is due, the mortgagor may, by bill, compel them to pay the mortgage or submit to a sale to pay it; and the decree may properly provide a remedy over against B., in favor of A., in case he should pay it. *Id.*

248. Grantor who is not liable. Where the owner of an equity of redemption, who is in no way liable on the mortgage, conveys the premises subject to the payment of the mortgage, the grantee, though by the terms of the conveyance he should assume the payment, is not liable to a decree over for a deficiency on a foreclosure of the mortgage. The right to recover a deficiency from one who has assumed the payment, depends on the fact that the relation of principal and surety subsists between him and the one with whom he agreed. *Chancery*, 1848, *King v. Whitely*, 10 *Paige*, 465; affirming *S. C.*, *Hoffm.*, 477. Approved and followed, *Ct. of Appeals*, 1854, *Trotter v. Hughes*, 12 *N. Y. (2 Kern.)*, 74.

249. One who assumed to pay cannot buy on foreclosure. One who had mortgaged two parcels of land, conveyed one parcel to A. by a deed expressing that A. was to pay one half the principal of the mortgage, and A., in like manner, conveyed to B., subject to the payment of the same. *Held*, that B. was bound to make the payment, in exoneration of the other parcel; and a purchase of the other parcel by B., on the foreclosure of the mortgage, without such payment having been made, was to be adjudged void. No party can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of the purchaser. *Chancery*, 1842, *Torrey v. Bank of Orleans*,* 9 *Paige*, 649.

3. Land the Primary Fund.

250. The purchaser of an equity of redemption under a junior judgment, or mortgage, takes the land subject to the prior mortgage, and the land becomes the primary fund for the payment. *Chancery*, 1816, *Tice v. Annin*, 2 *Johns. Ch.*, 125; 1844, *McKinstry v. Curtis*, 10 *Paige*, 508; *Russell v. Allen*, *Id.*, 249; *Vanderkemp v. Shelton*, 11 *Id.*, 28. *Ct.*

* Affirmed, *Ct. of Errors*, 1843, 7 *Hill*, 260. The opinions, which are not reported, being substantially in accordance with the view taken of the case by the chancellor.

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of Appeals, 1848, *Mathews v. Aikin*, 1 *N. Y. (1 Comst.)*, 595. *Supreme Ct.*, *Sp. T.*, 1847, *Weaver v. Toogood*, 1 *Barb.*, 238; 1852, *Dauchy v. Bennett*, 7 *How. Pr.*, 375; *S. P.*, *Gen. T.*, 1853, *Gilbert v. Averill*, 15 *Barb.*, 20.

251. Where land is expressly conveyed subject to a mortgage thereon, the land is, as between grantor and grantee, and those deriving title from the latter, the primary fund for the payment of the mortgage-debt. *Chancery*, 1839, *Jumel v. Jumel*, 7 *Paige*, 591.

252. Where A. and B. gave their bond and mortgage on the purchase of land, and A. conveyed his share of the land to B., who assumed the mortgage, and B. conveyed the whole, with warranty, to C.,—*Held*, that the land was primarily liable for the debt in C.'s hands, and this without reference to whether he had actual notice of the agreement between A. and B. *Chancery*, 1848, *Cherry v. Monro*, 2 *Barb. Ch.*, 618.

253. The fact that B. had given A. a bond of indemnity against the mortgage, B. having become insolvent, does not alter the case. *Ib.*

254. Right to subrogation. If the mortgagor is compelled to pay the mortgage, he is entitled to be subrogated. [2 *Johns. Ch.*, 128; 7 *Paige*, 470.] *Chancery*, 1844, *Vanderkemp v. Shelton*, 11 *Paige*, 28.

255. Upon a sale at law of the equity of redemption, for the satisfaction of the mortgage-debt, since the land was, in equity, the primary fund for such payment, the mortgagor would be entitled to an assignment of the mortgage, so as to enforce it against the land, in the hands of the purchaser. *Chancery*, 1816, *Tice v. Annin*, 2 *Johns. Ch.*, 125.

256. If the mortgagee, after obtaining judgment upon his bond, and selling the equity of redemption on execution, assigns the whole debt and mortgage to the purchaser at such sale, so that it is no longer in his power to transfer it to the mortgagor, the debt is extinguished in the hands of the purchaser. *Ib.*

257. Where land is conveyed subject to a mortgage, the amount being deducted from the purchase-money, all that the purchaser acquires is the equity of redemption; and if the mortgage-debt is subsequently paid by other securities of the debtor held by the creditor, the debtor is entitled to the benefit of the mortgage against the land in the hands of the purchaser. *Ct. of Errors*, 1845, *Ferris v. Crawford*, 2 *Den.*, 595.

258. Collateral security. The purchaser of land which is conveyed to him subject to a mortgage executed by the vendor, is not entitled to the benefit of a collateral security which the vendor placed with the mortgagee subsequent to the execution of the mortgage. After such a conveyance, the land becomes the primary fund for the payment of the mortgage-debt, and the personal liability of the mortgagor is the secondary fund. The mortgagor stands, in respect of the land, as a surety for the mortgage-debt. *A. V. Chan. Ct.*, 1846, *Brewer v. Staples*, 8 *Sandf. Ch.*, 579.

259. Claim against personal estate. Where a mortgagor conveys a part of the land subject to the whole mortgage, the part sold is primarily liable for the mortgage-debt, and the creditor is entitled to come in pro rata with other creditors against the personal estate, only for so much of his debt as cannot be realized from the land. *Chancery*, 1842, *Halsey v. Reed*, 9 *Paige*, 446; 1844, *Johnson v. Corbett*, 11 *Id.*, 265.

260. If he has been partly paid out of the personal estate, which proves insufficient to pay all the debts, the payment to him must be taken into account in determining his share as a creditor in the distribution of the personal estate. *Chancery*, 1844, *Johnson v. Corbett*, 11 *Paige*, 265.

261. Action against heirs, on the bond. The rule that the mortgaged premises are primarily liable [9 *Paige*, 453, 455; 11 *Id.*, 270], only applies as between the personal representatives of the obligor and his heirs. It does not extend to the case of an action by the holder of the bond against the heirs. *Supreme Ct.*, 1858, *Roosevelt v. Carpenter*, 28 *Barb.*, 427.

262. Representations of heirs. In an action upon the bond, against the heirs of the mortgagor, brought in the name of the mortgagee, but for the benefit of the grantee of the heirs of the mortgaged premises, where the defence is that the plaintiff ought first to resort to the mortgage, proof is admissible that the heirs represented to the grantee, at the time of his purchase, that the premises were subject only to another mortgage, the amount of which was deducted from the purchase-money, and the balance paid by the grantee, who understood that there was no further incumbrance; when, in fact, the mortgage accom-

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panying the bond sued on was at the time a lien on the premises. *Id.*

4. Order in which several Parcels should be charged.

263. Different parcels of land subject to a mortgage or other general incumbrance, are, in equity, to be charged in the inverse order of their alienation. *Chancery*, 1815, *Gill v. Lyon*, 1 *Johns. Ch.*, 447; 1821, *Clowes v. Dickenson*,* 5 *Id.*, 285; 1830, *Gouverneur v. Lynch*, 2 *Paige*, 800; 1841, *Schryver v. Teller*, 9 *Id.*, 178.

264. Where the purchase-money has been paid in good faith, the first purchaser has the prior equity, although the consideration was not actually paid until other portions had been actually purchased and paid for. *Chancery*, 1830, *Gouverneur v. Lynch*, 2 *Paige*, 800.

265. Where the mortgagor of six lots sold two, and the mortgagee afterwards released four of the lots from the mortgage, leaving the original debt to stand charged on the two which had been sold,—Held, that the two lots were chargeable only with their ratable proportion of the original debt, and interest, according to the relative value of the six lots at the date of the mortgage. *Chancery*, 1815, *Stevens v. Cooper*, 1 *Johns. Ch.*, 425.

266. Equitable rights of purchasers. Where mortgaged premises are sold, subsequent to the date of the mortgage, to different purchasers, such parcels, upon a foreclosure of the mortgage, are to be sold in the inverse order of their alienation according to the equitable rights of the different purchasers, as between themselves. *Chancery*, 1840, *Skeel v. Spraker*, 8 *Paige*, 182; S. P., 1836, *Guion v. Knapp*, 6 *Id.*, 85; 1844, *Snyder v. Stafford*, 11 *Id.*, 71; 1846, *N. Y. Life Ins. & Trust Co. v. Milnor*, 1 *Barb. Ch.*, 858; 1847, *Stuyvesant v. Hall*, 2 *Id.*, 151; affirming S. C., *sub nom.* *Stuyvesant v. Hone*, 1 *Sandf. Ch.*, 419.

267. This principle applied in peculiar cases. *Skeel v. Spraker*, 8 *Paige*, 182; *Patty v. Pease*, *Id.*, 277; *La Farge Fire Ins. Co. v. Bell*, 22 *Barb.*, 54.

268. Conveyances by grantee. This principle is not confined to the original alienations of the mortgagor, but extends to conveyances by his grantee, where he conveys with war-

ranty. *Chancery*, 1836, *Guion v. Knapp*, 6 *Paige*, 85.

269. Mortgages. The same principle is applicable to subsequent incumbrances by mortgage upon different parcels of the mortgaged premises. *Chancery*, 1841, *Schryver v. Teller*, 9 *Paige*, 178; 1847, *Stuyvesant v. Hall*, 2 *Barb. Ch.*, 151; affirming S. C., *sub nom.* *Stuyvesant v. Hone*, 1 *Sandf. Ch.*, 419.

270. A mortgagee of one lot gave a mortgage on another lot, and assigned the mortgage of the first, as additional security. He afterwards sold the second lot, with warranty; he also bought the first lot, agreeing to pay the mortgage, but, without doing so, sold it for full consideration, and both mortgages were assigned to the owner of the second lot. Held, that there was no merger of the mortgage, but the first lot was liable to the holder of both mortgages. *Chancery*, 1840, *Skeel v. Spraker*, 8 *Paige*, 182.

271. Though a mortgage is an alienation, within this rule it is only an alienation *pro tanto* [11 *Paige*, 59], and therefore it is, only to the extent of the mortgage, and not absolutely to the whole proceeds of the lands included in it, that the rule is to be applied. *Supreme Ct., Sp. T.*, 1856, *La Farge Fire Ins. Co. v. Bell*, 22 *Barb.*, 54.

272. That where there is a second mortgage of a part of the mortgaged premises, and subsequently a conveyance of the residue, the part mortgaged must, nevertheless, be first resorted to. *Chancery*, 1844, *Kellogg v. Rand*, 11 *Paige*, 59.

273. Notice. The right of grantees of lands incumbered by a mortgage to have the order of sale of the lands inversely to that of their alienation, is an equitable and not a legal right; and the mortgagee, when applied to for a release of a part of the mortgaged premises, is not bound at his peril to ascertain whether any part thereof has been aliened. He must have sufficient notice to put him upon inquiry, in order to require him to regard the equitable right. *Ct. of Appeals*, 1853, *Howard Ins. Co. v. Halsey*, 8 *N. Y. (4 Seld.)*, 271; affirming S. C., 4 *Sandf.*, 565. S. P., *Supreme Ct., Sp. T.*, 1856, *La Farge Fire Ins. Co. v. Bell*, 22 *Barb.*, 54.

274. Easement. Under the usual decree in foreclosure, directing the sale of several parcels to be in inverse order of alienation, according to the equitable rights of the parties,—if the grantee of a portion of the prem-

* Reversed on another point, *Ct. of Errors*, 1827, 9 *Conn.* 408.

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ises is entitled to an easement, in the residue of the premises which belonged to the mortgagor after the grant, such residue should be sold subject to the easement. *Chancery*, 1846, *N. Y. Life Ins. & Trust Co. v. Milnor*, 1 *Barb. Ch.*, 353. ¶

275. Right not defeasible by mortgagor. Where the mortgagor conveys a parcel of the land, expressly subject to the payment of the whole mortgage by the grantees, such parcel becomes primarily liable for the satisfaction of the mortgage; and if the mortgagor thereafter conveys other parcels to third persons, he cannot, by any subsequent act, divest them of their equitable right to have the first parcel held primarily liable, and the purchaser thereof held the principal debtor. *Ct. of Appeals*, 1852, *Russell v. Pistor*, 7 *N. Y. (8 Seld.)*, 171.

276. Rights of subsequent mortgagees. The owner of a large tract which he had mortgaged, subsequently conveyed a portion of it to A., by a conveyance declaring that portion to be subject to a specified portion of the mortgage-debt and no more. After the delivery of this deed, but before it was recorded, second mortgages upon other portions of the tract of land were executed by him and recorded, to mortgagees who took the same in good faith and without notice of the intermediate conveyance. *Held*, that the second mortgagees, having thus advanced their money on the faith of the fact that the prior mortgage covered more land than their second mortgages, and without any notice that such additional portion had been conveyed, thereby acquired an equitable right to have the prior mortgage satisfied first out of the portion which had been so conveyed without reference to the limit fixed in the conveyance respecting the amount of the mortgage-debt chargeable thereon. The provision of the recording act, 1 *Rev. Stat.*, 756, §§ 1, 37, 38,—which makes conveyances void against subsequent purchasers of the same real estate, or any portion thereof,—applies to such a case; for the second mortgagees under such circumstances may be deemed the purchasers of an equitable interest in respect to the portion conveyed, to have that sold first. *Supreme Ct., Sp. T.*, 1856, *La Farge Fire Ins. Co. v. Bell*, 22 *Barb.*, 54. *S. P., N. Y. Superior Ct.*, 1851, *Hoyt v. Doughty*, 4 *Sandf.*, 462.

277. Order of sale under mortgages to the State. *Laws of 1839*, 347, ch. 381.

5. Release of Part of the Premises.

278. Release without notice of other claim. Though a creditor holding two mortgages is bound, as towards another creditor holding a lien on one of the funds only, to look primarily to that which he exclusively holds; yet if he has, in good faith and without notice of the second creditor's lien, satisfied that mortgage, the other remains as a valid security as against the second creditor, especially when he has purchased under his judgment, with notice. *Chancery*, 1815, *Cheesebrough v. Millard*, 1 *Johns. Ch.*, 409.

279. A mortgagee who has neither actual, nor constructive notice of the conveyance of one parcel of land by the mortgagor, does not lose his lien thereon by releasing another parcel subsequently conveyed. *Chancery*, 1840, *Patty v. Pease*, 8 *Paige*, 277. To similar effect, *V. Chan. Ct.*, 1844, *Wheelwright v. Depeyster*, 4 *Edw.*, 232. *A. V. Chan. Ct.*, 1841, *Talmadge v. Wilgers*, *Id.*, 289, *note*; *S. C.*, 1 *N. Y. Leg. Obs.*, 42.

280. — with notice. If a mortgagee, with full notice of the equitable rights of subsequent purchasers or incumbrancers as between themselves, releases a part of the premises which is, in equity, primarily liable for the debt, he must deduct its value from his debt, and proceed only for the residue against the remaining parcels. *Chancery*, 1836, *Guion v. Knapp*, 6 *Paige*, 85; and see *Stuyvesant v. Hall*, 2 *Barb. Ch.*, 151; affirming *S. C.*, *sub nom. Stuyvesant v. Hone*, 1 *Sandf. Ch.*, 419.

281. Notice. But the right of such purchasers is not a legal, but an equitable right, and is protected on the principles of suretyship; so that if the mortgagee had no notice, actual or constructive, of their conveyances, his lien is not affected. *Chancery*, 1836, *Guion v. Knapp*, 6 *Paige*, 85. *S. P., Ct. of Appeals*, 1858, *Howard Ins. Co. v. Halsey*, 8 *N. Y. (4 Seld.)*, 271; affirming *S. C.*, 4 *Sandf.*, 565. *Supreme Ct., Sp. T.*, 1856, *La Farge Fire Ins. Co. v. Bell*, 22 *Barb.*, 54.

282. The record of the subsequent deed is not constructive notice to the mortgagee. *Ct. of Appeals*, 1858, *Howard Ins. Co. v. Halsey*, 8 *N. Y. (4 Seld.)*, 271; affirming *S. C.*, 4 *Sandf.*, 565. *A. V. Chan. Ct.*, 1841, *Talmadge v. Wilgers*, 4 *Edw.*, 289, *note*; *S. C.*, 1 *N. Y. Leg. Obs.*, 42. *V. Chan. Ct.*, 1844, *Wheelwright v. Depeyster*, 4 *Edw.*, 232.

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283. Information obtained by a solicitor retained by the mortgagee to foreclose the mortgage, is not notice, because not acquired in reference to the same transaction. *Ct. of Appeals*, 1853, *Howard Ins. Co. v. Halsey*, 8 *N. Y.* (4 *Seld.*), 271; affirming *S. O.*, 4 *Sandf.*, 565.

284. Where the release in terms refers to a conveyance, in which the premises conveyed are referred to as the lands of the grantee, the reference is constructive notice of the fact, to the same extent as if the conveyance referred to had been recited in the release. *Id.*

285. The existence of this equity does not depend on the grantee being a purchaser for value. *So held*, in favor of assignees for benefit of creditors. *Id.*

286. Application of purchase-money to mortgage. Where the mortgagor sold the land in two parcels, and the last purchaser applied to the mortgage the whole purchase-money, which was the fair value of the land, and his parcel was released by the mortgagee, —*Held*, that the other parcel was not exonerated from the residue of the mortgage-debt. *Chancery*, 1840, *Patty v. Pease*, 8 *Paige*, 277.

6. Liability of Heirs and Devisees.

287. Before the Revised Statutes, as between the owners of the personal and those of the real estate, the personal estate was the primary fund for the payment of a decedent's bond and mortgage. [3 *P. Wms.*, 358; 2 *Atk.*, 444.] *Chancery*, 1832, *Mollan v. Griffith*, 8 *Paige*, 402.

288. Heir or devisee must pay. When real property, subject to a mortgage executed by an ancestor or testator, descends to an heir or passes to a devisee, the heir or devisee must satisfy it from his own property, without resorting to the personal representative of the ancestor, unless the will expressly directs payment. 1 *Rev. Stat.*, 749, § 4.

289. That this rule is never disturbed, except by some clear and express provision of the will. *N. Y. Surr. Ct.*, 1857, *Taylor v. Wendel*, 4 *Bradf.*, 324.

290. Mortgage by another. The equity of this provision extends to a mortgage executed by another person, and assumed by the testator on purchasing a part of the mortgaged premises. *Chancery*, 1842, *Halsey v. Reed*, 9 *Paige*, 446.

291. It extends to intestate estates, as well as to those wholly or in part disposed of by will. *Chancery*, 1843, *House v. House*, 10 *Paige*, 158.

292. Voluntary payment By 1 *Rev. Stat.*, 749, § 4, the executor should not make any voluntary payments upon the mortgage on land descended or devised, unless expressly so directed in the will. *Supreme Ct.*, 1858, *Moseley v. Marshall*, 27 *Barb.*, 42; and see 22 *N. Y.* (8 *Smith*), 200.

293. Deficiency. Though 1 *Rev. Stat.*, 749, § 4, does not deprive the mortgagee of any part of his debt, where the mortgaged property is insufficient to pay the whole of the debt, including the expense of foreclosure, all he can ask is that the deficiency shall be paid out of the personal estate, pro rata with the claims of other creditors. That pro-rata allowance should not be computed upon the whole mortgage-debt, but only upon that part of it which is equitably chargeable upon the personal property. *Chancery*, 1844, *Johnson v. Corbett*, 11 *Paige*, 265.

294. Security taken by decedent. Where the testator had borrowed money upon a mortgage of his own real property for the benefit of a third person, and took the obligation of such third person to repay him, which obligation the executors collected, —*Held*, that the testator was to be regarded, in equity, as in effect but the surety for such third person, and that the devisees of the real property were entitled to require the executors to apply the proceeds collected by them to the satisfaction of the mortgage. This is not requiring payment from them as executors, out of the general assets; but only seeking against the executors, as trustees of a specific fund, its proper appropriation. [12 *Ves.*, 119; 8 *Sim.*, 97.] *N. Y. Surr. Ct.*, 1850, *Fisher v. Fisher*, 1 *Bradf.*, 335.

295. Liability of heirs not affected. The provision of 1 *Rev. Stat.*, 749, § 4, is a regulation between the heirs and personal representatives, and in no way affects the direct liability of the heirs, by the provision of 2 *Rev. Stat.*, 452, § 32, to the creditor. The mortgage-creditor can, after the death of the mortgagor and obligor, either sue the heirs, when they are liable for the debt, or foreclose the mortgage, at his option. *Supreme Ct.*, 1858, *Roosevelt v. Carpenter*, 28 *Barb.*, 426.

VI. PRIORITY OF MORTGAGES.

296. Tacking. The statute providing for registry has abolished, with respect to registered mortgages, the right of tacking a junior

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to a senior mortgage, and thus excluding an intervening one. They are to have preference in all courts of law and equity, according to the times of their respective registry. *Ot. of Errors*, 1804, *Grant v. U. S. Bank*, 1 *Cal. Cas.*, 112. *Chancery*, 1815, *Parkist v. Alexander*, 1 *Johns. Ch.*, 394; 1824, *Bridgen v. Carhartt*, *Hopk.*, 234.

297. Deposit of title-deeds. Since the registry of a mortgage is a substitute for the deposit of the title-deeds, the mere circumstance of leaving the title-deeds with the mortgagor is not, of itself, sufficient evidence of fraud, so as to postpone the first mortgage to a second mortgagee, who has taken the title-deeds without notice of the prior mortgage. There must be fraud, or gross negligence equivalent to fraud, on the part of the first mortgagee. *Chancery*, 1817, *Berry v. Mutnal Ins. Co.*, 2 *Johns. Ch.*, 608.

298. Several mortgages. Where one of several occupants of land on which there was a mortgage, has executed a mortgage of his part of the land, towards relieving the land from the prior mortgage, he cannot afterwards object, that such prior mortgage was without consideration, and void, as he knew the true state of that mortgage when he gave his own. *Chancery*, 1821, *Lee v. Porter*, 5 *Johns. Ch.*, 268.

299. Defendant mortgaged his undivided interest in land pending a suit for partition thereof, which resulted in a sale, at which he purchased a parcel of the premises, and was credited his share of the avails on the purchase-money. *Held*, that the mortgage was, as against him, a lien upon the parcel he had purchased, notwithstanding the mortgage was given after notice of *his pendens*; and that it took precedence of a subsequent mortgage to one who had notice and paid no value. *A. V. Chan. Ct.*, 1844, *Westervelt v. Haff*, 2 *Sandf. Ch.*, 98.

300. L. and wife mortgaged the wife's land to B., who assigned the mortgage. On the wife's death C., her heir, agreed to sell to L., who had agreed to sell to B.; and C. conveyed to L., who at the same time conveyed to B., who at the same time gave back a mortgage to C., for part of the consideration of his conveyance to L. In this transaction B. fraudulently concealed from C. the fact that he had assigned the prior mortgage, the amount of which was allowed to him by L.,

on the sale. *Held*, that the prior mortgage was still a lien, prior to the mortgage to C. *Chancery*, 1848, *Card v. Bird*, 10 *Paige*, 426.

301. A mortgagor of premises, who himself held a mortgage thereon at the time he mortgaged his interest in the premises to another, cannot set up such prior mortgage, or any interest he has acquired under the same, against his own mortgagee, or any person claiming under him. *Chancery*, 1845, *Williams v. Thorn*, 11 *Paige*, 459.

302. Where two mortgages are executed at the same time to the same person, and covering the same land, and one is recorded before the other with intent to make it a prior lien, an assignee of the mortgage last recorded, who takes it with notice of the facts, is not entitled to have it preferred to the other mortgage in the hands of a subsequent assignee. *V. Chan. Ct.*, 1841, *Douglas v. Peele*, *Clarke*, 568.

303. Where two mortgages upon the same premises were recorded at the same time, each mortgagee being cognizant of the giving of the other mortgage when he took his own,—*Held*, that the recording acts had no application, and that in equity an agreement or understanding of the parties that one should have priority, should be recognized, and it should be presumed that that one was delivered first. *Chancery*, 1847, *Jones v. Phelps*, 2 *Barb. Ch.*, 440.

304. Purchase made upon the production of a satisfaction-piece executed by the mortgagor, and without notice of an unrecorded assignment by him of the mortgage,—*Held*, to have precedence to that mortgage in the hands of the assignee. *A. V. Chan. Ct.*, 1844, *Warner v. Winslow*, 1 *Sandf. Ch.*, 480.

305. Priority as against conveyances. Where the vendor delivered a deed to the purchaser, on an agreement that it was not to take effect unless the balance of the purchase-money was paid; and, the balance not being paid, conveyed to another, and took back a mortgage for a larger sum than the amount due,—*Held*, that the lien of the mortgage, as against the title of the former purchaser, was coextensive only with the unpaid purchase-money and interest. *Chancery*, 1837, *Arnold v. Patrick*, 6 *Paige*, 810.

306. Unpaid purchase-money. A purchaser of land before he had acquired the legal title, contracted to sell it to others, and when

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they were in possession he gave a mortgage on it. He afterwards acquired the title, and conveyed according to his contract. *Held*, that the land in his grantee's hands was liable, under the mortgage, only for so much of the purchase-money as remained unpaid when the grantees first had actual notice of the mortgage. *Chancery*, 1840, Farmers' Loan & Trust Co. v. Maltby, 8 *Paige*, 361.

307. Assignment for benefit of creditors. A mortgage executed and delivered before a general assignment for the benefit of creditors, is entitled to a preference as against the assignees, though the assignment be recorded first. *Chancery*, 1845, Wyckoff v. Remsen, 11 *Paige*, 564.

308. But the date or acknowledgment of the mortgage is only presumptive evidence of the time of its delivery. *Id.*

309. Fraudulent mortgage. Where the plaintiff took a mortgage from B., with full notice of a prior mortgage upon the same premises, which had been assigned to, and was then held by, C., and with knowledge that B., without authority from C., the assignee, had executed a discharge of such prior mortgage,—*Held*, that the plaintiff, being a mere voluntary purchaser or mortgagee, was in no better situation to impeach C.'s mortgage than was B. himself. *Supreme Ct.*, 1857, Morgan v. Chamberlain, 26 *Barb.*, 168.

310. Where a creditor has two funds, and resorts to the secondary one, the owner or claimant of it has a right of subrogation. *Chancery*, 1837, Eddy v. Traver, 6 *Paige*, 521.

311. Advances by third persons. The owner of land mortgaged it upon an agreement in writing that the money was to be advanced in instalments, to enable him to erect buildings on the land. The mortgage was recorded, but before the completion of the buildings he executed a second mortgage to another person.

Held, that the first mortgage had preference over the second, for instalments thereafter advanced by any person and applied on the buildings. *V. Chan. Ct.*, 1846, Griffin v. Burtnett, 4 *Edw.*, 673.

312. A mortgage, though unrecorded, has preference over a subsequent docketed judgment. *Supreme Ct.*, 1809, Jackson v. Dubois, 2 *Johns.*, 216. *V. Chan. Ct.*, 1833, Schmidt v. Hoyt, 1 *Edw.*, 652.

313. But, it seems, not against a sheriff's sale under the judgment.* *Jackson v. Dubois*, 4 *Johns.*, 216.

314. An agreement for a mortgage is, in equity, a specific lien on the land, which gives a preference over subsequent judgment-creditors. [8 *Dessau.*, 74; 2 *Serg. & R.*, 11; 2 *Wash. C. C.*, 69; 8 *Bin.*, 847; *Sugd. Law of Vend.*, 386; 2 *Oruise Dig.*, 64, tit. 14, § 50.] *Chancery*, 1828, Matter of Howe, 1 *Paige*, 125.

315. Mortgage by fraudulent grantee. A creditor of a fraudulent grantee of land who takes from him a mortgage thereon as a further security for his precedent debt, but without notice of the fraud, is not protected against the prior liens of creditors of the fraudulent grantor by judgments recovered subsequent to the fraudulent conveyance but prior to the mortgage. *Chancery*, 1837, Manhattan Co. v. Evertson, 6 *Paige*, 457.

316. Agreement to discharge judgment. A subsequent mortgagee has no equity as against a prior judgment-creditor, by reason of an executory agreement for the discharge of the judgment, wholly unperformed by the mortgagor, and of which the mortgagee had no knowledge when he made the loan for which he took the mortgage. *Ct. of Appeals*, 1852, Crosby v. Wood, 6 *N. Y.* (2 *Seld.*), 369.

317. Judgments and purchase-money mortgages. Under 1 *Rev. Laws of 1813*, 375 (same statute, 1 *Rev. Stat.*, 749, § 5),—which declares that whenever lands are sold and conveyed, and a mortgage is given by the purchaser, at the same time, to secure the payment of the purchase-money, or any part thereof, such mortgage shall be preferred to any previous judgment which may have been obtained against such purchaser,—a mortgage so executed has priority, though not given to the vendor, but given to a third person who, upon its security, advanced the purchase-money. Such a mortgage is within the principle of the act, and the words of it are not restrictive to mortgages to the vendor. *Supreme Ct.*, 1818, Jackson v. Austin, 15 *Johns.*, 477. Followed in a peculiar case, 1848, Haywood v. Nooney, 8 *Barb.*, 643. To similar effect, *Chancery*, 1843, Card v. Bird, 10 *Paige*, 426; and see *Stow v. Tift*, 15 *Johns.*, 458.

* As to this point compare *Jackson v. Post*, 9 *How.*, 120, 128; *Jackson v. Chamberlain*, 8 *Wend.*, 620.

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318. — by trustee. Where a conveyance of lands is made to one person, in trust for the use and benefit of another, his heirs and assigns, without limitation, although by 1 Rev. Stat., 728, § 47, no estate or interest vests in the trustee, but the entire estate, legal and equitable, vests in the person to whose use the conveyance is made; it so vests, subject to the same conditions as his beneficial interest. Among these conditions are to be included those which would have been attached to the legal estate, had the title vested in the trustee according to the terms of the deed. Thus, where such a conveyance was made in terms to a trustee, and the trustee, at the time of the conveyance, executed to the grantor a mortgage upon the premises conveyed, to secure a part of the purchase-money; — *Held*, that the beneficiary took the title, subject to the lien of the mortgage. Such deed and mortgage are to be construed together, as though both were incorporated in one instrument. *Ct. of Appeals*, 1851, *Rawson v. Lampman*, 5 *N. Y.* (1 *Seld.*), 456.

319. Dower. Where, on a purchase of land, a mortgage for the purchase-money is given to a third person by arrangement with the seller, the mortgage is paramount to the dower-right of the wife of the purchaser. [4 *Kent's Com.*, 2 ed., 38; 15 *Johns.*, 402; 6 *Cow.*, 316; 1 *Bay*, 312; 1 *McCord's Oh.*, 270, 279; 4 *Leigh*; 4 *Mass.*, 506.] *A. V. Chan. Ct.*, 1843, *Kittle v. Van Dyck*, 1 *Sandf. Oh.*, 76; *S. C.*, 3 *N. Y. Leg. Obs.*, 126.

320. It is not, in this State, necessary that a wife should join with her husband in a purchase-money mortgage executed by him. The wife's right of dower is in subordination to such mortgage, as against the mortgagee. [14 *Wend.*, 234.] If, therefore, she survives her husband, she cannot claim dower in hostility to the mortgage, nor except on a full recognition of the mortgage-lien. But she, nevertheless, is entitled to dower in the equity of redemption, and is entitled to redeem the premises from the mortgage. *N. Y. Superior Ct.*, 1858, *Wheeler v. Morris*, 2 *Bow.*, 524.

For a fuller discussion of the effect as to dower, see **DOWER**.

As to priority over judgments, see **JUDGMENT AND DECREE**, 184-148.

As to all questions of priority turning on the **Registry laws**, see **RECORD**.

VII. PAYMENT, AND SATISFACTION.

321. Covenant not to sue. The mortgagor granted and released the premises, in fee, to the holder of the mortgage; but the latter retained the mortgage in his hands, indorsing thereon a covenant not to sue for the debt, and declaring that the mortgage was kept on foot merely to protect his title. *Held*, that the covenant was not a satisfaction of the mortgage, in law or equity; and the mortgage being unredeemed, the holder might set it up as a defence in ejectment, against the mortgagor, or those claiming under him. *Supreme Ct.*, 1811, *Denn v. Wynkoop*, 8 *Johns.*, 168.

322. A release of only the personal liability of the mortgagor for the debt, leaves the mortgage a valid claim against the land, in the hands of one to whom the land has been conveyed subject to the payment of the mortgage. [9 *M. & W.*, 484.] *Chancery*, 1846, *Tripp v. Vincent*, 8 *Barb. Oh.*, 618.

323. Payment. After delivering a check in payment of a mortgage, the payor, at the same interview, required an assignment of it, which the owner of it accordingly executed. *Held*, that the mortgage had not been satisfied by the payment. *Supreme Ct.*, 1857, *Graves v. Mumford*, 26 *Barb.*, 94.

324. Though a mortgage has been paid, if it is, with the knowledge and assent of the mortgagor, transferred to a purchaser for value, without notice, it is available as against the mortgagor, but not to the prejudice of third persons. *V. Chan. Ct.*, 1839, *Purser v. Anderson*, 4 *Edw.*, 17.

325. Wife's mortgage for husband. The wife gave a mortgage of her land as collateral to the husband's bond for his own debt. He paid it, and took a transfer in trust for himself. *Held*, that the land was discharged, and that a *bona-fide* purchaser for value from the trustee had no equity as against the wife. *A. V. Chan. Ct.*, 1844, *Fitch v. Cotheal*, 2 *Sandf. Ch.*, 29.

326. Advances by mortgagor. Where a debtor, by mortgage, makes advances to his creditor, though they are not by the parties applied on the mortgage,—if they are yet such that the debtor would have a right to set them off against the mortgage, a judgment recovered against the mortgagor fixes the application so far as to give the judgment-creditor a right to such set-off, and thus reduce the prior lien

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of the mortgage; and this right the parties to the mortgage cannot defeat. *Ct. of Errors*, 1827, *Niagara Bank v. Rosevelt*, 9 *Cow.*, 409; affirming *S. O.*, *Hopk.*, 579.

327. Assignment. The parties to a mortgage cannot, on procuring it to be assigned by the creditor to a third person, on his advancing a part and the debtor's paying the balance, continue the lien of the mortgage for the full amount, so as to make it a security for other debts of the debtor to such third person, as against a judgment-creditor having a lien on the land subsequent to the mortgage. *A. V. Chan. Ct.*, 1845, *Yelverton v. Sheldon*, 2 *Sandf. Ch.*, 481.

328. Renewal of notes. Where a mortgage is given as security for the payment of notes which are from time to time renewed, the renewal is not to be deemed an extinguishment of the original debt, so as to affect the mortgage security. *Ct. of Errors*, 1818, *Dunham v. Dey*, 15 *Johns.*, 555. To the same effect, *Chancery*, 1848 [citing 1 *Freem. Ch. (Miss.)*, 79], *Bank of Utica v. Finch*, 8 *Barb. Ch.*, 298.

329. Where a mortgage was expressed to be a collateral security to a bond, which bond was expressed to be conditioned to indemnify the mortgagee against a note for the same sum as the bond and mortgage, made by the mortgagor, and indorsed by the mortgagee, and discounted at a bank, for the accommodation of the mortgagor;—*Held*, that the mortgage continued a subsisting valid security, as long as the note was kept alive in whole or in part, by renewals from time to time, according to the customary course of such transactions with the bank. The terms of the mortgage were enough to give notice; and the fluctuations of the debt, so long as it did not exceed the original sum, did not affect the case. *Chancery*, 1819, *Brinckerhoff v. Lansing*, 4 *Johns. Ch.*, 65.

330. Refunding payment. Part-payment of a mortgage discharges its lien to that extent, and subsequently refunding the money cannot restore it, as against third persons. *Ct. of Errors*, 1825, *Marvin v. Vedder*, 5 *Cow.*, 671. Followed, in the case of a judgment, *Chancery*, 1828, *De La Vergne v. Evertson*, 1 *Paige*, 181.

331. No subrogation to satisfied mortgage. B. advanced money to A., to pay up a mortgage, and took a new mortgage, and the first mortgage was paid, but satisfaction was not entered of record. In his search for liens,

B. had disregarded a judgment against A., which had been satisfied by a sale of the premises. *Held*, that he could not acquire priority over the judgment by subrogation to the mortgage which had been paid; for that mortgage had been absolutely extinguished. *A. V. Chan. Ct.*, 1844, *Banta v. Garmo*, 1 *Sandf. Ch.*, 888.

332. Authority to satisfy. Where the mortgagee urged defendant to purchase the land, telling him that he would agree to any bargain the mortgagor should make, and left the mortgage in the latter's hands, who delivered it up to defendant when defendant bought the land,—*Held*, that the mortgage was satisfied. *V. Chan. Ct.*, 1840, *Curtiss v. Tripp*, *Clarke*, 318.

333. Where an executor, by consent of the widow, sold the testator's real property, and invested one-third of the proceeds on bond and mortgage in his own name, but making the interest payable to her for life; and subsequently, without her knowledge, entered satisfaction of the mortgage;—*Held*, that the discharge of the mortgage, so far as it affected the right of the widow, should be vacated, and the bond and mortgage established as valid during her life. *A. V. Chan. Ct.*, 1843, *Hays v. O'Connor*, 1 *N. Y. Leg. Obs.*, 405.

334. Fraud of agent. Where the mortgagee was in possession, and a third person sent his agent with funds to purchase the land, including payment of the mortgage, and by the consent of the mortgagee the agent retained the amount of the mortgage, instead of paying it, and accepted the vendor's deed to his principal, agreeing with the vendor to indemnify him against the mortgage; and the agent concealed this from his principal, and became insolvent;—*Held*, that there being no fraud on the part of the mortgagee, his right under the mortgage was not affected. The injury to the principal was wholly owing to the conduct of his own agent. *Supreme Ct.*, 1816, *Jackson v. Leonard*, 13 *Johns.*, 180.

335. Neglect to produce the instruments. After the mortgagee had assigned the bond and mortgage, the mortgagor conveyed the land to the mortgagee, and took from him a certificate of satisfaction, upon which the mortgage was discharged of record, but the bond and mortgage were not produced at the time. *Held*, that their non-production was a circumstance that should have induced

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inquiry, and being unexplained, the mortgagor remained liable upon the bond, which, with the mortgage, was then outstanding in the hands of the mortgagee's assignee. *Ct. of Appeals*, 1852, *Brown v. Blydenburgh*, 7 *N. Y.* (3 *Seld.*), 141.

336. Trust. After A. had executed a mortgage in trust, he conveyed the land to B., who gave a bond and mortgage for the purchase-money, it being agreed that A. should pay off the trust mortgage, and that B. might do so out of the purchase-money so secured. A. was subsequently appointed trustee of the mortgage, and B. paid his mortgage to A. *Held*, a payment of the trust mortgage in the hands of A. *Chancery*, 1844, *Hadley v. Chapin*, 11 *Paige*, 245.

337. Purchase under judgment. Where one receives a deed with warranty, subject, by its terms, to the payment of a mortgage upon the premises, in ignorance of the existence of a prior judgment, upon which the land is subsequently sold, and he takes title from the purchaser, he holds the land as against the grantor and the mortgagee, discharged of the mortgage. *Chancery*, 1844, *McCammon v. Worrall*, 11 *Paige*, 99.

338. Where the mortgagor's equity of redemption passes by sheriff's sale to a third person, who releases for a nominal consideration to the mortgagee, the mortgagor is entitled to a credit upon his bond for the value of the premises. *Supreme Ct.*, 1830, *Spencer v. Harford*, 4 *Wend.*, 381.

339. — at foreclosure. Where the defendant took a conveyance subject to two mortgages, which he agreed to pay, and the prior one was foreclosed, the junior incumbrancer being a party to the suit, and the defendant became the purchaser for the amount of the decree,—*Held*, that the junior mortgage was not extinguished. [5 *Hill*, 228; 9 *Paige*, 649.] *A. V. Chan. Ct.*, 1844, *Hilton v. Bissell*, 1 *Sandf. Ch.*, 407.

340. The mortgagee's taking a conveyance of a part of the premises, does not extinguish the whole of the mortgage-debt. *Supreme Ct.*, 1841, *Klock v. Cronkhite*, 1 *Hill*, 107.

341. Reinstating after satisfaction. L. and M. owned a number of city lots, L.'s title being purely equitable; and M. mortgaged them, and afterwards they made partition, and an apportionment of the mortgage-debt upon the

several lots, and L. took title to the lot set off to him. On their application, K. agreed to furnish certain obligations of the mortgagee, to be applied to the mortgage, and procured them, L. paying him one half as advanced by himself, and agreeing to take an assignment of the mortgage in his own name, to be held as a lien upon the remaining lots of M., for the remaining half. K. applied the obligations to the mortgage, and it was assigned to L., who afterwards discharged it of record. *Held*, that K., as purchaser of the mortgage, which was prior to any equities arising between L. and M., had no notice of such equities, and that he was entitled to have the mortgage reinstated and enforced for his benefit. *A. V. Chan. Ct.*, 1846, *King v. McVickar*, 8 *Sandf. Ch.*, 192. Compare *Brown v. Dewey*, 1 *Id.*, 56.

342. Reviving. A mortgage which has once been paid cannot be revived by a parol agreement of the parties, and continued as security for other demands, to the prejudice of subsequent judgments or mortgages. *Ct. of Appeals*, 1852, *Mead v. York*, 6 *N. Y.* (2 *Seld.*), 449; *S. P.*, *Truscott v. King*, *Id.*, 147.

343. A tender of the mortgage-debt by the owner of the land, though made after the day of payment has passed, and though unaccepted, discharges the lien of the mortgage. At common law the rule was otherwise, but a mortgage by our law is but a lien on the land, and on payment after forfeiture, no reconveyance is necessary. Tender and refusal is equivalent to payment, in respect to discharging the lien, though it does not extinguish the debt. *Supreme Ct.*, 1820, *Jackson v. Crafts*, 18 *Johns.*, 110. *Ct. of Errors*, 1841, *Farmers' Fire Ins. & Loan Co. v. Edwards*, 26 *Wend.*, 541; affirming *S. C.*, 21 *Id.*, 467 (overruling *Merritt v. Lambert*, 7 *Paige*, 344). *Supreme Ct.*, 1848, *Arnot v. Post*,* 6 *Hill*, 65. *Ct. of Appeals*, 1860, *Kortright v. Cady*, 21 *N. Y.* (7 *Smith*), 343; reversing *S. C.*, 5 *Abbotts' Pr.*, 358; 23 *Barb.*, 490; and at *Sp. T.*, 12 *How. Pr.*, 424; and see *Astor v. Hoyt*, 5 *Wend.*, 608; *Jackson v. Myers*, 11 *Id.*, 538; *Stoddard v. Hart*, 23 *N. Y.* (9 *Smith*), 556.

344. Application of payment. A mortgage was payable in ten years from date—the

* This case was reversed in the Court of Errors (*Post v. Arnot*, 2 *Den.*, 844), several members of the court agreeing that such a tender does not discharge the lien; and in *Southworth v. Van Pelt* (3 *Barb.*, 347), their opinion was approved.

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mortgagor being at liberty, however, to pay any part within the ten years, in a specified manner of payment; and the mortgagor being required to pay, at the end of every three years from date, a sum equal to the annual interest of the principal. The mortgagor made payments long before the first payment of interest became due, but it did not appear that he made them in the prescribed manner. *Held*, that they were to be presumed as having been so made, and therefore applicable to the principal, and not as having been made in anticipation of the instalments of interest. *V. Chan. Ct., 1841, Davis v. Fargo, Clarke, 470.*

345. Cancelling. When the debt is satisfied by the mortgagor,—*e. g.*, on a sale under a decree,—the mortgagor is entitled to have the bond and mortgage delivered up to him and cancelled. *Chancery, 1817, Matter of Coester, 2 Johns. Ch., 508.*

346. Settlements of accounts for lands mortgaged to the State. 1 *Rev. Stat.*, 175.

As to Chattel mortgages, see that title.

MOTIONS AND ORDERS.

[Under this title are presented the general rules applicable to proceedings by motion; while matters peculiar to particular subjects of motion are more fully treated under their respective titles. Some matters peculiar to only one of the systems of Practice, will be found under the head of PRACTICE.]

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I. FOR WHAT PURPOSES MOTIONS ARE NECESSARY OR PROPER.

1. To strike an attorney from the rolls, a motion is not made in the first instance; but the proofs are presented to the court, who, if they deem it a proper case, order the entry of a rule to show cause. *Supreme Ct., 1840, Anonymous, 22 Wend., 656.*

2. Unauthorized action. The proper remedy for suing in a case forbidden by statute,—*e. g.*, where an action is brought upon a judgment without the leave of the court [Code 71],—is by motion to set aside the summons and complaint. *Supreme Ct., Sp. T., 1857, Finch v. Carpenter, 5 Abbotts' Pr., 225.*

3. The remedy for irregularity in bringing an action upon an injunction-bond without leave of the court, is by motion to set aside the proceedings. [8 Hill, 898.] *Supreme Ct., Sp. T., 1851, Higgins v. Allen, 6 How. Pr., 80.*

4. Suing bail in wrong court. Though bail should be sued in the court where the original suit was [18 Johns., 424], yet the Supreme Court has jurisdiction of an action against bail in the Common Pleas; and the objection should be taken not by plea but by motion. *Supreme Ct., 1834, Matthews v. Cook, 18 Wend., 38.*

5. The rule is the same where the original suit was in another State. *Supreme Ct., 1841, Otis v. Wakeman, 1 Hill, 604.*

6. A mere notice from a party that he intends to proceed in a manner which would be irregular, does not make it necessary for the adverse party to apply to the court on the

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subject. *Chancery*, 1886, *Vandenburgh v. Van Rensselaer*, 6 *Paige*, 147.

7. **Misnomer.** Where plaintiff, after serving only one of two defendants, amends his declaration by changing the name of the other defendant, the former, as he cannot plead the misnomer in abatement, may move to set aside the declaration, &c. *Supreme Ct.*, 1828, *Atkinson ada. Clapp*, 1 *Wend.*, 71.

8. Proceedings may be set aside on motion on the ground of misnomer. *Supreme Ct.*, *Sp. T.*, 1852, *Elliott v. Hart*, 7 *How. Pr.*, 25; but see *Misnomer*, 18.

9. **Wrong defendant.** The fact that the action has been brought against the wrong defendant,—*s. g.*, against the board of supervisors instead of against the supervisors individually,—is not ground for setting aside the summons and complaint. If the *board* are sued, it must be assumed on such motion that it is sought to charge the county; and the objection that not the county, but the supervisors officially, are liable, and therefore the action ought to have been against them individually, though it may be a defence, or a reason for amending, is not to be taken by motion to set aside the proceedings. *Supreme Ct.*, *Sp. T.*, 1854, *Wild v. Supervisors of Columbia*, 9 *How. Pr.*, 315.

10. The fact that the same matter is pending between the parties in chancery, is a reason for refusing to entertain a motion, particularly where a feigned issue will be necessary. *Supreme Ct.*, 1881, *McLaren v. McLaren*, 6 *Wend.*, 537.

11. A variance between a bailable capias and the declaration, in the subject of the suit, may be taken advantage of by motion, to set the latter aside. [4 *Johns.*, 485; 1 *Wend.*, 305.] *N. Y. Superior Ct.*, 1847, *Haviland v. Tuttle*, 1 *Sandf.*, 668.

12. If the complaint varies from the summons, in respect to the notice in the summons, the remedy is by motion to set aside only the complaint. *Supreme Ct.*, *II. Dist.*, 1857, *Tuttle v. Smith*, 6 *Abbotts' Pr.*, 829; *S. O.*, 14 *How. Pr.*, 895. To the same effect, *VI. Dist.*, *Sp. T.*, 1856, *Ridder v. Whitlock*, 12 *Id.*, 208; 1857, *Allen v. Allen*, 14 *Id.*, 248. These cases overrule *Voorhies v. Scofield*, *V. Dist.*, *Sp. T.*, 1852, 7 *Id.*, 51; *Cemetery Board of Hyde Park v. Teller*, *II. Dist.*, *Sp. T.*, 1858, 8 *Id.*, 504.

13. Leave to amend given on such a mo-

tion. *Supreme Ct.*, *Sp. T.*, 1857, *Allen v. Allen*, 14 *How. Pr.*, 248.

14. And such a motion may be granted, even though the summons and complaint were served together. *Id.*; and see *Oroden v. Drew*, 8 *Duer*, 652.

15. That the complaint should not be set aside where the variance could not mislead defendant, or prejudice him in respect to the mode of obtaining judgment. *III. Dist.*, *Sp. T.*, 1856, *Dunn v. Bloomingdale*, 6 *Abbotts' Pr.*, 340, *note*; *S. O.*, 14 *How. Pr.*, 474.

16. The error of a referee in assuming to allow the name of a party to be struck out, may be corrected on motion as well as by appeal. [6 *How. Pr.*, 217.] *Supreme Ct.*, *Sp. T.*, 1858, *Billings v. Baker*, 6 *Abbotts' Pr.*, 218.

17. The propriety of a nonsuit cannot be reviewed by another judge on a motion to set aside the judgment. *N. Y. Com. Pl.*, *Sp. T.*, 1851, *Wileox v. Bennett*, 10 *N. Y. Leg. Obs.*, 80.

18. Where a default is regular, it is not to be set aside though subsequent proceedings in the suit are irregular. The court will set aside those only that are irregular. *Supreme Ct.*, 1808, *Griswold v. Stoughton*, 1 *Cai.*, 6; *S. O.*, *Col. & C. Cas.*, 146.

19. A motion to strike out an answer because unverified, should not be denied on the ground that the plaintiff's remedy was to disregard the answer, return it, and enter judgment. Where the complaint is verified, and the answer is not, plaintiff may disregard the answer and enter judgment. But in so doing, he takes the risk of the correctness of his own verification. Where the practice is unsettled, he may fairly call on the court, by way of a motion, to decide the point for him. And the practice is so far under the control of the court, that the want of a verification (when required) may be treated as a badge of falsity. *Supreme Ct.*, *Sp. T.*, 1856, *Tibbals v. Selfridge*, 12 *How. Pr.*, 64.

20. **Several defences.** There is no good objection to uniting in a single motion an application to have one or more defences stricken out as sham, and an application for judgment on remaining defences as frivolous. The practice is calculated to save expense and delay; it can work no embarrassment or injustice, and should be not only allowed but encouraged. *Ct. of Appeals*, 1858, *People v. McOumber*, 18 *N. Y. (4 Smith)*, 315; affirming *S. O.*, 27 *Barb.*, 682; and at *Sp. T.*, 15 *How. Pr.*, 186.

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21. After a final decree, an order changing essentially the relief sought by the bill,—*e. g.*, directing defendants to account when an account was not prayed,—will not be granted on motion. There must at least be a rehearing. *Chancery*, 1817, *Hendricks v. Robinson*, 2 *Johns. Ch.*, 484.

22. A stipulation entered into under ignorance or mistake, pertaining merely to the conduct of the suit, and no part of the issue to be tried, presents a proper case for relief upon motion, if it is a plain case. [2 *Johns. Cas.*, 121, 258; *Ool. & C. Cas.*, 187; 1 *Johns.*, 581; 6 *Hill*, 289.] *Supreme Ct., Sp. T.*, 1855, *Becker v. Lamont*, 18 *How. Pr.*, 38.

23. Surrender of release. Though the court protects the rights of a person necessarily suing in the name of another, it will not, *on motion*, compel a defendant to surrender a release, obtained from the nominal plaintiff, after notice of assignment. The question is one for the trial. *Supreme Ct.*, 1848, *Timan v. Leland*, 6 *Hill*, 287.

24. That in a proper case, a release may be set aside on motion. *Ferris v. Crawford*, 2 *Den.*, 595.

25. Discharge. Effect will not be given to a bankrupt discharge, on motion, where the defendant might have pleaded it; but judgment by default may be set aside to allow him to plead it; with leave to plaintiff to discontinue without costs. *Supreme Ct.*, 1848, *Lee v. Phillips*, 6 *Hill*, 246.

26. A discharge in bankruptcy, which could not have been pleaded, is not ground for cancelling the judgment on motion, but is ground for a perpetual stay of execution as against property acquired after the discharge, on payment of costs of the suit, and of the motion. *N. Y. Superior Ct.*, 1847, *Mechanics' Banking Association v. Lawrence*, 1 *Sandf.*, 659.

27. Validity of discharge. Although the validity of a discharge cannot be tried on affidavits, the court may, if a probable case is made out, direct that the execution, &c., shall stand as security, pending a suit to be brought to test the discharge. *Supreme Ct.*, 1845, *Bangs v. Strong*, 1 *Den.*, 619.

28. The validity of an insolvent discharge is not to be tried on motion; but, if it be presumptively impeached by the counter-affidavits, an issue to test its validity should be ordered; and in lieu of retaining the levy, defendant may give security or bring the amount

into court. *N. Y. Superior Ct.*, 1851, *Cramer v. —*, 8 *Sandf.*, 700.

Consult, also, *DISCHARGE*.

29. Motion against sheriff. The sheriff sold, on execution against a tenant, more property than had been under view in making the levy, and the landlord moved that the proceeds be paid over to him as landlord. *Held*, that as the levy was in part sufficient, and the proceeds had been mingled by the sheriff, the landlord should be left to his action. *Supreme Ct.*, 1845, *Adams v. Elliott*, 1 *How. Pr.*, 220.

30. Where the right of a party, moving to compel the sheriff to pay over money, is in doubt upon the affidavits, his motion should be denied, and he left to his action. *Supreme Ct.*, 1845, *Camp v. McCormick*, 1 *Den.*, 641.

31. Bail for the liberties. The court has no power to order the sheriff to accept bail for the jail-liberties. Although he is responsible if he unjustly refuses to do so, the prisoner cannot be relieved on motion in the cause. *N. Y. Com. Pl., Sp. T.*, 1854, *Santos v. Merceques*, 9 *How. Pr.*, 188.

II. WHO MAY MOVE.

32. Motion of party not served. When a guardian for a plaintiff in partition had been improperly appointed, and his proceedings were dilatory, upon petition of a co-tenant in the lands in question, who had been made a party but not served in the action, the plaintiff's proceedings were vacated. *Supreme Ct., Sp. T.*, 1856, *Lyle v. Smith*, 18 *How. Pr.*, 104.

Consult, also, *APPEARANCE*, 3-9.

33. Petition for maintenance. In a suit involving the wife's property, an allowance for her maintenance cannot be made upon the petition of the husband alone. She must freely join in the petition. And it must clearly show the necessity of an allowance for maintenance. *V. Chan. Ct.*, 1838, *Mowatt v. Graham*, 1 *Edw.*, 575.

34. Judgment-creditor. A voidable execution cannot be set aside, on motion of a judgment-creditor, after the defendant has, by assent, cured the irregularity. *Supreme Ct.*, 1824, *Oakley v. Becker*, 2 *Cow.*, 454.

35. The comptroller of the city of New York, being also a taxpayer and corporator, may move to have a judgment, recovered against the city through collusion with the city officials, set aside, and to be allowed to come in and defend the action. *Supreme Ct.*,

Motions which concern several Actions.

1857, *Lowber v. Mayor, &c.*, of N. Y., 5 *Abbotts' Pr.*, 484; S. C., 26 *Barb.*, 262; 15 *How. Pr.*, 128; modifying S. C., 5 *Abbotts' Pr.*, 825.

36. *It seems*, that any one who is a taxpayer and corporator may be heard on such a motion; or that the comptroller may be heard in virtue of his official capacity only. *Id.*

37. *Whether a person not a party to a confessed judgment, but complaining of its injurious operation on his interests, shall be heard summarily on informal affidavits, or be put to the more tedious remedy of a bill in equity, depends upon the circumstances of the case, as ascertained after the affidavits on both sides have been read. It is more usual to hear a motion; and to order a reference or leave the parties to a suit only when necessary.* *Supreme Ct., Sp. T.*, 1857, *Lowber v. Mayor, &c.*, of N. Y., 5 *Abbotts' Pr.*, 825.

That judgments may be set aside on motion of *Third parties* without resort to action, see *CONFESSION OF JUDGMENT*, 102-124.

38. *A party in contempt* for disobedience of an order, was required to comply with its terms before he could have it modified. *Barker v. Barker*, 15 *How. Pr.*, 568. See, also, *CONTEMPT*, 187-189; *INJUNCTION*, 469, 470.

III. MOTIONS WHICH CONCERN SEVERAL ACTIONS.

39. *A motion to amend an erroneous ca. sa.*, on which the defendant was taken, and for which he had brought an action for false imprisonment, was made on papers entitled in the latter suit, and granted. *Holmes v. Williams*, 3 *Cai.*, 98.

40. *Motion to set aside execution.* Where A. stipulated with B., both being judgment-creditors of the same defendants, that he would not issue execution without giving B. notice,—*Held*, that B.'s motion to set aside an execution issued without notice, must be entitled in both causes. *Supreme Ct.*, 1845, *Parent v. Kellogg*, 1 *How. Pr.*, 70.

41. *Bail-bond suit.* On moving to set aside the proceedings in a bail-bond suit, the papers must be entitled in that suit. *Supreme Ct.*, 1810, *Phelps v. Hall*, 5 *Johns.*, 367. To similar effect, 1808, *Pell v. Jadwin*, 8 *Id.*, 448.

42. *Set-off of judgments.* Where judgments to be set off are in different courts, the

party should move in that where the judgment against himself was rendered. *Supreme Ct.*, 1845, *Cooke v. Smith*, 7 *Hill*, 186.

43. The papers should be entitled in all the causes. *Supreme Ct.*, 1845, *Alcott v. Davison*, 2 *How. Pr.*, 44.

44. *Where pendency of one suit is a ground for staying proceedings in another, an application should be made in the suit in which the proceedings are sought to be stayed; and upon notice, if the defendant has answered.* *Supreme Ct., Chambers*, 1849, *Dederick v. Hoysradt*, 4 *How. Pr.*, 350; S. C., 8 *Code R.*, 86.

45. *Removal of cause.* On a motion in the Supreme Court to remove thither a cause from the Common Pleas, the papers should be entitled in the Common Pleas. *Supreme Ct.*, 1846, *Miller v. Dows*, 2 *How. Pr.*, 98.

46. *Cross-actions in separate courts.* A defendant, sued in the N. Y. Superior Court, obtained in the Supreme Court an injunction restraining plaintiff from prosecuting the action, which plaintiff disregarded and entered judgment on failure to answer. The Superior Court, on motion to vacate the judgment, held it regular, yet allowed defendant twenty days to come in and answer, on condition that he consented to a modification of the injunction. During the twenty days, and before serving any answer, defendant moved in the Supreme Court to punish plaintiff for contempt, in violating the injunction; whereupon plaintiff moved in the Superior Court to vacate the order opening the judgment.

Held, 1. That the Superior Court would not require defendant to waive his motion in the Supreme Court, as the condition on which he would be allowed to come in and answer. The question whether any contempt of the Supreme Court had been committed by plaintiff, must be left to be adjudicated in that court.

2. That the order of the Superior Court, holding the judgment regular, yet allowing the defendant to come in upon terms, did not affect defendant's right to pursue the proceedings in the Supreme Court for the alleged contempt. When a court of equity has restrained a party from proceeding at law, and he, notwithstanding, proceeds, it is discretionary with the court of law to sustain or vacate his proceedings therein; but the exercise of this discretion does not preclude the court of equity from inquiry into the contempt.

Enumerated and Non-enumerated Motions.

Orders to Show Cause.

3. That the former order of the Superior Court should be so modified as to require the defendant to elect instant, instead of within twenty days, whether the judgment should be continued in force, or opened on the terms specified. *N. Y. Superior Ct., Sp. T., 1857, Bennett v. Le Roy, 5 Abbotts' Pr., 156.*

47. One motion in several actions. In actions between the same parties and in the same court, when one of the parties moves in each at the same time and with the same object, but one set of papers is necessary, but one rule upon the decision should be entered, and the party prevailing, on the motion, is entitled to the costs of one motion only. *Supreme Ct., Sp. T., 1850, Hornfager v. Hornfager, 6 How. Pr., 18.*

As to disregarding defects in the Title of affidavits, see AFFIDAVIT.

IV. ENUMERATED AND NON-ENUMERATED MOTIONS.

48. A motion for new trial on newly discovered testimony is an enumerated motion. *Supreme Ct., 1804, Chandler v. Trayard, 2 Cai., 94; S. O., Col. & C. Cas., 358.*

49. A motion to set aside a report of referees, on the ground of irregularity, is a non-enumerated motion; but if grounded on merits also, it is an enumerated motion. *Supreme Ct., 1808, Remsen v. Isaacs, 1 Cai., 22; S. O., Col. & C. Cas., 158.*

50. Motion to set aside a verdict for irregular conduct of jury, is non-enumerated. *Supreme Ct., 1805, Smith v. Oheetham, 2 Cai., 381; S. O., Col. & C. Cas., 425.*

51. Motion to bring on trial by record, is a non-enumerated motion. *Supreme Ct., 1805, McKenzie v. Wilson, 2 Cai., 385; S. O., Col. & C. Cas., 428.*

52. An appeal from an order sustaining or overruling a demurrer, is an enumerated motion, and the cause must be placed on the calendar, and papers printed and furnished as in other calendar causes. *N. Y. Superior Ct., 1852, Reynolds v. Freeman, 4 Sandf., 702.*

53. Distinction between enumerated and non-enumerated motions. *Rule 40 of 1858.*

V. ORDERS TO SHOW CAUSE.

54. When granted. Orders to show cause not granted, except on special reason for short notice. *Rule 39 of 1858.*

55. Where returnable. An order to show

cause, returnable at special term, must be granted at special term; and an order to show cause, returnable before a judge out of court, must be made by the judge before whom it is returnable. [*§ 402.*] *Supreme Ct., Sp. T., 1851, Merritt v. Slocum, 6 How. Pr., 850; 1858, Hasbrouck v. Ehrich, 7 Abbotts' Pr., 76.*

56. An order for examination required the debtor to appear before the justice who granted it, "or one of the other justices of the said Supreme Court." On the return-day the debtor appeared before the justice who made the order, and he ordered a reference. The debtor having failed to submit himself to the examination, was attached for contempt. *Held*, that he could not, in an action for false imprisonment, take advantage of the irregularity, if any, in the insertion, in the order, of the words quoted. The clause was mere surplusage, and the objection could not be set up by plea or demurrer in another action. [*2 E. D. Smith, 508; 15 Wend., 301.*] *N. Y. Superior Ct., 1857, Dresser v. Van Pelt, 15 How. Pr., 19.*

57. An order returnable on Sunday is a nullity. *Supreme Ct., 1858, Arctic Fire Ins. Co. v. Hicks, 7 Abbotts' Pr., 204.*

58. The argument. An order to show cause should be considered as a notice, for all the purposes of a motion, and does not affect the rights of the parties in respect to the order in which they should be heard before the court. Upon an order to show cause why an injunction should not issue, plaintiff should be regarded as the moving party, and as such entitled to open and close the argument. *N. Y. Com. Pl., Sp. T., 1858, N. Y. & Harlem R. R. Co. v. Mayor, &c., of N. Y., 1 Hill., 562.*

59. Postponing. A rule to show cause will not be enlarged, merely to give counsel time to consider the propriety of expunging part of his client's affidavit. *Supreme Ct., 1808, People v. Freer, 1 Cai., 485.*

60. The final order on the default, cannot extend beyond what is expressed in the first order to show cause. *N. Y. Superior Ct., 1848, Anderson v. Johnson, 1 Sandf., 713; S. O., 1 Code R., 95.*

VI. WHAT MOTIONS MUST BE MADE PROMPTLY.

61. Against irregularity. A motion to set aside proceedings for irregularity, must be made at the next term after the irregularity,

What Motions must be made Promptly.

if the party had sufficient notice to put him on inquiry. *Supreme Ct.*, 1800, *McEvers v. Markler*, 1 *Johns. Cas.*, 248; *S. C.*, *Col. & C. Cas.*, 96.

62. Against mere irregularity one must move at the first opportunity. *Supreme Ct.*, 1833, *Nichols v. Nichols*, 10 *Wend.*, 560. *Chancery*, 1834, *Hart v. Small*, 4 *Paige*, 288; 1834, *Parker v. Williams*, *Id.*, 439; 1844, *Cowman v. Lovett*, 10 *Id.*, 559; 1845, *Watt v. Crawford*, 11 *Id.*, 470.

63. A motion to set aside the report of a referee for irregularity, even in substance, must be made promptly. A delay of nearly seven months,—*Held*, fatal. *Supreme Ct.*, 1854, *Patterson v. Graves*, 11 *How. Pr.*, 91.

64. A stockholder being sued on a judgment against his corporation, moved to set aside the judgment for irregularity. *Held*, that three months' delay after notice of the judgment was laches that precluded his motion. *Supreme Ct.*, *Sp. T.*, 1857, *Jones v. U. S. Slate Co.*, 16 *How. Pr.*, 129.

As to the rule that a motion to open a Judgment for irregularity must be made within one year, see JUDGMENT AND DECREE, 200-208.

65. Settlement of case. Delay of a year and a half,—*Held*, conclusive against an application for leave to settle a case. *N. Y. Com. Pl.*, 1856, *Robinson v. Hudson River R. R. Co.*, 1 *Hill.*, 144; *S. C.*, 8 *Abbotts' Pr.*, 115.

66. On a motion to set aside a verdict for the misbehavior of the jury, it appeared that the facts were not discovered until the 21st of January; the case was settled on the 22d of February following, too late to prepare and serve the motion-papers for the special term in March; and they were prepared and served for the April term. *Held*, that the defendant was not chargeable with laches; he had a right to wait for the settlement of the case, as he desired to ground his motion partly upon it. *Supreme Ct.*, *Sp. T.*, 1853, *Reynolds v. Champlain Transportation Co.*, 9 *How. Pr.*, 7.

67. The attorney's ignorance of the practice no excuse for delay. *Moreland v. Sanford*, 1 *Den.*, 660.

68. It is an excuse that the motion was previously noticed for a term which adjourned unexpectedly, and it was therefore noticed at the earliest practicable day of another term. *Supreme Ct.*, *Sp. T.*, 1849, *Whipple v. Williams*, 4 *How. Pr.*, 28.

69. Matters of substance. The principle that a motion must be made as soon as practicable, relates generally to a mere irregularity which is waived by delay. *Supreme Ct.*, 1830, *Doty v. Russel*, 5 *Wend.*, 129.

70. The delay of the defendant to move to set aside proceedings based on a summons which was insufficient or not served, does not give the court jurisdiction. *Supreme Ct.*, 1858, *Titus v. Relyea*, 8 *Abbotts' Pr.*, 177; *S. C.*, 16 *How. Pr.*, 371. *Sp. T.*, *Bulkley v. Bulkley*, 6 *Abbotts' Pr.*, 307.

71. Old rule not now applicable. The strict rule of the old practice, requiring a party to move against an irregularity at the first special term, is not applicable under the present judicial system, by which the special terms in a judicial district are held successively at different places in the district. *Supreme Ct.*, 1858, *Titus v. Relyea*, 8 *Abbotts' Pr.*, 177; *S. C.*, 16 *How. Pr.*, 371.

72. Special term and circuit. A motion to take advantage of an irregularity not connected with the merits,—*e. g.*, to set aside a complaint for stating no place of trial,—though it must be made promptly, is not to be deemed too late, when it is actually made at a circuit and special term only a week later than the earliest possible term. It is not the practice to hold a party in default for not making such a motion at a special term connected with a circuit. *Supreme Ct.*, *Sp. T.*, 1853, *Reddy v. Wilson*, 9 *How. Pr.*, 84; and see *Rule 40 of 1853*.

73. A party entitled to the costs of a circuit should move the first opportunity after the circuit adjourns. [5 *Wend.*, 82; 1 *How. Pr.*, 105; 2 *Wend.*, 288; 7 *Id.*, 519.] *Supreme Ct.*, *Sp. T.*, 1849, *Whipple v. Williams*, 4 *How. Pr.*, 28. See *Jones v. Van Epps*, 1 *Id.*, 105; *Kirby v. Sisson*, 1 *Wend.*, 88.

74. A motion to readjust costs should be made before their payment. *Supreme Ct.*, *Sp. T.*, 1851, *Collomb v. Caldwell*, 5 *How. Pr.*, 326; *S. C.*, 1 *Code R.*, *N. S.*, 41.

75. What amounts to laches, in bringing on such motion. *Dresser v. Wickes*, 2 *Abbotts' Pr.*, 460.

76. A trial is considered as lost only when a junior issue could have been tried at the circuit. *So held*, on motion for attachment against the sheriff. *Supreme Ct.*, 1800, *Post v. Van Dine*, 1 *Johns. Cas.*, 412; *S. C.*, *Col. & C. Cas.*, 109.

Before whom, and where, Motions should be made.

VII. BEFORE WHOM, AND WHERE, MOTIONS SHOULD BE MADE.

77. Different judges. Motions and proceedings by way of appeal from one judge to another in the same court, should always be avoided if possible. *N. Y. Superior Ct.*, 1852, *Morris v. Brower*, 4 *Sandf.*, 701. *Supreme Ct.*, *Sp. T.*, 1857, *Ryle v. Harrington*, 4 *Abbotts' Pr.*, 421; *S. O.*, 14 *How. Pr.*, 59; and see *Jackson v. Fassit*, 17 *Id.*, 458; *S. O.*, 9 *Abbotts' Pr.*, 187; *Nesmith v. Clinton Fire Ins. Co.*, 8 *Id.*, 141.

78. Motions may be made in the first district, to a judge out of court, except for a new trial on the merits. *Code of Pro.*, § 401, sub. 2.

As to motions for **New trial**, see **NEW TRIAL**.

79. A motion in the first judicial district to open a judgment, and let defendants in to defend, may be made to a justice out of court. [*Code*, § 401.] *Supreme Ct.*, *Sp. T.*, 1857, *Lowber v. Mayor, &c.*, of *N. Y.*, 5 *Abbotts' Pr.*, 325.

80. A petition for the appointment of a guardian to sell infants' lands, must be presented to the court. The statute imposing the duty on the Court of Chancery to make orders, on applications for the sale or other disposal of infants' real estate, is made applicable to the Supreme Court. [*Laws of 1847*, 823, § 16.] The Supreme Court is the only authority recognized by statute for making orders in such cases; and the court, and not the judge, must make the order. [13 *Barb.*, 301; disapproving 2 *Id.*, 90; 8 *Id.*, 232.] *Supreme Ct., Chambers*, 1856, *Matter of Bookhout*, 21 *Barb.*, 848.

81. But in the first judicial district such petitions,—*e. g.*, for appointment of guardian in partition,—may be made to a judge. [*Code of Pro.*, 401.] *Supreme Ct.*, *Sp. T.*, 1857, *Disbrow v. Folger*, 5 *Abbotts' Pr.*, 58.

82. An order for payment of costs may be made at chambers; but, if so made, does not authorize a precept to collect, which only issues on an order of the court. *Supreme Ct.*, 1855, *Hulsaver v. Wilea*, 11 *How. Pr.*, 446.

83. Enlargement of time. A judge at chambers cannot extend the time to make a case after the ten days have expired. The party must apply to the court on notice. *Supreme Ct., Chambers* (1847?), *Doty v. Brown*,

8 *How. Pr.*, 375. To the same effect, 1827, *Hawkins v. Dutchess & Orange Steamboat Co.*, 7 *Cow.*, 467.

84. A judge at chambers has no power to grant an order extending the time to demur. That can be done only by the court. *Supreme Ct.*, *Sp. T.*, 1847, *Davenport v. Sniffen*, 1 *Barb.*, 223.

85. A motion to dismiss an appeal from a decision at circuit or special term, will not be entertained at special term; for the exercise of such interference would subvert the appellate jurisdiction. *Supreme Ct.*, *Sp. T.*, 1851, *Barnum v. Seneca County Bank*, 6 *How. Pr.*, 82; 1854 [citing, also, 6 *Johns.*, 384], *Harris v. Clark*, 10 *Id.*, 415.

86. A motion to dismiss an appeal from a justice's court for the reason that the notice does not contain the grounds upon which the appeal is founded, should be made at the special term. *N. Y. Com. Pl.*, 1853, *Griswold v. Van Deusen*, 2 *E. D. Smith*, 178.

87. Reviewing referee's report. Under an order of special term, that the report of a referee be confirmed, unless cause to the contrary be shown within eight days, a party filed exceptions to the referee's finding, and an order was entered that all the proofs and testimony taken before the referee come before the court on the hearing of the exceptions;—*Held*, that the cause might be placed on the general-term calendar for hearing in the first instance. The motion to set aside the report of the referee might properly be made either at special or general term, according to convenience. *Supreme Ct.*, 1855, *Tracy v. Talmadge*, 1 *Abbotts' Pr.*, 460.

88. Non-enumerated motions to be heard at special term. *Rule 40 of 1858*.

89. Contempt of referee. The court may punish for a contempt committed before a referee, although the offence was one that by the act of 1857 the referee had power to punish. *Supreme Ct.*, *Sp. T.*, and *N. Y. Com. Pl., Chambers*, 1858, *Case of Sealey and Jobson*, 6 *Abbotts' Pr.*, 217, *note*.

As to the power of the court to enforce an order of a single judge, &c., compare **CONTEMPT**, 106–110; **COURT**, 19–32; and **SUPPLEMENTARY PROCEEDINGS**.

90. "Orders made out of court, without notice, may be made by any judge of the court, in any part of the State; and they may also be made by a county judge of the county where the action

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is triable, or by a county judge of the county in which the attorney for the moving party resides, except to stay proceedings after verdict." *Code of Pro.*, § 401, subd. 3; as amended, *Laws of 1859*, 970, ch. 428, § 10.

91. Under § 401, subd. 3, the county "where the action is triable," means the county which has been fixed as the place of trial, either by being named by plaintiff in his complaint, or by being changed by the court.* It does not mean any county in which plaintiff might have laid the place of trial. *Supreme Ct., Sp. T.*, 1856, *Askins v. Hearn*, 8 *Abbotts' Pr.*, 184; 1852, *Chubbuck v. Morrison*, 6 *How. Pr.*, 367; S. P., 1856, *Bangs v. Selden*, 18 *Id.*, 168, 374; overruling *Peebles v. Rogers*, 5 *Id.*, 208.

92. Subdivision 3 of section 401 of the Code does not apply to motions made at chambers under section 405; and an application upon notice for an order enlarging time, &c., may be granted by any judge of the court in any part of the State, without reference to the place where the action is triable. *Supreme Ct., Chambers*, 1856, *Adams v. Sage*, 18 *How. Pr.*, 18.

93. The report of a referee is not a "verdict," within the meaning of § 401, subd. 3. *Supreme Ct.*, 1853, *Otis v. Spencer*, 8 *How. Pr.*, 171.

As to **Staying proceedings**, see **STAY OF PROCEEDINGS**.

94. **Motions upon notice** must be made within the district in which the action is triable, or in a county adjoining† that in which it is triable; except that where the action is triable in the First Judicial District, the motion must be made therein, and no motion upon notice can be made in the First Judicial District in an action triable elsewhere." *Code of Pro.*, § 401, subd. 4.

95. This provision applies exclusively to motions upon notice. *Supreme Ct., Sp. T.*, 1850, *Peebles v. Rogers*, 5 *How. Pr.*, 208.

96. **The true construction of this phraseology** is, that motions must be made within the district, or in a county adjoining the county in which it is triable. *Supreme Ct., Sp. T.*, 1850, *Inglehart v. Johnson*, 6 *How. Pr.*, 80;

and see *Gould v. Chapin*, 4 *Id.*, 185; S. C., 2 *Code R.*, 107.

97. **Motions for allowance** in cases tried by referee should, in general, be made in the county where the judgment was rendered. [Rule 86.] *Supreme Ct., Sp. T.*, 1850, *Niver v. Rossman*, 5 *How. Pr.*, 153.

98. **An application for a commission** to examine witnesses abroad, under the Revised Statutes, is a motion within sections 400 and 401 of the Code, and must be made in the district in which the action is triable, or a county adjoining that in which it is triable. [1 *Code R.*, 128.] *Supreme Ct., Chambers*, 1856, *Sturges v. Weed*, 18 *How. Pr.*, 180. Compare *Wells v. Jones*, 2 *Abbotts' Pr.*, 20.

99. **Venue.** Motions, where notice is required, can only be made within the district which embraces the county where the venue of the action is at the time of making the motion, or a county adjoining that of the venue. [Code, § 401, subd. 4.] When the object of the motion is a change of venue, it must of necessity be made in the district where the county designated in the complaint as the place of trial is found, or an adjoining county. No court sitting elsewhere has jurisdiction of the subject. *Supreme Ct., Sp. T.*, 1856, *Bangs v. Selden*, 18 *How. Pr.*, 168; again, *Id.*, 374; S. P., 1856, *Askins v. Hearn*, 8 *Abbotts' Pr.*, 184.

100. **Where the summons** stated that the complaint would be filed in a county named, —*Held*, that a motion to dismiss the action for not serving the complaint should be made in the district in which the complaint was to be filed, or in a county adjoining the county in which it was to be filed. [Code, § 401.] *Supreme Ct., Sp. T.*, 1850, *Johnston v. Bryan*, 5 *How. Pr.*, 355; S. P., 1856, *Davison v. Powell*, 18 *Id.*, 287.

101. **Where the summons and complaint** were defective in not fixing a place for the trial of the action, —*Held*, that defendant might move in the district where he resided, as well as in that in which plaintiff resided. *Supreme Ct., Sp. T.*, 1858, *Hotchkiss v. Crocker*, 15 *How. Pr.*, 336.

102. **A motion to consolidate** several suits may be made anywhere in the district containing the county in which the venue of either of the suits to be consolidated is laid. *Supreme Ct., Sp. T.*, 1858, *Percy v. Seward*, 6 *Abbotts' Pr.*, 326.

* Before it had been provided that a change of the place of trial removed all other proceedings (*Code*, § 126), it was held that a change of the place of trial did not affect the place where motions should be made. *Supreme Ct., Sp. T.*, 1849, *Gould v. Chapin*, 4 *How. Pr.*, 185; S. C., 2 *Code R.*, 107.

† As to the county of Orleans, see *Laws of 1843*, 47, ch. 85.

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103. First district. The fair import of section 401 of the Code is, that no motion (upon notice) shall be made in the First Judicial District in a cause in which the venue is laid in another district. *Supreme Ct.*, 1855, *Canal Bank v. Harris*, 19 *Barb.*, 587; *S. C.*, 1 *Abbotts' Pr.*, 192; 10 *How. Pr.*, 452; and see *Harris v. Clark, Id.*, 415.

104. The fact that a cause has been referred to a referee in the first district, which should be tried in another county, does not authorize a motion to be made in the first district. *Supreme Ct., Sp. T.*, 1855, *Wheeler v. Maitland*, 12 *How. Pr.*, 85.

105. An application for an order of supersedeas (under 2 *Rev. Stat.*, 556, §§ 86, 87) may be made to a judge of the first district, although the action is triable elsewhere. It is a motion which is excepted from the operation of section 401 of the Code, by section 471, which preserves existing statutory remedies not inconsistent. *Supreme Ct.*, 1855, *Wells v. Jones*, 2 *Abbotts' Pr.*, 20. Compare *Sturgess v. Weed*, 18 *How. Pr.*, 180.

106. A motion to require an attorney to give up to his client papers in a suit, is not necessarily a motion in such suit, and may be made in the first district, although the action is triable elsewhere. *Supreme Ct., Sp. T.*, 1857, *Cunningham v. Widing*, 5 *Abbotts' Pr.*, 418.

As to the powers of County judges and **Staying proceedings**, see those titles.

VIII. OBTAINING TESTIMONY. IMPEACHING, AND SUSTAINING IT.

107. Compelling deposition. On a motion, or other proceeding, in the Supreme Court, where a witness has refused voluntarily to make deposition, the court may appoint commissioners to take his testimony, the witness may be subpoenaed to attend before them. 2 *Rev. Stat.*, 554, §§ 24, 25.

108. Before this statute the court had no power to compel the making of an affidavit, for the purposes of a motion. *Supreme Ct.*, 1827, *Bacon v. Magee*, 7 *Cow.*, 515.

109. Reference, for the same purpose, authorized, in any court of record. *Code of Pro.*, § 401; as amended, *Laws of 1862*.

110. Order to appear. A judge before whom a motion is heard at special term, cannot direct the responding party to appear before him and be examined orally touching the matters of fact involved in the controversy, and, upon his refusing to submit to such ex-

amination, determine the motion against him therefor. If the affidavits upon a motion are not sufficiently definite and certain, the court should order a reference to try the question. *Ct. of Appeals*, 1855, *Meyer v. Lent*, 7 *Abbotts' Pr.*, 225; reversing *S. C.*, 16 *Barb.*, 538.

111. After a witness has made a voluntary affidavit, at the request of a party, to be used on a motion, a commission should not be granted to take his testimony under the statute, for it may be presumed it would be useless. *Supreme Ct.*, 1841, *Ryers v. Hedges*, 1 *Hill*, 646. Consult, also, *DEPOSITION*, 58, 64.

112. Affidavits impeaching the character for truth and veracity of the deponents, on whose affidavits a motion is made, must be taken into account in deciding the motion, but cannot warrant the rejection of such affidavits. Where there is a conflict, deponents whose credit is impeached ought not to have the same influence as if unimpeached. *V. Chan. Ct.*, 1841, *Francis v. Church, Clarke*, 475.

113. If affidavits as to credibility of a deponent should ever be received on a motion, it should be with an opportunity to the party to produce counter-affidavits. *Supreme Ct., Sp. T.*, 1854, *Merritt v. Baker*, 11 *How. Pr.*, 456.

114. Rebutting. Affidavits may be introduced to establish the general reputation of a person whose character has been impeached. *Supreme Ct.*, 1805, *Clark v. Frost*, 3 *Cai.*, 125. To the contrary, 1824, *Callen v. Kearny*, 2 *Cow.*, 529.

IX. MOTION-PAPERS.

1. In General.

115. Papers already served. A motion against a party to the suit may be heard on a notice that it will be founded upon copies of papers already served on him. *Supreme Ct., Sp. T.* (1852?), *Newbury v. Newbury*, 6 *How. Pr.*, 182; *S. C.*, 10 *N. Y. Leg. Obs.*, 52.

But on a motion against one not a party, the papers to be used must be served with the notice. *Chancery*, 1844, *Morley v. Green*, 11 *Paige*, 240.

116. A copy of a paper served in the cause, purporting to be signed by the opposite attorney, is admissible, as foundation of a motion, without an affidavit that it is a true copy. *Supreme Ct.*, 1842, *Ripley v. Burgess*, 2 *Hill*, 860.

117. Papers annexed. On motion, a copy

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of an instrument—*e. g.*, an insolvent discharge—annexed to the affidavit, and referred to therein as a copy, is evidence. *Supreme Ct.*, 1843, *Thompson v. Hewitt*, 6 *Hill*, 254.

118. Disclosing ground of motion. Where in answer to a motion, the opposite party would have a right to explain by affidavit the matters which constitute the foundation of the motion, the motion-papers must apprise him of the grounds upon which the moving party relies. *Supreme Ct., Sp. T.*, 1847, *Brower v. Brooks*, 1 *Barb.*, 428; *S. C.*, *sub nom.* *Brower v. Judson*, 8 *How. Pr.*, 243.

This rule is not applicable where the opposite party has no right to explain or answer by affidavit, or to amend or perfect his proceedings on terms. *Chancery*, 1846, *Hanna v. Curtis*, 1 *Barb. Ch.*, 268.

119. Objections on the ground of irregularities are not available on the motion if not taken in the moving-papers. *Supreme Ct.*, 1858, *Harder v. Harder*, 26 *Barb.*, 409. To the same effect, 1845, *People v. Stevens*, 1 *How. Pr.*, 241; *Sp. T.*, 1858, *Roche v. Ward*, 7 *Id.*, 416.

120. Proper county. It is not necessary to show, in order to authorize the Supreme Court to hear a motion, that it is made in a proper county. The contrary may be shown in opposition. *Supreme Ct., Sp. T.*, 1856, *Newcomb v. Reed*, 14 *How. Pr.*, 100; disapproving *Schermerhorn v. Devellin*, 1 *Code R.*, 13.

Otherwise of a motion before a judge at chambers. *Dodge v. Rose*, 1 *Code R.*, 128.

121. Scandalous matter. The court may, of its own motion, order scandalous or impertinent matter to be expunged from a paper, read on a motion; and where they order a reference, formal exceptions are not necessary. *Chancery*, 1835, *Powell v. Kane*, 5 *Paige*, 265; affirming *S. C.*, 2 *Edw.*, 450.

122. Irregularities. A motion to set aside proceedings on mere technical grounds,—*e. g.*, that the folios are not numbered pursuant to Rule 44,—will be denied with costs, where the moving-papers are obnoxious to the same objections. *Supreme Ct., Sp. T.*, 1853, *Sawyer v. Schoonmaker*, 8 *How. Pr.*, 198.

123. Names of parties. Under the former practice, where parties' names were reversed in every paper served, the error was *Held*, fatal. *Supreme Ct.*, 1803, *Parkman v. Sherman*, 1 *Cai.*, 844; *Col. & C. Cas.*, 260. Compare *Ryers v. Hillyer*, 1 *Cai.*, 112.

124. And if one defendant moved in a cause where there were other defendants, his papers must be entitled with his own name, as impleaded with the others. *Supreme Ct.*, 1846, *Foot v. Emmons*, 2 *How. Pr.*, 89; 1844, *Felt v. Hyde*, 1 *Id.*, 62.

Otherwise where a motion was made for all the defendants. 1846, *Rowell v. Crofoot*, 3, *Id.*, 15.

125. Title of petition. The petition for the appointment of a guardian to sell infants' lands must be addressed, not to the judge who holds the court, by name, but "To the Supreme Court, of the State of New York. [Equity Rules, 1847, No. 8.] *Supreme Ct., Chambers*, 1856, *Matter of Bookhout*, 21 *Barb.*, 348.

126. An affidavit and order for the examination of witnesses, *de bene esse*, in a criminal case in the city of New York (*Laws of 1844*, 876, ch. 415, § 11), made before indictment, should not be entitled; and if they are entitled, the title cannot be referred to for the purpose of showing who is meant by "the defendants" mentioned in the body of the papers. Such papers are void. [12 *Johns.*, 460; 6 *T. R.*, 640.] *Supreme Ct.*, 1850, *People v. Chrystal*, 8 *Barb.*, 545; *S. P.*, 1846, *Milliken v. Selye*, 3 *Den.*, 54; *q. v.*, *Affidavit*, 56.

2. The Notice.

A. Necessity of. When to be Given, and to Whom. Its Requisites, and Effect.

127. After appearance, the opposite party should be given notice of every application to the court, where he has any interest to appear and oppose it, orders for time and of a similar nature alone excepted. [Rule 40.] *Chancery*, 1828, *Isnard v. Cazeaux*, 1 *Paige*, 89. Compare *Matter of Patterson*, 4 *How. Pr.*, 84.

128. To take the effect of a motion for judgment on a frivolous demurrer, notice or argument must be given. *Supreme Ct.*, 1804, *Anonymous*, 2 *Cai.*, 56.

129. If the notice specifies that the motion is for frivolousness, it has preference before other enumerated motions, and entitles plaintiff to judgment, on reading proof of service of the notice, if no substantial ground is shown to the contrary. *Supreme Ct.*, 1804, *McCabe v. McKay*, 2 *Cai.*, 100. Followed, 1805, *Kane v. Scofield*, *Id.*, 368; *S. C.*, *Col. & C. Cas.*, 414.

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130. A solicitor cannot be stricken from the rolls for malpractice, except upon charges filed and served, and an opportunity to be heard. [1 Rev. Stat., 109, § 80.] *Chancery*, 1845, *Saxton v. Stowell*, 11 *Paige*, 526.

131. Where an administrator is changed, a revival in the name of the new administrator, of a suit in which defendant has already appeared, can only be by motion and on notice. *Supreme Ct., Sp. T.*, 1849, *Thayer v. Mead*, 2 *Code R.*, 18.

132. Upon the death of a party to proceedings in partition, it is usual to give notice of an application for an order under section 121 of the Code, that the action be continued against those who have succeeded to the interest of the deceased party; but it seems that a surviving defendant, who has no interest in the question, and would have no right to resist the motion, is not entitled to notice. *Supreme Ct., Sp. T.*, 1856, *Gordon v. Sterling*, 13 *How. Pr.*, 405.

133. Notice of application by a surety to be exonerated as bail, served without any thing to show authentically that the application was from the sheriff;—*Held*, insufficient, to call on the attorney to do any thing more than to apprise the sheriff that he had received such notice. *N. Y. Com Pl., Sp. T.*, 1854, *Buckman v. Carnley*, 9 *How. Pr.*, 180.

134. An application for leave to amend a summons should be upon notice [Code of Pro., § 414], where there has been a general appearance. *Supreme Ct., Sp. T.*, 1852, *Hewitt v. Howell*, 8 *How. Pr.*, 346.

135. Motion before suit. A motion for the appointment of a receiver will be denied as irregular, when the order to show cause is served before the commencement of the suit. *N. Y. Superior Ct., Sp. T.*, 1853, *Kattenstroth v. Astor Bank*, 2 *Duer*, 682.

136. Eight days' notice of motion must be served, but the court or judge may, by order to show cause, fix shorter time. *Code of Pro.*, § 402.

137. Such orders to show cause, how obtained. *Rule 89 of 1858*.

138. Short notice. The power conferred by the Code, of prescribing a shorter notice of motion than eight days, or dispensing with notice altogether, should be confined to exceptional cases. *Supreme Ct., Chambers*, 1857, *Androvette v. Bowne*, 4 *Abbotts' Pr.*, 440; *S. C.*, 15 *How. Pr.*, 75.

139. One who receives short notice of a

motion, must object on that ground on the day of the motion. If he suffers the motion to be made without objection, he cannot afterwards take advantage of it on another motion. *Supreme Ct., Sp. T.*, 1858, *Main v. Pope*, 16 *How. Pr.*, 271.

140. Where an attorney is retained, even though only to confess judgment, service of notice of motion to vacate satisfaction must be on him, and not on the party; and this, though he was constituted attorney for the purpose of confessing judgment. *Supreme Ct.*, 1800, *Wardell v. Eden*, 2 *Johns. Cas.*, 121.

141. When the attorney of one party becomes incapacitated, the opposite party must give him personal or other equivalent notice to appoint a new attorney; otherwise, he is not bound to take notice of the proceedings. Thirty days is sufficient notice; and it need not be by rule of court. *Supreme Ct.*, 1805, *Given v. Driggs*, 3 *Cat.*, 150.

142. New attorney. Where a copy of the declaration, with notice of the rule to plead, has been served on the defendant personally, an attorney whose notice of retainer is afterwards served is not entitled to new service, but the rule runs from the service on defendant. *Supreme Ct.*, 1808, *Kleecke v. Styles*, 3 *Johns.*, 250. To the same effect, 1801, *Haskins v. Snowden*, 2 *Johns. Cas.*, 287.

143. Motion long after judgment. Service of order to show cause in 1810, why judgment obtained in 1808 should not be satisfied, on the record, was directed to be served by delivery to the attorney of record, and putting up copy in clerk's office. *Supreme Ct.*, 1810, *Lee v. Brown*, 6 *Johns.*, 182.

144. Several defendants. On a motion by one of several defendants to change the place of trial, notice must be given to the other defendants. *Supreme Ct., Sp. T.*, 1850, *Mairs v. Remsen*, 3 *Code R.*, 188.

145. Where several defendants appear by different attorneys motion-papers should be addressed to the attorneys of all. *Supreme Ct.*, 1845, *Anderson v. Vandenburg*, 1 *How. Pr.*, 212.

146. Where the attorney for a plaintiff in error has removed from the State, although notice has been given to the party to appoint another attorney, a motion to quash the writ of error cannot be made without notice to the plaintiff in error. *Ct. of Appeals*, 1848, *Jewell v. Schouten*, 1 *N. Y. (1 Comst.)*, 241.

Motion-Papers;—The Notice;—Necessity of.

147. Application in creditor's suit. A creditor applying for leave to prove his debt after master's report filed, under a decree in a creditor's suit, must give notice of the application to the solicitors of the creditors who have established their claims before the master, and have entered their appearances, as well as to the original parties in the suit. *Chancery*, 1832, Wilder v. Keeler, 8 *Paige*, 164; 1838, Pratt v. Rathbun, 7 *Id.*, 269; overruling *Mason v. Codwise*, 6 *Johns. Ch.*, 188.

148. A preferred creditor loses his priority by neglect to apply before the master; and he will not be permitted to come in then and prove his claim, except on condition that, if the fund should be more than sufficient to pay the preferred class, he shall be placed upon the same footing as the creditors not preferred, as between himself and them, and on payment of costs occasioned by the application. *Chancery*, 1838, Pratt v. Rathbun, 7 *Paige*, 269.

149. In general, one who purchases a claim pending the suit, cannot come in under the decree. He cannot proceed except by supplemental bill, unless the other parties consent. [1 *Russ. & M.*, 69; *Mad. & Geld.*, 59.] *Chancery*, 1832, Wilder v. Keeler, 8 *Paige*, 164.

150. Where a creditor came in after the report, and without stipulating to contribute to the costs, the fund being insufficient, he was not allowed his costs. *Mason v. Codwise*, 6 *Johns. Ch.*, 188.

151. Parol evidence of contents of a notice may be given when the party has no copy. *Supreme Ct.*, 1805, Tower v. Wilson, 8 *Cai.*, 174; S. C., *Col. & C. Cas.*, 494.

152. Formal objections to the notice of motion are waived by entering on the argument. *Supreme Ct.*, 1805, Roosevelt v. Dean, 8 *Cai.*, 105; S. C., *Col. & C. Cas.*, 480.

153. In determining the sufficiency of notice of trial and similar notices, the court inquires whether the attorney or party was misled by the defect. *Supreme Ct.*, 1825, Bander v. Covill, 4 *Cow.*, 60.

154. If the party served with a notice is not misled, or the paper is not such as evidently may mislead, a mere clerical misprision—*e. g.*, an error in the title—will not prejudice. *Supreme Ct.*, 1805, Quick v. Merrill, 8 *Cai.*, 183; and see *Ryers v. Hillyer*, 1 *Id.*, 112.

155. Time. A notice of motion must specify one certain time only. It cannot be in the

alternative. *Supreme Ct.*, 1845, Crane v. Crofoot, 1 *How. Pr.*, 191.

156. Non-enumerated. Notice of motion—*e. g.*, for reference—must be for the first day of term, unless excuse is shown. *Supreme Ct.*, 1808, Lusher v. Walton, 1 *Cai.*, 150; S. C., *Col. & C. Cas.*, 206.

157. A notice for any day in term is good, if excuse is shown, but the motion will be heard only on a non-enumerated day. *Supreme Ct.*, 1804, Jackson v. —, 2 *Cai.*, 259; 1807, Pintard v. Ross, 2 *Johns.*, 186; and see *Fink v. Bryden*, 8 *Id.*, 244, 245.

158. Excuse. Where the reason of not noticing for the first day appears on record, no affidavit in excuse need be made. *Supreme Ct.*, 1805, Kane v. Scofield, 2 *Cai.*, 368; S. C., *Col. & C. Cas.*, 414.

159. Except in the first district, non-enumerated motions must be noticed for the first day of term, unless excuse is shown in the affidavits. *Rule 49 of 1858. Supreme Ct., Sp. T.*, 1849, Ogdensburg Bank v. Paige, 2 *Code R.*, 67; 1850, Walrath v. Killer, *Id.*, 129.

160. Enumerated motions to be noticed for first day of term. *Rule 42 of 1858.*

161. Mistaking the first day of term,—*Held*, a sufficient excuse for not noticing for the first day. *Supreme Ct.*, 1805, Bayard v. Malcom, 8 *Cai.*, 102; S. C., *Col. & C. Cas.*, 456.

162. Notice for "the next term" includes the first day of the term, and is good. *Supreme Ct.*, 1822, Avery v. Cadogan, 1 *Cow.*, 230.

Even though it adds a particular day which is not in the term. 1825, Jackson v. Brownson, 4 *Id.*, 51.

163. The words, "or as soon thereafter as counsel can be heard," are not necessary in a notice of motion. *Supreme Ct.*, 1806, Anonymous, 1 *Johns.*, 143.

164. Place. Notice of motion good without stating the place,—that being notorious. *Supreme Ct.*, 1804, Bodwell v. Willcox, 2 *Cai.*, 104; S. C., *Col. & C. Cas.*, 367.

165. Specifying ground of motion. A party moving on the copy of a paper to set the proceeding aside for a formal defect or error, must point it out in his notice or affidavit, or the motion will be denied with costs. *Supreme Ct.*, 1841, Wilson v. Wetmore, 1 *Hill*, 216. *Ct. of Errors*, 1843, Boyd v. Weeks, 6 *Id.*, 71

Motion-Papers;—The Notice;—Demand of relief.

166. Notice of motion, or order to show cause against irregularity, must specify the alleged irregularity; it is not sufficient that the alleged irregularity is specified in the affidavit on which the order to show cause was granted. *Supreme Ct., Sp. T., 1849, Coit v. Lambeer, 2 Code R., 79.* To the same effect, *Rule 89 of 1858.* To the contrary was, *N. Y. Com. Pl., Sp. T., 1848, Burns v. Robbins, 1 Code R., 62.*

167. A motion by a creditor to vacate a judgment by confession, entered against his debtor, founded on the ground that the statement is insufficient to authorize a judgment to be entered, is not a motion for irregularity, within this rule. *Supreme Ct., 1859, Winnebrenner v. Edgerton, 8 Abbotts' Pr., 419; S. C., 30 Barb., 185; 17 How. Pr., 368.*

168. When there are several grounds upon which a motion may be made, that upon which the moving party means to rely must be specified in the notice. *N. Y. Superior Ct., 1852, Bowman v. Sheldon, 5 Sandf., 657.*

169. The notice of motion was "to set aside the judgment for irregularity, *vis.*, in entering judgment, &c., subsequent to a full and complete settlement, &c.; and for such further relief," &c. *Held*, that the motion was not founded on irregularity merely, and therefore the order made upon such motion was appealable. *Supreme Ct., 1854, Marquat v. Mulvy, 9 How. Pr., 460.*

170. *Signature.* *Notice of motion signed by the counsel,—*Held*, sufficient where the attorney was not to be found. *Supreme Ct., 1805, Bogert v. Bancroft, 3 Cai., 127; S. C., Col. & C. Cas., 400.*

B. Demand of relief.

171. A party is confined to the objects specified in his notice. A judgment cannot be set aside on a motion merely to set aside the execution. *Supreme Ct., 1808, Alexander v. Esten, 1 Cai., 152.*

172. That under the general clause asking for other relief, the party may have any relief consistent with the case made by the affidavits.* *Supreme Ct., 1848, Barstow v. Randall, 5 Hill, 518; and see Jackson v. Stiles, 1 Cow., 185, note.* To similar effect, 1834, *Ferguson v. Jones, 12 Wend., 241; 1848, Stearns v. Kenyon, 5 Hill, 519.*

* The propriety of this practice was questioned in *Mann v. Brooks, 7 How. Pr., 449.*

173. A motion to dissolve an injunction, "and for other and further relief," &c., was denied at special term; and the general term, on appeal, ordered a new defendant to be joined in the action,—*Held*, that this order was regular, being authorized by the prayer for other relief. *Supreme Ct., 1855, Martin v. Kanouse, 2 Abbotts' Pr., 390.*

174. Where an answer contained two defences, and plaintiff moved for judgment for frivolousness of the answer, and one defence was held good and the other frivolous;—*Held*, that the latter defence might be stricken out, under the notice that plaintiff would ask other and further relief. *N. Y. Superior Ct., Sp. T., 1857, Hecker v. Mitchell, 5 Abbotts' Pr., 453.*

175. On motion to set aside a summons for varying from the complaint, the complaint may be set aside (this being the proper remedy), under the prayer for other and further relief. *Supreme Ct., Sp. T., 1856, Ridder v. Whitlock, 12 How. Pr., 208; 1857, Boington v. Lapham, 14 Id., 360.*

176. An order striking out the whole of a pleading, is not warranted by a notice of motion to strike out specified parts of it, and for other and further relief, &c. *N. Y. Com. Pl., 1851, Mott v. Burnett, 2 H. D. Smith, 50.*

177. Under a general clause in a notice asking for other and further relief, the party cannot, on default, take costs of the motion. [10 Wend., 608.] *Supreme Ct., 1850, Northrop v. Van Dusen, 5 How. Pr., 134; S. C., 3 Code R., 140.*

178. *Further order.* Under a notice of a motion that the answer be stricken out as frivolous, "or for such or further order," &c., the plaintiff cannot demand judgment. To effect this, the words "judgment" or "relief" should have been used instead of "order." [1 Hill, 370; 3 How. Pr., 75.] *Supreme Ct., Chambers, 1850, Darrow v. Miller, 5 How. Pr., 247; S. C., 3 Code R., 241.*

179. *Alternative.* Where the notice of motion asks two things, in the alternative, one of which the party is not entitled to, costs of opposing must be allowed. *Supreme Ct., Sp. T., 1849, Smith v. Jones, 2 Code R., 38.*

180. *Leave to renew* cannot be granted under the general prayer, as a legitimate object of the principal motion, where there are no facts in the moving-papers on which to found this particular relief. [5 How. Pr., 247;

Opposing Motions.

3 *Id.*, 75.] *Supreme Ct., Sp. T.*, 1853, *Bellinger v. Martindale*, 8 *How. Pr.*, 113.

8. *The Affidavits.*

181. Service necessary. Whenever a special motion is to be made, founded on an affidavit, a copy of such affidavit must be regularly served on the opposite party. *Supreme Ct.*, 1799, *Fitzroy v. Card*, 1 *Johns. Cas.*, 30; *S. C., Col. & C. Cas.*, 69; 1808, *Grover v. Green, Id.*, 190.

182. Where notice of motion is requisite, a copy of the affidavit on which it is made ought to be served. *Chancery*, 1817, *Brown v. Ricketts*, 2 *Johns. Ch.*, 425.

183. Affidavits and other papers in support of non-enumerated motion, to be served. *Rule 49 of 1853.*

184. What to be served on enumerated motion. *Rule 42 of 1853.*

185. Affidavits which have not been served, cannot be used in support of a motion. *Supreme Ct.*, 1800, *Campbell v. Grove*, 2 *Johns. Cas.*, 105; *S. C., Col. & C. Cas.*, 113; and see *Deas v. Smith*, 1 *Cai.*, 172; *S. C., Col. & C. Cas.*, 221; *S. P.*, 1846, *Frost v. Flint*, 2 *How. Pr.*, 74; *Bennett v. Pratt, Id.*, 77.

186. Copy affidavit served need not contain the name of the magistrate before whom it was sworn. *Supreme Ct.*, 1807, *Livingston v. Cheetham*, 2 *Johns.*, 479.

187. When the jurat is an essential part,—*e. g.*, in respect to the date,—it must be given. *Supreme Ct.*, 1829, *Chase v. Edwards*, 2 *Wend.*, 283.

188. An error in the name of the court, in the title of an affidavit, is to be disregarded, when it is certain that the party could not have been misled. [Code, § 406.] *N. Y. Superior Ct.*, 1852, *Bowman v. Sheldon*, 5 *Sandf.*, 657.

189. An affidavit to set aside proceedings for irregularity, should be made either by the party or his solicitor. The affidavit of the counsel is not sufficient without an excuse. *Chancery*, 1831, *People v. Spalding*, 2 *Paige*, 326. Consult, also, *AFFIDAVIT.*

190. When a third person makes an affidavit (on motion to open default), a sufficient reason should be shown why it was not made by the party himself. *Supreme Ct.*, 1805, *Clark v. Frost*, 3 *Cai.*, 125; *S. C., Col. & C. Cas.*, 464.

191. Several defendants. That an affidavit to obtain an injunction on a bill filed by

several defendants, need not be sworn to by all. *Ct. of Errors*, 1801, *Le Roy v. Servis*, 1 *Cai. Cas.*, iii.

192. Age and infirmity of party not an excuse for not making affidavit, for the commissioner should go to his house. *Supreme Ct.*, 1805, *Clark v. Frost*, 3 *Cai.*, 125; *S. C., Col. & C. Cas.*, 464.

193. A complaint duly verified by the plaintiff, is an affidavit upon which an injunction may be granted, if the facts are alleged positively, and not on information and belief. [17 *Barb.*, 229.] *N. Y. Com. Pl., Sp. T.*, 1858, *Levy v. Ely*, 15 *How. Pr.*, 395; *S. C., sub nom. Levy v. Ley*, 6 *Abbotts' Pr.*, 89.

Consult, also, *INJUNCTION*, IV., V.

194. A special affidavit of merits, under the Code, is not indispensable in order to be let in to defend, when there are no suspicious circumstances. [4 *Hill*, 61, note.] But when circumstances are suspicious, if a defendant has a good defence on the merits, he should show the court in what it consists. *Supreme Ct., Sp. T.*, 1851, *Dix v. Palmer*, 5 *How. Pr.*, 238; *Van Horne v. Montgomery, Id.*, 238.

X. OPPOSING MOTIONS.

195. The objection, that the complaint does not state facts sufficient to constitute a cause of action, though not waived by omitting to demur, is not available to resist an interlocutory motion in the cause,—*e. g.*, an application for an order for the examination of the defendant, as upon a discovery. *N. Y. Superior Ct.*, 1853, *Draper v. Henningsen*, 16 *How. Pr.*, 281; *S. P.*, *Banks v. Maher*, 2 *Bow.*, 690.

196. Counter-affidavits, admissible to oppose an original motion. *Supreme Ct.*, 1809, *Watkinson v. Laughton*, 4 *Johns.*, 807; 1810, *Hart v. Faulkener*, 5 *Id.*, 362; and see *Campbell v. Grove*, 2 *Johns. Cas.*, 105; *S. C., Col. & C. Cas.*, 113.

197. Attorney's own affidavit. Where a client makes a summary application to the court against his solicitor, the latter is entitled to use his own affidavit in opposing the motion. *Chancery*, 1848, *Merritt v. Lambert*, 10 *Paige*, 352.*

198. If papers to oppose a motion are wrongly entitled, they cannot be relied on to raise the same objection to the moving-papers.

* Affirmed, *Court of Errors*, 1845, *sub nom. Wallis v. Loubat*, 2 *Den.*, 607.

Affirmative Relief.

Supreme Ct., 1846, *Atwater v. Williams*, 2 *How. Pr.*, 274.

199. Contradicting affidavit of merits. Counter-affidavits are inadmissible on motion to set aside inquest, where merits are sworn to. *Supreme Ct.*, 1806, *Anonymous*, 1 *Johns.*, 818; 1808, *Philips v. Blagge*, 3 *Id.*, 141; *S. P.*, 1829, *Hanford v. McNair*, 2 *Wend.*, 286. See, also, *Inquest*, 88.

200. Excuse. Counter-affidavits may be read as to the sufficiency of an excuse for not moving at the earliest opportunity. *Supreme Ct.*, 1808, *Quin v. Riley*, 3 *Johns.*, 249.

XI. AFFIRMATIVE RELIEF.

201. Opportunity to answer. It is irregular to grant affirmative relief to a party opposing a motion, upon matter appearing in his papers which the other party has had no opportunity to answer. *Supreme Ct.*, 1848, *Garcie v. Sheldon*, 3 *Barb.*, 232.

202. One who has taken an irregular order cannot have its benefits saved to him upon terms, on the motion to set it aside; he must move anew. *V. Chan. Ct.*, 1889, *Johnston v. Bloomer*, 3 *Edw.*, 328.

203. Leave to sue. Where defendant, in an action on a judgment, moves to set aside the summons and complaint, for the reason that the action was commenced without leave of the court, such leave should not be granted *nunc pro tunc*, upon the motion to vacate the proceedings, but the plaintiff should be left to his direct motion. *Supreme Ct., Sp. T.*, 1857, *Finch v. Carpenter*, 5 *Abbotts' Pr.*, 225.

204. A mere numerical error in a judgment,—*e. g.*, where a sale was directed to be advertised *three* weeks, instead of *six* as required by law, but in fact the advertisement was published six weeks,—may be corrected on a motion to compel a purchaser to take the title. *Supreme Ct., Sp. T.*, 1857, *Alvord v. Beach*, 5 *Abbotts' Pr.*, 451.

205. Amending. On motion to set aside irregular proceedings, it is the settled practice to allow trifling mistakes to be amended, without requiring a cross-motion. *Supreme Ct.*, 1842, *Jones v. Williams*, 4 *Hill*, 84.

Consult, also, **AMENDMENT**, 27.

XII. REBUTTING AFFIDAVITS.

206. Supplementary affidavits to support motion, not received. *Supreme Ct.*, 1800, *Campbell ad. Grove*, 2 *Johns. Cas.*, 105; *S. C.*,

Rebutting Affidavits

Col. & C. Cas., 118; 1808, *Deas v. Smith*, 1 *Cai.*, 172; *S. C.*, *Col. & C. Cas.*, 221; 1805, *Clark v. Frost*, 3 *Cai.*, 125; *S. C.*, *Col. & C. Cas.*, 484.

207. An affidavit containing new matter cannot be read in support of a motion, though the facts in it were not known till the day of bringing it on. The party should have served copies, and moved the next day. *Supreme Ct.*, 1804, *Bergen v. Boerum*, 2 *Cai.*, 256. To the same effect, 1805, *Clark v. Frost*, 3 *Cai.*, 125; *S. C.*, *Col. & C. Cas.*, 484.

208. Counter-affidavits are never received to sustain a motion, even in support of character of witnesses impeached by the opposing affidavits. *Supreme Ct.*, 1824, *Callen v. Kearny*, 2 *Cow.*, 529.

To the contrary, 1805, *Clark v. Frost*, 3 *Cai.*, 125; *S. C.*, *Col. & C. Cas.*, 484; *Sp. T.*, 1854, *Merritt v. Baker*, 11 *How. Pr.*, 456.

209. Service necessary. Supplemental affidavits cannot be received, unless copies have been served the same length of time before the day of moving, as though the motion were founded on them, *Supreme Ct.*, 1827, *Wilcox v. Howland*, 6 *Cow.*, 576.

210. On application to be discharged, on filing common bail, counter-affidavits are admissible in the discretion of the judge. But where plaintiff swears positively to a debt, it would be improper to receive them. *Supreme Ct.*, 1806, *Welsh v. Hill*, 2 *Johns.*, 100.

But a positive affidavit of indebtedness may be avoided—*e. g.*, by showing an insolvent discharge. 1831, *Jordan v. Jordan*, 6 *Wend.*, 524.

211. Injunction. The rule that on a motion to dissolve an injunction, plaintiff cannot support his original application by additional affidavits to those on which it was based, unless the defendant by his answer sets up new matter in avoidance of the plaintiff's claim [citing many cases], is applicable to a motion for an injunction; and the plaintiff will not be allowed to read new affidavits to meet those put in by the defendant, unless the latter set up new matter in avoidance. *N. Y. Com. Pl., Sp. T.*, 1857, *Powell v. Clark*, 5 *Abbotts' Pr.*, 70.

212. What evidence admissible. Where the facts involved in a suit occurred at a distance, statements contained in alleged letters of third persons to one of the parties, although not strictly evidence, were received with other testimony, to sustain a provisional remedy. *Merritt v. Thompson*, 3 *E. D. Smith*, 283.

Consult, as to **Supplemental affidavits** to

How Heard and Determined.

sustain a motion, the titles of the various subjects of motions.

XIII. HOW HEARD AND DETERMINED.

213. Time. A motion noticed for a day out of an appointed term, must be brought on upon the day specified; and if it is not, a default cannot be taken on a subsequent day. *Supreme Ct., Sp. T., 1848, Vernoy v. Tauney, 8 How. Pr., 859.*

214. Non-enumerated motions, when to be heard. *Rule 48 of 1858.*

215. The practice of the N. Y. Superior Court, in respect to *ex-parte* motions, the hearing of motions upon notice, and the granting of orders by default—defined. *N. Y. Superior Ct., Chambers, 1855, Cobb v. Lackey, 4 Duer, 678; S. C., 2 Abbotts' Pr., 158; 12 How. Pr., 300.*

216. Where no one opposes, only the thing specifically asked for will be granted; though where opposition is made, relief may be given under the general or alternative prayer. *Chancery, 1844, Rogers v. Toole, 11 Paige, 212.*

217. Proof of service. A motion, though not opposed, cannot be granted if proof of service is insufficient. *Supreme Ct., 1805, Jackson v. Giles, 3 Cai., 88; S. C., Col. & C. Cas., 442.*

218. But a party who relies on the attention of the court, and does not attend to oppose, cannot, after lapse of a term, object to the insufficiency, if the court failed to notice it. *Supreme Ct., 1812, Caines v. Brown, 8 Cai., 88, note.*

219. Upon a motion where there is no opposition, the court will not examine further than to see that there has been regular service of the notice. If the notice was defective, the party must appear and oppose. *Supreme Ct., 1800, Hoyt v. Campbell, Col. & C. Cas., 129.*

220. To appear merely for the purpose of asking an adjournment, is a waiver of an objection to the proof of service. [1 Abbotts' Pr., 34.] *Supreme Ct., 1859, Utica City Bank v. Buel, 17 How. Pr., 498; S. C., 9 Abbotts' Pr., 385.*

221. Distance of residence of the attorney receiving a notice from the place of the court,—*Held*, an excuse for not opposing on the first day of the term. *Supreme Ct., 1800, Torrey v. Morehouse, 1 Johns. Cas., 242.*

222. Preliminary objections often heard and reserved to be disposed of with the merits. *Lowber v. Mayor, &c., of N. Y., 5 Abbotts' Pr., 325, 327, note.*

223. Irregularity. That to set aside proceedings solely for irregularity, a clear case must be shown. *Supreme Ct., 1829, Potter v. Tuttle, 2 Wend., 254.*

And the moving party will be held to strict regularity. *Chancery, 1840, Hawley v. Donnelly, 8 Paige, 415.*

224. Conflict of testimony. On an application to its equitable powers, the court is competent to decide questions of fact; but in case of a difficulty in weighing contradictory testimony, and the credibility of witnesses, it will award a feigned issue. *Supreme Ct., 1884, McKinstry v. Thurston, 12 Wend., 222.*

225. If the cause of action is one which would authorize an execution against the person, in case of a recovery, an order of arrest should not be vacated merely because the cause of action is denied, while the opposing affidavits sustain that on which the order was granted. *N. Y. Superior Ct., Sp. T., 1857, Bedell v. Sturta, 1 Bow., 684; S. C., 6 Abbotts' Pr., 319, note.*

226. Preference. A motion for judgment on a frivolous demurrer will not have priority, unless the notice states that such is the ground of the application. *Supreme Ct., 1805, Kibbe v. Stoddard, 3 Cai., 129.*

227. Motion to overrule frivolous plea has the same preference as a motion on a frivolous demurrer. *Supreme Ct., 1805, Anonymous, 2 Cai., 377; S. C., Col. & C. Cas., 419.*

228. Motions to vacate or modify a provisional remedy, and appeals from orders allowing provisional remedy, have preference over all other motions. *Code of Pro., § 401; as amended, Laws of 1858, 496, ch. 306, § 18.*

229. In enumerated motions, each party to briefly state, upon his printed points, the leading facts, with references to the evidence. The court will not hear extended discussion on mere question of fact. *Rule 45 of 1858.*

230. The court will not postpone a motion, to give time to prepare affidavits, except on some reason shown for not being prepared. *Supreme Ct., 1805, Jackson v. Ferguson, 3 Cai., 127; S. C., Col. & C. Cas., 467.*

231. A motion suspended, upon the ground of alleged fraud in its foundation. *Brown v. Burdick, 18 Wend., 511.*

232. Standing over. Motions at chambers not heard on the day for which they are noticed, in consequence of the inability of the court to hear them, stand over as a matter of

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course until the next day, unless a different disposition is made. *Supreme Ct., Chambers*, 1855, *Mathis v. Vail*, 10 *How. Pr.*, 458.

233. Transferring. Judge at chambers, unable to hear motion, may transfer it to another. *Code of Pro.*, § 404.

234. The constitutionality of a law of the State ought not to be called in question summarily on a motion to strike out part of a pleading as irrelevant. *N. Y. Com. Pl., Sp. T.*, 1852, *Brien v. Clay*, 1 *E. D. Smith*, 649.

XIV. COUNTERMANDING.

235. Where the object of a motion is effected without bringing it on, the party will not be charged with costs, if he countermands the notice. *Supreme Ct.*, 1828, *Lisher v. Parmelee*, 1 *Wend.*, 22.

236. A notice of a motion cannot be so countermanded as to deprive the other party of the right to attend and have the motion dismissed with costs. *N. Y. Superior Ct., Sp. T.*, 1858, *Bates v. Jaines*, 1 *Duer*, 668.

XV. RENEWALS.

237. A motion denied upon the merits cannot be renewed without leave. *Chancery*, 1814, *Hoffman v. Livingston*, 1 *Johns. Ch.*, 211; 1847, *Dodd v. Astor*, 2 *Barb. Ch.*, 895. *Supreme Ct.*, 1845, *Pike v. Power*, 1 *How. Pr.*, 164; *Harker v. McBride*, *Id.*, 108; *Sp. T.*, 1858, *Bellinger v. Martindale*, 8 *Id.*, 118.

238. This rule applies to motions for a commission as well as other cases. *Supreme Ct.*, 1848, *Dollfus v. Frosch*, 5 *Hill*, 493. *S. P.*, 1884, *Allen v. Gibbs*, 12 *Wend.*, 202.

239. The new matter which will alone justify the renewal of a motion without leave, must be something which has happened, or for the first time come to the knowledge of the party, since the former decision. *Supreme Ct., Sp. T.*, 1847, *Willet v. Fayerweather*, 1 *Barb.*, 72.

240. Additional or cumulative evidence is not enough. *V. Chan. Ct.*, 1841, *Ray v. Connor*, 3 *Edw.*, 478.

241. New papers. A motion founded only upon the same papers, or only a part of the papers upon which it was formerly made and denied, must be denied with costs. *V. Chan. Ct.*, 1840, *Fenton v. Lumberman's Bank*, *Clarke*, 360.

242. Omitted costs. If a party does not

apply for all the costs which he is entitled to on his motion, he waives what he does not ask, and cannot move for them at a subsequent term. *Supreme Ct.*, 1805, *Palmer v. Mulligan*, 2 *Cai.*, 880.

243. Several irregularities. A party complaining of proceedings as irregular, must embody all his objections in one motion; he cannot make separate motions for each. *Supreme Ct., Sp. T.*, 1848, *Desmond v. Wolf*, 1 *Code R.*, 49; *S. C.*, 6 *N. Y. Leg. Obs.*, 889. Followed, 1852, *Mills v. Thursby* (No. 2), 11 *How. Pr.*, 114.

244. Default. The denial of a motion by the default of the moving party is no bar to its renewal if the default is excused. *N. Y. Superior Ct.*, 1852, *Bowman v. Sheldon*, 5 *Sandf.*, 657.

245. Renewal after default. Where a motion granted by default is opened on excuse, it must be heard, as to the party who took it, on the identical papers on which it was moved. *Supreme Ct.*, 1828, *Knowlton v. Bowrason*, 8 *Cow.*, 185.

246. A motion to vacate an order denying a previous motion of the party cannot be made without leave of the court. *Ct. of Errors*, 1884, *Mitchell v. Allen*, 12 *Wend.*, 290; explaining *Standard v. Williams*, 10 *Id.*, 599.

247. Motion to set aside revocation. Under 2 *Rev. Stat.*, 2 ed., 209, § 27, which forbids a second application to a Supreme Court commissioner for an order once refused, revocation of an order by the officer who granted it is equivalent to an original refusal of it; and an appeal or a motion to set aside the revocation cannot be had. *Supreme Ct.*, 1848, *Gould v. Root*, 4 *Hill*, 554.

248. A motion once denied cannot be renewed before another justice on the same facts. [Rule 87.] *Supreme Ct., Sp. T.*, 1852, *Mills v. Thursby* (No. 2), 11 *How. Pr.*, 114.

249. But this should not prevent a motion to modify or vacate, founded on matters arising or discovered since the first motion, when no laches are imputable to the moving party. *N. Y. Superior Ct., Sp. T.*, 1857, *Cazneau v. Bryant*, 6 *Duer*, 668; *S. C.*, 4 *Abbotts' Pr.*, 402.

250. Renewing motion which had been granted on terms. A defendant may move upon his answer for a discharge of a *ne exeat*; although, before answer, he had obtained an order for its discharge, upon terms which he never complied with. *V. Chan. Ct.*, 1839, *Evans v. Van Hall*, *Clarke*, 22.

Orders;—In General.

251. Stipulation to abide event of motion. Pending defendant's motion to open a default, he gave a note for the judgment to the plaintiff, on a stipulation that if the motion were granted the note should be returned, if denied, it should be plaintiff's absolutely. The motion was denied without prejudice. *Held*, that defendant could not renew it. *Supreme Ct.*, 1846, *Smith v. Van Patten*, 2 *How. Pr.*, 285.

252. Waiver of leave to renew. By appealing from an order, the appellant waives leave reserved to him to renew the motion which the order denied. *Supreme Ct.*, 1858, *Peel v. Elliott*, 16 *How. Pr.*, 488.

253. New motion on a new judgment. A motion of a judgment-creditor to set a judgment by confession, having been denied, without leave to renew, subsequently the assignees of that judgment-creditor having recovered another judgment, made a new motion upon them both. *Held*, that the subject of the motion was not *res adjudicata*. The new judgment gives a right to move. *Supreme Ct.*, *Sp. T.*, 1855, *Bonnell v. Henry*, 18 *How. Pr.*, 142.

254. Distinct motions. Denial of a motion to set aside declaration, on the ground that it had not been filed when it was served, does not preclude a subsequent motion to open a default, on the ground that the declaration had never been regularly filed. *Supreme Ct.*, 1846, *Frost v. Flint*, 2 *How. Pr.*, 125.

255. Second applications. If any application for an order be made to any judge or justice, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application upon the same state of facts shall be made to any other judge or justice; and if upon such subsequent application any order be made, it shall be revoked. And in his affidavit for such order, the party shall state whether any previous application for such order has been made. *Rule 23 of 1858*.

256. Several defendants. The denial of a motion for a change of place of trial, made by one defendant, does not prejudice the right of another defendant, subsequently served with summons, to make a similar motion. *Supreme Ct.*, *Sp. T.*, 1859, *New Jersey Zinc Co. v. Blood*, 8 *Abbotts' Pr.*, 147.

257. Moving after stipulation. That where the rules do not provide otherwise, an enlargement of time may be applied for *ex parte* after

an enlargement by stipulation; but the application should disclose the stipulation. *Chancery*, 1831, *Fitch v. Hazeltine*, 2 *Paige*, 416.

XVI. ORDERS.

1. In General.

258. Order defined, as a direction of a court or judge made or entered in writing, and not included in a judgment. *Code of Pro.*, § 400.

259. The action of the court, not the terms of the notice, are the test whether the determination of an application is an order or a judgment. Granting a "motion" for judgment on a demurrer is a judgment. *Supreme Ct.*, *Sp. T.*, 1858, *Roberts v. Morrison*, 7 *How. Pr.*, 396; *S. C.*, 11 *N. Y. Leg. Obs.*, 61.

260. That an illegal provision in an order, which is separable from the rest, and has been disregarded, does not vitiate the proceedings as to the rest. *Supreme Ct.*, 1857, *People v. Onummings*, 8 *Park Cr.*, 848.

261. Form of caption of order under judiciary act. *Matter of Myers*, 8 *How. Pr.*, 284.

262. Mistake of the clerk in drawing up a rule, amended on application to the court. *Church v. United Ins. Co.*, 1 *Oct.*, 7.

263. Error in title. An order, agreed upon by attorneys, in open court, allowing defendant time to appeal, entered and acted upon by both parties, but in which defendant's Christian name was erroneously stated;—*Held*, valid and amendable. *Supreme Ct.*, *Sp. T.*, 1857, *People v. Tarbell*, 17 *How. Pr.*, 120.

264. Chambers' order made and entitled at special term. The mere entitling an order as at special term, which by law may be made before a judge out of court, or the making of it by the judge when sitting at special term, instead of when sitting at chambers, does not vitiate the order. He has the power to make the order as a judge, and it detracts nothing from the force of the order made by him as a judge, that he makes it at the special term, or entitles it as made at the special term. And if such an order is to be appealed from, it is to be entered as if made at the special term. [*Code of Pro.*, § 350.] *Supreme Ct.*, 1855, *Matter of Kniekerbocker Bank*, 19 *Barb.*, 602; *S. P.*, *Sp. T.*, 1857, *Wiokes v. Dresser*, 4 *Abbotts' Pr.*, 98; *S. C.*, 13 *How. Pr.*, 331; and see *Court*, 31; *Main v. Pope*, 16 *How. Pr.*, 278; but compare *Harris v. Clark*, 10 *Id.*, 415.

265. Special term order at circuit. An order which can only be made at special term,

Orders;—Filing Papers and Entering Order;—Notice of Entry. Service. Enforcing.

is void if made at circuit when there was no special term. *Supreme Ct.*, 1849, *Bedell v. Powell*, 8 *Code R.*, 61.

266. Delay of the court. After defendant has moved to change the place of trial, but before a decision of the motion, if there is no stay of proceedings, plaintiff may take an inquest; but if, subsequently, a decision is rendered granting the motion, the inquest will be defeated thereby. The order takes effect as of the time the motion was made. Delay of the court should not prejudice the party. [4 Barb., 524.] *Supreme Ct., Sp. T.*, 1857, *Willson v. Henderson*, 15 *How. Pr.*, 90.

267. The doctrine of the conclusive effect of an adjudication, does not apply to the decision of a summary application, but a further discussion of the same subject may be had, on further facts. *Ct. of Errors*, 1816, *Simson v. Hart*, 14 *Johns.*, 68.

Or in the more regular form of a suit. 1823, *Dickenson v. Gilliland*, 1 *Cow.*, 495. See, also, **FORMER ADJUDICATION**, 66-71.

268. An order empowering a trustee of infants, 1, to sell, or 2, to mortgage, or 3, to convey in satisfaction of any debts, at a valuation; and providing that every sale, and mortgage, and conveyance in satisfaction shall be approved by a master,—*Held*, not to require approval in case of a sale for cash. *Ct. of Errors*, 1888, *Cochran v. Van Surlay*, 20 *Wend.*, 365; affirming S. O., *sub nom.* *Clarke v. Van Surlay*, 15 *Id.*, 436.

269. An order requiring a bond, is satisfied by an undertaking, if it is such as would be effective for the same purpose. *Supreme Ct., Sp. T.*, 1858, *People v. Lowber*, 7 *Abbotts' Pr.*, 158.

270. A party who is unable to fulfil the conditions for which, on opening a default, he is required to stipulate, should seek his remedy, not by appeal from the order which required the stipulations, but by giving the required stipulations; and if by reason of facts beyond his control, he cannot comply with it, he should then set up such facts in answer to the defendant's motion founded on his omission to comply. *N. Y. Superior Ct.*, 1852, *Gale v. Vernon*, 4 *Sandf.*, 709.

2. Filing Papers and Entering Order.

271. Filing. It is the duty of the attorney to file the affidavits on making or opposing a motion, whether enumerated or non-enumer-

ated, and he will be compelled to do so upon a mere suggestion; nor can he or the party object that filing them will criminate him. *Supreme Ct.*, 1825, *Anonymous*, 5 *Cow.*, 18.

272. Where several applications are decided or several directions in a cause are given at the same time by the court, unless the court otherwise direct, the whole should be embraced in one order. And if any thing is omitted, the other party should not enter an additional order, but apply to have it corrected. *Chancery*, 1837, *Hunt v. Wallis*, 6 *Paige*, 371.

273. Entry and settlement. Orders not effectual till entered. If not entered within twenty-four hours, any party interested may enter. If its provisions are special, copy should be served before settlement. *Chancery*, 1833, *Whitney v. Belden*, 4 *Paige*, 140. Compare *Hoffman v. Treadwell*, 5 *Id.*, 83.

274. Filing papers regulated. *Rule 3 of 1858.*

275. Upon a motion before a judge out of court upon notice, the affidavits must be filed by the attorney, and the order must be entered by the prevailing party. *Supreme Ct., Chambers*, 1848, *Savage v. Relyea*, 3 *How. Pr.*, 276; S. O., 1 *Code R.*, 42; and see *Nicholson v. Dunham*, *Id.*, 119.

276. Order of a judge, enlarging time, made *ex parte* at chambers, need not be entered with the clerk; but may be disregarded, unless the affidavit, or a copy thereof, is served with a copy of the order. *Supreme Ct., Chambers*, 1848, *Savage v. Relyea*, 3 *How. Pr.*, 276; S. O., 1 *Code R.*, 42.

277. As the Code does not expressly require affidavits to be filed, if it appear on a motion to set aside an order for a defect in the affidavits, that a sufficient affidavit was used on the hearing of the motion, though not filed, the order should not be set aside. *Supreme Ct., Sp. T.*, 1850, *Vernam v. Holbrook*, 5 *How. Pr.*, 8.

278. Affidavits on which injunction or attachment or service by publication or substituted service has been ordered, must be filed with the order. *Rule 4 of 1858.*

279. An order opening a default is of no avail to support a notice of argument given before the order has been entered and served. *Supreme Ct., Sp. T.*, 1854, *Ayres v. Covill*, 9 *How. Pr.*, 573.

8. Notice of Entry. Service. Enforcing.

280. Notice, when necessary. Where a judge who had granted a stay of proceedings

Orders;—Conditions;—Void and Voidable.

on a verdict, subsequently entertained an application to modify it by allowing judgment to be entered, which application the adverse party opposed,—*Held*, that notice of his order granting the application was not necessary to be given to the adverse party before the entry of judgment. *Supreme Ct., Sp. T., 1847, Ladd v. Ingham, 8 How. Pr., 90.*

281. Notice of resettlement. When an order is settled *ex parte*, and entered and a copy served, but is afterwards resettled and modified by the judge who made it, by modifying the original order, the party obtaining the order, if he would limit the time in which to appeal from it, must cause it to be entered as finally settled, and serve a copy of it anew. *N. Y. Superior Ct., 1854, Bowman v. Earle, 8 Duer, 691.*

282. A party who obtains a rule must take notice of it. *Supreme Ct., 1827, Jackson v. Johnson, 7 Cow., 419. N. Y. Superior Ct., 1848, Mottram v. Mills, 1 Sandf., 671.*

283. Under the act of 1844 (Laws of 1844, 376, ch. 415, § 11),—which authorizes examination of non-residents of the city of New York, *de bene esse*, in criminal cases there, and requires the judge's order for examination to specify the length of notice to be given,—an order specifying an hour of the same day as the time for the examination, and directing the order to be served forthwith on the accused, is sufficient; and if the accused attends without objection, due service may be presumed. *Supreme Ct., 1850, People v. Chrystal, 8 Barb., 545.*

284. To bring a party into contempt for disobeying a judge's order, the original must be shown at the time the copy is served. [8 T. R., 351.] *Supreme Ct., 1808, Howland v. Ralph, 3 Johns., 20.*

Except for this purpose, showing an original order is unnecessary. 1827, *Bank of Utica v. Kibby, 7 Cow., 148.*

285. To bring into contempt for non-payment of costs, greater strictness is required than in ordinary cases; and the person serving the taxed bill, &c., must show his authority to receive the costs. *Supreme Ct., 1808, Jackson v. Virgil, 3 Johns., 188.*

286. Order of court. Where an injunction is granted by the court, and not by a judge out of court, it is properly served by delivering a certified copy; exhibiting the original is not requisite. *N. Y. Com. Pl., Sp. T., 1857, Mayor, &c., of N. Y. v. Conover, 5 Abbotts' Pr., 244.*

287. An order directing payment of any sum of money, if not conditional, may be enforced by precept issued of course and without demand. *Laws of 1840, 833, ch. 886, § 15.*

288. That an order that plaintiff pay defendant's costs subsequent to an offer to take judgment (Code, § 885) may be enforced under the Laws of 1845, 491. *N. Y. Superior Ct. 1851, Megrath v. Van Wyck, 3 Sandf., 750.*

289. An order overruling a demurrer with costs absolutely, is an interlocutory order, and the costs may be collected by precept (in a case before the Code), without enrolling the order. *N. Y. Superior Ct., 1849, Poillon v. Houghton, 2 Code R., 14.*

4. Conditions.

290. Where a favor is granted to a party on condition,—e. g., leave to amend on payment of costs,—he must, at his peril, take notice of the order and comply with its conditions. *Supreme Ct., 1840, Willink v. Renwick, 22 Wend., 608.*

291. An order to amend and pay costs, does not make payment a condition precedent. *N. Y. Superior Ct., 1851, Sturtevant v. Fairman, 4 Sandf., 674.*

292. Under an order granted upon payment of costs, with no time specified for their payment, the payment is a condition, and must be made within 24 hours. *Supreme Ct., 1827, Sabin v. Johnson, 7 Cow., 421. To the same effect, 1811, Pugsley v. Van Alen, 3 Johns., 852.*

293. Twenty days allowed for performance of condition; but in case of costs to be adjusted, fifteen days allowed for payment after adjustment. *Rule 57 of 1858.*

294. Rule 85 of the Supreme Court (Rule 57 of 1858)—allowing time for the payment of costs, or performance of condition imposed by an order—has no application to an order under section 244 of the Code for the satisfaction of part of plaintiff's claim, admitted by defendants. Such order may be enforced either as a judgment or as a provisional remedy. *N. Y. Com. Pl., 1858, Baker v. Nussbaum, 1 Hill., 549.*

5. Void and Voidable Orders. Disregarding.

295. An irregular order of the court is not void; but a common order entered contrary to it may be made good by relation, by setting the former aside. *Chancery, 1885, Studwell v. Palmer, 5 Paige, 166.*

Orders;—Void and Voidable. Disregarding;—Vacating and Modifying.

296. An irregular order of the court made *ex parte* is not void. [8 Paige, 166; 6 Id., 871; 2 Wend., 625.] *Supreme Ct., Sp. T.*, 1854, *Harris v. Clark*, 10 *How. Pr.*, 415. To similar effect, see *Davenport v. Sniffen*, 1 *Barb.*, 223.

297. That a chamber order which is entirely unauthorized is a nullity. *Chancery*, 1837, *Hunt v. Wallis*, 6 *Paige*, 871.

298. An order to stay is not to be treated as a nullity merely because the affidavit on which it was founded failed to conform to the requisites of the rules. Though erroneous, it must be respected until revoked. *Supreme Ct.*, 1840, *Starr v. Francis*, 22 *Wend.*, 633.

299. An order to stay proceedings, though improvidently made, or not in due form, is effectual until revoked. *Supreme Ct.*, 1824, *Roosevelt v. Gardinier*, 2 *Cow.*, 463; 1824, *Jackson v. Jackson*, 3 *Id.*, 73. To the same effect, 1840, *Starr v. Francis*, 22 *Wend.*, 633. *Chancery*, 1832, *Osgood v. Joslin*, 3 *Paige*, 195.

300. Until the *vacatur* of a stay it is irregular to proceed. *Supreme Ct.*, 1829, *Duncan v. Sun Fire Ins. Co.*, 2 *Wend.*, 625.

301. An order improvidently granted, or irregular, or obtained by fraud of a party, is not to be disregarded as void, but application must be made to the court or officer. *Supreme Ct.*, 1843, *Gould v. Root*, 4 *Hill*, 554.

302. Where the officer has no jurisdiction—*e. g.*, a Supreme Court commissioner, to stay proceedings after verdict—his order is null, and may be disregarded. *Supreme Ct.*, 1843, *Spencer v. Barber*, 5 *Hill*, 568; 1846, *Methodist Episcopal Church v. Tryon*, 2 *How. Pr.*, 132; *Sp. T.*, 1849, *Schenck v. McKie*, 4 *Id.*, 246; and see *Haner v. Bliss*, 7 *Id.*, 246.

303. May obey. That a party is not bound to treat as a nullity an order which is obtained in conflict with rules of court. *Chancery*, 1832, *Osgood v. Joslin*, 3 *Paige*, 195.

304. An order enlarging time may be disregarded unless the affidavit or copy thereof on which it was obtained is served with it. *Code of Pro.*, § 405.

305. If an order extending the time to answer or demur be made without the affidavit of merits required by Rule 20, it may be disregarded as much as if it were made without any affidavit at all. [Code, § 405.] *Supreme Ct., Sp. T.*, 1857, *Ellis v. Van Ness*, 14 *How. Pr.*, 313.

306. Stay of Proceedings. An order stay-

ing proceedings twenty days, when served with the affidavit on which it was granted, cannot be disregarded as void because not accompanied by a notice of motion. It is merely irregular. *Supreme Ct., Sp. T.*, 1852, *Hempstead v. Hempstead*, 7 *How. Pr.*, 8.

307. An order staying proceedings does not necessarily enlarge the time of the party obtaining it, and hence a copy of the affidavit need not be served with it. [Code, § 405.] *Supreme Ct., Sp. T.*, 1851, *Langdon v. Wilkes*, 1 *Code R., N. S.*, 10.

308. An order to produce authority of attorney to bring ejectment, which does not designate a place for its production, and specify the officer before whom it is to be produced, is null, and may be disregarded. *Supreme Ct.*, 1846, *Turner v. Davis*, 2 *Den.*, 187.

309. Naming the officer is not enough. 1846, *Turner v. Davis*, 2 *How. Pr.*, 86.

6. Vacating and Modifying.

310. Absence of counsel. A rule regularly and fairly obtained, will not be vacated at a subsequent term, on the ground of the absence of the counsel for the other party when the motion was made. *Supreme Ct.*, 1801, *Hildrith v. Harvey*, 2 *Johns. Cas.*, 221.

311. When the court is not full, very slight reasons induce them to refuse to vacate a rule, granted on argument in full court. *Supreme Ct.*, 1804, *Day v. Wilber*, 2 *Cas.*, 251.

312. Who may vacate. That an officer who has power to make an order may modify or revoke it. *Moore v. Merritt*, 9 *Wend.*, 482; *Bigelow v. Heaton*, 2 *How. Pr.*, 207.

313. An order made by one judge, or commissioner, can be set aside only by himself or by the court; not by any other judge or commissioner. *Supreme Ct.*, 1842, *Hart v. Butterfield*, 3 *Hill*, 455.

314. Court. A motion to dissolve or set aside an order of a judge at chambers, may be heard by the court. The Supreme Court has power, both in suits at law and in equity, to vacate any order made in a cause by a judge out of court. [1 *Barb. Ch. Pr.*, 637; 4 *Johns. Ch.*, 173; 6 *How. Pr.*, 182; 8 *Danl. Pr.*, 1895; 4 *Hill*, 554; 3 *Id.*, 455; 9 *Wend.*, 470; 6 *Id.*, 555; 1 *Burr.*, 350; 3 *Chitt. G. Pr.*, 33; Code, § 324; *Jud. Act*, § 16.] *Supreme Ct., Sp. T.*, 1853, *Woodruff v. Fisher*, 17 *Barb.*, 224. To the same effect [citing, also, 4 *Cow.*, 539], 1851, *Lindsay v. Sherman*, 5 *How. Pr.*, 308; *Sp. T.*,

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1850, *Blake v. Looy*, 6 *Id.*, 108. Compare *ARREST*, 270; *ATTACHMENT*; *COURT*, 26, 208, 205.

The contrary practice was taken in *Snyder v. Olmstead*, 1 *How. Pr.*, 194; and see *Conway v. Hitchins*, 9 *Barb.*, 878.

315. An application to vacate or modify an *ex-parte* order, if made before another judge than him who granted the order, must be made, not at chambers, but in court and on notice. *Supreme Ct., Chambers*, 1856, *Cayuga County Bank v. Warfield*, 13 *How. Pr.*, 439.

316. Vacating without notice. Section 824 of the Code applies as well to injunction-orders as to other orders. The special provision made by section 225, is in addition to the powers conferred by section 824. [Overruling 1 Code R., 121.] It is competent for a judge to vacate or modify an injunction-order, without notice; but this should not be done except in urgent cases. *Supreme Ct.*, 1853, *Bruce v. Delaware & Hudson Canal Co.*, 8 *How. Pr.*, 440.

317. Motion necessary. An attachment under the Code, being merely a provisional remedy, the sufficiency of the affidavits on which it is granted is not a jurisdictional question, and it can be set aside only on a motion in the action, and cannot be collaterally impeached. *Supreme Ct.*, 1851, *Matter of Griswold*, 18 *Barb.*, 412.

318. Weight of evidence. An order granted by a justice of this court, under a statute authorizing him to act on its appearing to his satisfaction, should not be set aside because the evidence upon which it was granted may be thought slight. *Supreme Ct., Sp. T.*, 1853, *Roche v. Ward*, 7 *How. Pr.*, 416.

319. The decision of the judge that the facts which authorize a provisional remedy,—*s. g.*, an order of arrest,—exist, is, like that of a jury on the weight of evidence, conclusive; and if there was legal evidence, another judge should not vacate the order on the ground that it was insufficient. *Supreme Ct., Sp. T.*, 1854, *Courter v. McNamara*, 9 *How. Pr.*, 255.

320. Appeal from order on default. That where the court at special term makes, upon default, an order which it had no authority to make, the party prejudiced may either move at special term to set it aside for irregularity, or may appeal to the general term. *Supreme Ct.*, 1857, *Wilkinson v. Tiffany*, 4 *Abbotts' Pr.*, 98.

321. To get rid of an order improperly made by a judge at chambers,—*s. g.*, an in-

definite and continuing stay of proceedings,—the proper practice is to move the court to set it aside; not by appeal. *Supreme Ct.*, 1857, *Bank of Genesee v. Spencer*, 15 *How. Pr.*, 14.

322. Modification by another judge. An order made by one justice at special term,—*Held*, to have been properly modified by another justice at special term. *Supreme Ct.*, 1855, *Selden v. Christophers*, 1 *Abbotts' Pr.*, 272.

323. An order by consent,—*s. g.*, an order of reference stipulating that an answer and schedules shall be deemed correct,—cannot be modified or varied, in an essential part, without the assent of both parties to such order; although the court may give such further directions as necessary to carry such order into effect, according to its spirit and intent. *Chancery*, 1884, *Leitch v. Cumpston*, 4 *Paige*, 476.

MUNICIPAL CORPORATIONS.

[Under this title are presented those matters which are common to this class of Corporations in general; but the titles of the several cities and villages should also be referred to for matters which, though turning upon special statutes, further illustrate this head of the law. The general rights and duties of OFFICERS, and questions of CONSTITUTIONAL LAW, are presented under those titles respectively.]

- I. IN GENERAL.
- II. CORPORATE POWERS.
 1. General principles.
 2. Special powers.
- III. OFFICERS.
- IV. BY-LAWS AND RESOLUTIONS.
- V. LIABILITIES.
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- VI. LOCAL IMPROVEMENTS.
 1. In general.
 2. Estimate and assessment.
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I. IN GENERAL.

1. The Legislature to provide for the organization of cities and villages, and restrict their powers of taxation, assessment, &c. *Const. of 1846*, art. 8, § 9.

2. Mode of applying for incorporation of a city or alteration of charter, &c. 1 *Rev. Stat.*, 86, §§ 1-3; 155, §§ 1-4.

3. Who constitute. It is the citizens of a city, and not the Common Council, who con-

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stitute the "Corporation" of the city. The aldermen and other charter officers are only officers of the Corporation. *Supreme Ct., Sp. T.*, 1857, *Lowber v. Mayor, &c.*, of N. Y., 5 *Abbotts' Pr.*, 325.

4. **Cities**, enumerated and bounded. 1 *Rev. Stat.*, 5 ed., 343, 372.

As to the **Power** of the Legislature over municipal corporations, see CONSTITUTIONAL LAW, 132-142, 318-321.

5. **Dissection** legalized in cities whose population exceeds 30,000. *Laws of 1854*, 282, ch. 123.

II. CORPORATE POWERS.

1. General Principles.

6. **Governmental, and private** powers distinguished. *Lloyd v. Mayor, &c.*, of N. Y., 5 *N. Y.* (1 *Seld.*), 369; *Bailey v. the same*, 3 *Hill*, 531; *Lowber v. the same*, 7 *Abbotts' Pr.*, 248; *Green v. the same*, 5 *Id.*, 503.

7. **Contracts**. A municipal corporation has no power, as a party, to make a contract which should control or embarrass their legislative powers and duties.* *Supreme Ct.*, 1826, *Brick Presbyterian Church v. Mayor, &c.*, of N. Y., 5 *Cow.*, 538. Followed, 1827, *Stuyvesant v. Mayor, &c.*, of N. Y., 7 *Id.*, 588. Compare *Attorney General v. Mayor, &c.*, of N. Y., 3 *Duer*, 119, 131, 147; *Davis v. the same*, 14 *N. Y.* (4 *Kern.*), 506; *Costar v. Brush*, 25 *Wend.*, 628; and see *N. Y. & Harlem R. R. Co. v. Mayor, &c.*, of N. Y., 1 *Hill*, 562, 588.

8. Thus where the Corporation granted a lot to be used as a burying-ground, covenanting for quiet enjoyment, and afterwards, by ordinance, forbade it to be so used;—*Held*, that this was not a breach of the covenant, but an effectual legislative abrogation of it. *Supreme Ct.*, 1826, *Brick Presbyterian Church v. Mayor, &c.*, of N. Y., 5 *Cow.*, 538.

9. An ordinance or by-law of a municipal corporation cannot so cripple its powers as to disable it from performing its legal duties. *Supreme Ct.*, 1840, *Exp. Mayor, &c.*, of Albany, 28 *Wend.*, 277.

10. **Assuming liability of another**. A municipal corporation has no right to assume the defence of an action to which it is not a party, and which it has no interest in resisting.—*e. g.*, actions brought against the super-

visors of the county for penalties for an alleged neglect of duty in refusing to audit and allow salaries to associate judges of general sessions of the city and county, appointed under an unconstitutional law,—nor to pay judgments and costs in such suits; and negotiable drafts drawn for such payments are void. *Ct. of Appeals*, 1850, *Halstead v. Mayor, &c.*, of N. Y., 3 *N. Y.* (8 *Comst.*), 430; affirming *S. C.*, 5 *Barb.*, 218.

11. **Contracts**. Where the officers of a Corporation do an act in excess of the corporate power, the Corporation is not bound; and when the statute under which the Corporation acts restricts its action to a particular mode, none of the agents through whom the Corporation acts can bind it in any other than the mode prescribed. [5 *Barb.*, 649.] Those who deal with a Corporation, the mode of whose action is thus limited, must take notice of the restriction in its charter, and see to it that the contracts on which they rely are entered into in the manner authorized by the charter. *N. Y. Superior Ct.*, 1857, *Brady v. Mayor, &c.*, of N. Y., 2 *Bow.*, 173; *S. C.*, 7 *Abbotts' Pr.*, 234; 16 *How. Pr.*, 432; affirmed, *Ct. of Appeals*, 1859, 20 *N. Y.* (6 *Smith*), 312. To similar effect, *Supreme Ct., Sp. T.*, 1858, *Appleby v. Mayor, &c.*, of N. Y., 15 *How. Pr.*, 428.

12. One who, instead of examining into the validity of proceedings to authorize a local improvement, enters into a contract with the Corporation to do the work, and performs it, relying on their representation that the proceedings are regular, cannot recover from the Corporation damages for the falsity of such representation. He might have ascertained its falsity by reference to the records; and to allow him to recover, would evade the statutory restrictions on the power of the Corporation. *Supreme Ct.*, 1857, *Swift v. City of Williamsburgh*, 24 *Barb.*, 427.

13. **Employing surveyor**. That a municipal corporation have authority to employ a surveyor to furnish copies of an original map, or to make new surveys, and furnish a new map, exhibiting the streets, squares, wharves, &c. *Ct. of Appeals*, 1858, *People v. Flagg*, 17 *N. Y.* (8 *Smith*), 534; *S. C.*, 16 *How. Pr.*, 36.

14. **Presumption in favor of discretion**. Courts are bound to assume, where a discretion is vested in a municipal body exercising functions of a legislative character, that good

* Approved in *West. Sav. Fund v. City of Philadelphia*, 31 *Penn.*, 175.

Corporate Powers;—Special Powers.

reasons existed for doing an act which was the result of such a discretion. *N. Y. Com. Pl., Sp. T.*, 1858, *N. Y. & Harlem R. R. Co. v. Mayor, &c.*, of N. Y., 1 *Hill*, 562.

15. Estoppel. A distinction is to be observed between the legislative powers of a municipal corporation and the exercise of their rights over property belonging to them; and no act done by them in regard to their property, can be set up as an estoppel to restrain them from acting in matters which require legislation for the interests of the city. *Supreme Ct., Sp. T.*, 1858, *Opening of Albany-street*, 6 *Abbotts' Pr.*, 278.

16. The charter of the city of Hudson gives the Common Council no power to restrict the erection of wooden or frame buildings, or limit the size of buildings. *Chancery*, 1838, *Mayor, &c.*, of Hudson *v. Thorne*, 7 *Paige*, 261.

17. Special restrictions. Though they might prohibit a business which was dangerous in promoting fires, yet, since all by-laws must be reasonable, they cannot prohibit the erection of wooden buildings for carrying on such business, while they permit such business to be carried on in buildings already erected. *Id.*

18. Railroads. A municipal corporation, by virtue of its general powers over the streets, has power to authorize laying a railway track therein. *Supreme Ct.*, 1853, *Milbau v. Sharp*, 15 *Barb.*, 193; *Stuyvesant v. Pearsall*, *Id.*, 244. Compare *Williams v. N. Y. Central R. R. Co.*, 18 *Id.*, 222; reversed, *Ct. of Appeals*, 1857, 16 *N. Y.* (2 *Smith*), 97.

19. Railroads in cities, how to be authorized. *Laws of 1854*, 323, ch. 140.

20. Streets. The authority and obligations of municipal corporations considered in reference to the streets. *Hope v. Sixth and Eighth Avenue R. R. Cos.*, 2 *Liv. Law Mag.*, 584.

21. Nuisance. A municipal corporation has no more right to maintain a nuisance on its lands than a private person possesses. *Supreme Ct., Sp. T.*, 1848, *Brower v. Mayor, &c.*, of N. Y., 3 *Barb.*, 254.

22. Abating. Although a municipal corporation is indictable for neglecting to remove a public nuisance which it is empowered to abate, it has not, as such, authority to destroy a bulkhead authorized by law, merely on the ground that its destruction is necessary for the preservation of public health; and is not indictable for neglecting to remove such an

obstruction, though it is the cause of a nuisance. *Supreme Ct.*, 1834, *People v. Corporation of Albany*, 11 *Wend.*, 539.

23. The power to borrow, contract debts, and loan credit, regulated and restricted. *Laws of 1853*, 1135, ch. 608.

24. Credit. A municipal corporation having power to contract a debt, may, if not restricted, contract upon credit. *Ct. of Appeals*, 1856, *Ketchum v. City of Buffalo*, 14 *N. Y.* (4 *Kern.*), 856.

25. Real property. A municipal corporation may, at common law, purchase and hold real property necessary for its powers; and an express power to establish and regulate markets includes a power to purchase the site requisite for a market. *Id.*; *S. P.*, 1858, *Peterson v. Mayor, &c.*, of N. Y., 17 *N. Y.* (3 *Smith*), 449; reversing *S. O.*, 4 *E. D. Smith*, 418.

2. Special Powers.

26. Revocation. Political power conferred on a Corporation for its government,—*e. g.*, the right to license the sale of liquors,—is not a vested right, as against the government; and may be taken away by the Legislature. *Supreme Ct.*, 1835, *People v. Morris*, 18 *Wend.*, 325.

27. It seems, too, that in such case a corporation cannot object to a law changing the powers of the Corporation,—only the Corporation can do so. *Id.*

28. The court can look only to the particular charter, and not to the charters of similar Corporations, for powers claimed under it, whether express or constructive; and when a power is claimed which in its exercise will derogate from individual right, it ought not to be allowed on ambiguous words. [See 4 *Pet.*, 152.] *Supreme Ct.*, 1841, *Wright v. Briggs*, 2 *Hill*, 77.

29. Discretion not to be delegated. The statute (1833, ch. 293, § 84) authorized the Common Council of the city of Schenectady to make certain improvements "in such manner as they may prescribe, under the superintendence and direction of the city superintendent." They passed an ordinance, directing certain of such improvements to be made in such manner as the superintendent, under the direction of the committee on roads of the Common Council, shall direct and require." *Held*, in an action against the owner of lots

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for expenses of improvements, that the Common Council could not so delegate the discretion conferred to fix the manner in which the improvement should be made; and that the ordinance was void. *Ct. of Appeals*, 1851, *Thompson v. Schermerhorn*, 6 *N. Y.* (2 *Seld.*), 92; affirming *S. C.*, 9 *Barb.*, 152.

30. Drafts on treasury. The provision of a charter, requiring an order and warrant of the Common Council for drawing money from the treasury, is satisfied by a draft authorized according to the usual course of corporate business. "Order" means only direction, which may be express or implied. *Supreme Ct.*, 1848, *Kelley v. Mayor, &c.*, of Brooklyn, 4 *Hill*, 268.

31. A power to sell lands for taxes imposed upon such lands, does not authorize selling lands for taxes required laid upon the owners or occupants. *Supreme Ct.*, 1848, *Sharp v. Speir*, 4 *Hill*, 76.

32. Power to regulate butchers and the places and manner of selling meats, and to prevent unlicensed persons from acting as butchers, authorizes an ordinance regulating the killing and bleeding of meats, and imposing a penalty for infringement. Such ordinances cannot be considered void as being in restraint of trade. *Supreme Ct.*, 1848, *City of Brooklyn v. Cleves*, *Hill & D. Supp.*, 281.

33. Power to regulate vending of meats and the measuring of any commodity,—*Held*, not to authorize an ordinance forbidding the sale of unwholesome meats or other provisions so as to sustain a penalty for selling putrid eggs. *Supreme Ct.*, 1848, *Mayor, &c.*, of Rochester v. *Rood*, *Hill & D. Supp.*, 146.

34. Nuisances. Under a power to make by-laws relative to nuisances, a by-law prohibiting the keeping of a ball-alley for gain, is valid. *Supreme Ct.*, 1848, *Tanner v. Trustees of Albion*, 5 *Hill*, 121.

As to what is a nuisance, see NUISANCE.

35. A power to abate and remove nuisances confers no authority to prevent them, nor to impose penalties for their creation; but a power to do all acts, and make all regulations which the Council deem necessary for the preservation of health and the suppression of disease, implies full authority to pass ordinances for the prevention and punishment of nuisances injurious to health. *Supreme Ct.*, 1850, *City of Rochester v. Collins*, 12 *Barb.*, 559.

36. Under a general power conferred upon

a municipal corporation to abate nuisances, the Corporation has not power to destroy a valuable dam which was lawfully erected. They must proceed by indictment or otherwise. *Supreme Ct.*, 1852, *Clark v. Mayor, &c.*, of Syracuse, 18 *Barb.*, 32.

37. Extra territorial power. A municipal corporation having power by its charter "to purchase, hold, and convey any estate, real or personal, for the public use of said Corporation, is not thereby authorized to hold lands beyond its boundaries, for governmental purposes,—e. g., to be used as a highway,—for this would conflict with the jurisdiction of surrounding towns; and a conveyance to such Corporation, of lands beyond its boundaries, for the purpose of a street is void. *Ct. of Appeals*, 1858, *Riley v. City of Rochester*, 9 *N. Y.* (5 *Seld.*), 64; reversing *S. C.*, 18 *Barb.*, 321.

38. Examination of witnesses. Certain officers authorized to compel testimony of witnesses in matters relating to the affairs of the Corporation. *Laws of 1848*, 86, ch. 57, § 4; 1860, 48, ch. 39.

III. OFFICERS.

39. Board of Aldermen. It is a general rule of practice in legislative bodies which consist of two branches, that all business before them and unfinished at the end of a session is discontinued; and if taken up at all at a session following, it must be taken up *de novo*. This rule is applicable to the action of the New York Common Council; and an act passed by the Board of Assistant Aldermen in 1852, and not by the Board of Aldermen until 1853, when a new board comes into office, is void. The making a regulation of the city streets, and the making a grant of a franchise, are both legislative acts within the meaning of the rule. *Supreme Ct.*, 1856, *Wetmore v. Story*, 22 *Barb.*, 414; *S. C.*, 3 *Abbotts' Pr.*, 262.

40. Alderman acting as mayor. The charter of a city provided that no alderman should be appointed mayor, but, provided also, that in case of a vacancy, the presiding officer of the Common Council should possess all the powers of mayor. *Held*, that an alderman, though chosen such presiding officer after a vacancy, could legally act as mayor. *Supreme Ct.*, 1842, *State of N. Y. v. City of Buffalo*, 2 *Hill*, 434.

41. Attorney of the Corporation. The principle that where an attorney has been re-

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tained, and has appeared in the action, the party will not be allowed to revoke his authority and appoint a new one without the order of the court, or of a judge at chambers, duly entered in the minutes of the court, applies to all suitors; and municipal corporations having a law department created by their charter, and an attorney and counsel elected or appointed for a given period of time, are no exceptions. *Supreme Ct., Sp. T.*, 1856, *Parker v. City of Williamsburg*, 13 *How. Pr.*, 250. Compare *Brady v. Mayor, &c.*, of N. Y., 1 *Sandf.*, 569.

42. Officers not to be contractors. Members of Common Councils, trustees of villages and supervisors of towns, forbidden to become contractors with their boards, or interested as principal or surety. *Laws of 1843*, 36, ch. 57.

43. No person elected to Common Council, eligible to office within their gift, except officers whose appointment is vested in them by the Constitution. 1 *Rev. Stat.*, 116, § 2.

44. Number of notaries and commissioners of deeds in cities, except New York, to be fixed by Common Councils from time to time. *Laws of 1848*, 271, ch. 161.

45. Expenses. Where the charter requires an officer of a municipal corporation to do an act which involves expense, the expense is chargeable to the Corporation, and they are liable on his contract therefor. *Supreme Ct.*, 1831, *Tucker v. Trustees of Rochester*, 7 *Wend.*, 254.

46. Salary, how recovered. After a person has been duly declared and certified to be elected to an office in a municipal corporation, and has taken the oath and entered on the office, his salary is a debt against the Corporation, and may be recovered by suit, like any other debt; and hence he cannot proceed by mandamus to compel payment. *Supreme Ct., Sp. T.*, 1857, *People v. Thompson*, 25 *Barb.*, 78.

47. Removal. An officer appointed by a municipal corporation to an office created by them, is not bound by a removal from office without actual notice of the removal. Such an office is in the nature of a contract of employment; and if the Corporation suffer the officer to go on rendering the services, after they have resolved on his removal, they are liable for his compensation until they give him notice. *N. Y. Com. Pl.*, 1844, *Jarvis v. Mayor, &c.*, of N. Y., 2 *N. Y. Leg. Obs.*, 896.

IV. BY-LAWS AND RESOLUTIONS.

48. Form. A by-law passed under an authority to pass such, if found necessary, need

not recite any adjudication of such necessity; nor need the declaration in an action on such a by-law aver any such adjudication, nor that the prohibition was necessary. Their judgment of its necessity is implied in the enactment itself. [12 *Wheat.*, 19.] *Supreme Ct.*, 1827, *Stuyvesant v. Mayor, &c.*, of N. Y., 7 *Cow.*, 588.

49. Non-residents. That a municipal corporation has no power to make a by-law which will be binding on owners of property within its limits who reside without its limits, as a ground of criminal punishment. *Reed v. People*, 1 *Park. Cr.*, 481.

50. Limit of penalty. Under a charter or statute authorizing the Corporation to impose penalties of not more than \$250, no more than that can be imposed for any one offence, or for the violation of the by-laws in any one transaction. A by-law imposing a penalty of \$125 for every cwt. of gunpowder kept, is void, for with the same propriety the penalty might have been imposed on every grain. [Cowp., 640.] *Supreme Ct.*, 1815, *Mayor, &c.*, of N. Y. v. *Ordrenan*, 12 *Johns.*, 122. Compare *Stokes v. Corporation of N. Y.*, 14 *Wend.*, 87.

51. Validity. A by-law may be good in part, and void for the rest. [2 *Kyd on C.*, 155.] *Supreme Ct.*, 1828, *Rogers v. Jones*, 1 *Wend.*, 287.

52. That a by-law may be valid, though it further regulate a subject already regulated by general statute. *Id.*

53. An ordinance requiring coal to be weighed by city weighers, under a penalty,—*Held*, not void as in restraint of trade, nor unreasonable. *Supreme Ct.*, 1835, *Stokes v. Corporation of N. Y.*, 14 *Wend.*, 87.

54. Infringing license. An ordinance of a municipal corporation prohibiting the sale of strong or spirituous liquors on the Sabbath, is void so far as it conflicts with the right of licensed innkeepers to sell liquors to be drank in their houses, to lodgers and lawful travellers. *Supreme Ct., Sp. T.*, 1852, *Wood v. City of Brooklyn*, 14 *Barb.*, 425.

55. Self-defence. A resolution of the Common Council of a city, empowering the mayor to take measures for the safety of the city, and borrow arms for its defence, and to give the city's bond for the return of the arms,—*Held*, valid, and the bond obligatory. *Supreme Ct.*, 1842, *State of N. Y. v. City of Buffalo*, 2 *Hill*, 434.

Liabilities;—Upon Contract.

56. Farmers. A butcher who has a farm, as a convenient appendage to his business, to fatten sheep upon, is not "a farmer" within an ordinance forbidding persons to sell meat without a license, except farmers selling the produce of their farms. *Supreme Ct.*, 1837, *Trustees of Rochester v. Pettinger*, 17 *Wend.*, 265.

57. Appropriation. A resolution that a specified periodical allowance be appropriated to an officer for the payment of the expenses of keeping a horse and wagon, which is required to enable him to discharge his duties, appropriates the entire sum, not merely what may be necessary for the expenses. *Supreme Ct.*, 1857, *People v. Northrop*, 15 *How. Pr.*, 152.

58. Repeal by statute. A statute imposing a penalty for an act, does not necessarily operate as a repeal of a previous municipal ordinance, which imposed a penalty for the same act. Unless irreconcilably inconsistent, both may stand together. *N. Y. Com. Pl.*, 1854, *Mayor, &c., of N. Y. v. Hyatt*, 8 *E. D. Smith*, 156. Compare *Mayor, &c., of N. Y. v. Nichols*, 4 *Hill*, 209.

V. LIABILITIES.

1. Upon Contract.

59. Contract for local improvement. If the Corporation are empowered to grade, pave, and drain streets, they have an implied power to make general contracts therefor, and this is not restricted by a direction in the charter that the expense be assessed upon the property benefited. If they make a contract, by which the compensation is to be paid out of the fund to be raised by assessment, and unreasonably delay making a proper assessment, the contractor may have a general decree against them, for the contract price. The Corporation, therefore, cannot object that a decree in such case, instead of directing them to pay immediately, gives them time to collect the money by assessment. *Chancery*, 1845, *Cumming v. Mayor, &c., of Brooklyn*, 11 *Paige*, 596.

60. Contractor may be restricted to assessment. One who performs services for a municipal corporation in a local improvement, conducted under a statute which makes a fund raised by an assessment solely applicable to the expenses, cannot recover for his services, in an action against the Corporation, without

showing that the latter failed to proceed to raise such fund. *Ct. of Appeals*, 1859, *Baker v. City of Utica*, 19 *N. Y. (5 Smith)*, 326.

61. Assessment sale. An action of covenant does not lie against a municipal corporation for refusing to give a lease to a purchaser on an assessment sale, where the certificate of sale contains no covenant. The remedy is an action on the case, or a mandamus. [10 *Wend.*, 393.] *Supreme Ct.*, 1840, *Western v. Mayor, &c., of Brooklyn*, 23 *Wend.*, 384.

62. Under a conveyance of lands to the Corporation, on condition that they should be immediately inclosed, &c., and used forever as a public square, the Corporation covenanting to stand seized to the use declared, and to perform the conditions of the grant;—*Held*, that the Corporation was bound by the covenant, and liable to the grantor for damages for non-performance. *Chancery*, 1845, *Stuyvesant v. Mayor, &c., of N. Y.*, 11 *Paige*, 414.

63. Ultra vires. A municipal corporation is one of limited powers; and if its officers assume to incur an obligation which it is not authorized to do, it is not made liable by the fact that it has received the consideration for the obligation. A Corporation cannot, by subsequent ratification, make good an act of an agent which it could not have directly empowered. *Supreme Ct.*, 1846, *Hodges v. City of Buffalo*, 2 *Den.*, 110. To similar effect, *Ct. of Appeals*, 1850, *Halstead v. Mayor, &c., of N. Y.*, 8 *N. Y. (3 Const.)*, 430; affirming *S. O.*, 5 *Barb.*, 218. *Supreme Ct.*, 1848, *Boom v. City of Utica*, 2 *Barb.*, 104. Compare *Peterson v. Mayor, &c., of N. Y.*, 17 *N. Y. (8 Smith)*, 440.

64. Ratification. Since the Common Council of the city of New York, having the general power to build markets, is authorized to employ an architect to prepare plans, specifications, &c., for their construction,—if such services, though rendered without authority, are accepted by the Common Council, the city is bound to pay for them. The doctrine of ratification of the acts of an agent is applicable to corporations as well as individuals. *Ct. of Appeals*, 1858, *Peterson v. Mayor, &c., of N. Y.*, 17 *N. Y. (8 Smith)*, 449; reversing *S. O.*, 4 *E. D. Smith*, 418; and see *People v. Flagg*, 17 *N. Y. (8 Smith)*, 584; *S. O.*, 16 *How. Pr.*, 36.

65. Where the contract under which work is done for a municipal corporation is void, because entered into in violation of the charter, the contractor cannot recover for the work

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in any form;—neither under the contract, nor as upon a *quantum meruit*. And a subsequent ratification of the contract by the Common Council, whether before or after the work is done, does not make it binding on the Corporation. *N. Y. Superior Ct.*, 1857, *Brady v. Mayor, &c.*, of N. Y., 2 *Bow.*, 178; *S. C.*, 7 *Abbott's Pr.*, 284; 16 *How. Pr.*, 432; affirmed, *Ct. of Appeals*, 1859, 20 *N. Y.* (6 *Smith*), 312.

2. For Wrongs.

66. Omission to exercise discretionary power. Although a statute makes it the duty of a municipal corporation to make all needful drains, &c., so that they may be indictable for a wilful neglect to do so; they have a discretion, as against individuals, and are not liable for injuries caused by their refusing to construct such a work. *Supreme Ct.*, 1845, *Wilson v. Mayor, &c.*, of N. Y., 1 *Den.*, 595; explaining and limiting *Mayor, &c.*, of N. Y. *v. Furze*, 3 *Hill*, 612. Followed, *Supreme Ct.*, 1858, *Cole v. Trustees of Medina*, 27 *Barb.*, 218.

67. Work not required by law. In order to charge a municipal corporation, or indeed any person, in an action for negligence in the construction or repair of a public work, the law must have imposed the duty, or conferred an authority to do it. If a municipal corporation construct or repair a bridge which their legal duty does not require, they are not liable for injuries resulting from negligence in the execution of the work. [Esp. *N. P.*, 365; 1 *Bac. Abr.*, tit. *Brid.*, 380; 2 *Inst.*, 701; 5 *Bing.*, 91; 3 *Barn. & Ad.*, 77; 1 *Bing. N. C.*, 222.] The mere builder is only liable to his employer. *Ct. of Appeals*, 1849, *Mayor, &c.*, of Albany *v. Cunliff*, 2 *N. Y.* (2 *Comst.*), 165; reversing *S. C.*, 2 *Barb.*, 190.

68. Performance must be careful. Where a municipal corporation has power by its charter "to cause common sewers, drains, &c., to be made in any part of the city," although passing an ordinance for the construction of such a work is a judicial act for which they are not liable; yet the doing of the work, in carrying it out, is ministerial, and it is their duty to see that it is carefully and skilfully done. If, by the want of care or skill in its agents, a culvert be constructed of insufficient capacity to carry off the water in a freshet, the city will be liable to individuals for the damages thereby occasioned. *Ct. of Appeals*, 1850, *Rochester White Lead Co. v. City of*

Rochester, 3 *N. Y.* (3 *Comst.*), 468; *S. P.*, 1851, *Lloyd v. Mayor, &c.*, of N. Y., 5 *N. Y.* (1 *Seld.*), 369. *N. Y. Superior Ct.*, 1848, *Delmonico v. the same*, 1 *Sandf.*, 222. Compare *Radcliff v. Mayor, &c.*, of Brooklyn, 4 *N. Y.* (4 *Comst.*), 195.

69. A municipal corporation is liable in damages to any person who may sustain injury from an improper exercise of its legitimate powers, when those powers become ministerial, though it is otherwise where they are judicial or discretionary. Every Corporation, in the exercise of its powers over its own property, is as much bound so to manage and use its property as not to produce injury to others, as an individual owner. Thus, though the question whether it shall undertake a local improvement may be discretionary; if it does undertake such work, it is bound to exercise care in its execution. *N. Y. Superior Ct.*, 1854, *Lacour v. Mayor, &c.*, of N. Y., 8 *Duer*, 406.

70. Incidental injuries. A municipal corporation is not liable to an action for injuries incidentally done to the property of individuals in the exercise of its authority to regulate streets. [4 *Durnf. & E.*, 796.] *Supreme Ct.*, 1845, *Wilson v. Mayor, &c.*, of N. Y., 1 *Den.*, 595.

71. A municipal corporation, in grading one of their streets, as they were authorized to do, removed a high bank in the street, which constituted a natural support to the premises of an adjoining owner, so that a portion of his land fell. *Held*, that as there was no allegation of malice, or want of care or skill, that such owner could not maintain an action for the damages sustained by him. *It seems*, that this is *damnum absque injuria*; and if not, still it is settled that persons acting under legislative authority to improve highways, if they exercise proper care and skill, are not answerable for consequential damages sustained by adjoining owners. [4 *T. R.*, 794; 2 *B. & C.*, 703; 2 *Hill*, 466; 1 *Den.*, 595; 3 *Barb.*, 459; 9 *Watts*, 382; 8 *Watts & S.*, 85; 6 *Wheat.*, 593; 17 *Wend.*, 667.] *Ct. of Appeals*, 1850, *Radcliff v. Mayor, &c.*, of Brooklyn,* 4 *N. Y.* (4 *Comst.*), 195. Compare *Waddell v. Mayor, &c.*, of N. Y., 8 *Barb.*, 95.

72. Neglect of duty. The principle that where individuals or corporations assume ob-

* See this case in the table of CASES CRITICIZED, Vol. I., *Ante*.

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ligations or duties for a consideration received from the public, they are liable for a neglect of those duties to any individual injured, is applicable to the case of municipal corporations. The charters of such Corporations being franchises of value, the grantees are to be held to strict performance. [Reviewing many cases.] *Supreme Ct., Sp. T., Weet v. Trustees of Brockport*, 16 *N. Y. (2 Smith)*, 161, *note*. Approved and followed in the case of a mere omission of duty, *Ct. of Appeals*, 1856, *Hickok v. Trustees of Plattsburgh, Id.*; *S. P.*, 1857, *Conrad v. Trustees of Ithaca, Id.*, 158. To similar effect, see *Morey v. Town of Newfane*, 8 *Barb.*, 645; *Storrs v. City of Utica*, 17 *N. Y. (3 Smith)*, 104. Compare, however, *Lorillard v. Town of Monroe*, 11 *N. Y. (1 Kern.)*, 392; affirming *S. C.*, 12 *Barb.*, 161.

73. Protection of streets. A municipal corporation, owing to the public the duty of keeping its streets in a safe condition for travel, is liable to persons receiving injury from the neglect to keep proper lights and guards at night around an excavation which it has caused to be made in the street, whether it has or has not contracted for such precautions with the persons executing the work. [16 *N. Y.*, 161.] *Ct. of Appeals*, 1856, *Storrs v. City of Utica*, 17 *N. Y. (3 Smith)*, 104.

74. A municipal corporation cannot recover from a contractor damages which it had been compelled to pay to a person who was injured by falling into a public sewer in course of construction by the contractor, and by him left unguarded, unless the contract imposed upon the contractor the duty of putting up barriers, &c., and protecting passengers against injury by accident. Otherwise it is the duty of the city to do this, and it is their neglect that it was not done. *Ct. of Appeals*, 1852, *City of Buffalo v. Holloway*, 7 *N. Y. (3 Seld.)*, 493; affirming *S. C.*, 14 *Barb.*, 101.

75. Wharves. A municipal corporation owning wharves, &c., for which they charge dockage, are bound to keep them in repair; and, in an action for dockage, defendant may recoup his special damage from their neglect of this duty. *Supreme Ct.*, 1839, *Buckbee v. Brown*, 21 *Wend.*, 110.

76. Negligence of contractor's servants. A municipal corporation is not liable for injuries to third persons, occasioned by the negligence of workmen engaged, under the direction of a person who has entered into a con-

tract with the Corporation to perform work in conformity to a plan referred to in the contract, for a specified sum to be paid by the Corporation. The contractor in such case is not the servant or agent of the Corporation. *Ct. of Appeals*, 1853, *Pack v. Mayor, &c.*, of *N. Y.*, 8 *N. Y. (4 Seld.)*, 222. Followed, 1854, *Gent v. Mayor, &c.*, of *N. Y.*, *Seld. Notes*, No. 6, 68. *S. P.*, 1851, *Blake v. Ferris*, 5 *N. Y. (1 Seld.)*, 48; and see *Storrs v. City of Utica*, 17 *N. Y. (3 Smith)*, 104; *Gourdier v. Cormack*, 2 *E. D. Smith*, 254.

77. The fact that there is a clause in the contract by which he engages to conform the work to such further directions as may be given by the Corporation or its officers, makes no difference. Such a reservation relates merely to the kind of work to be done, and not to the manner of doing it. *Ct. of Appeals*, 1853, *Pack v. Mayor, &c.*, of *N. Y.*, 8 *N. Y. (4 Seld.)*, 222.

78. The same principle applies in the case of a contract providing that the work is to be done under the direction and to the satisfaction of certain officers of the Corporation. The object of such a clause is to give them power to prescribe what shall be done, not how it should be done, nor by whom. *Ct. of Appeals*, 1854, *Kelly v. Mayor, &c.*, of *N. Y.*, 11 *N. Y. (1 Kern.)*, 432; reversing *S. C.*, 4 *E. D. Smith*, 291.

79. Public meeting. The plaintiff passing through a park at the time that a public meeting was being held at the call of the Corporation to consider national affairs, was injured by the discharge of a cannon fired by some persons there. *Held*, that the Corporation were not liable for the injury. Calling a public meeting of the citizens, for political or philanthropic purposes, is no part of the business of the Corporation, and they are not liable for an injury that may flow from it. If it were otherwise, the persons who fired the gun must be shown to have done so as the agents of the Corporation. *N. Y. Superior Ct.*, 1847, *Boylard v. Mayor, &c.*, of *N. Y.*, 1 *Sandf.*, 27.

80. Violation of ordinance. A municipal corporation is not liable for an injury resulting from a breach of its police regulations,—*e. g.*, for damage done by swine going at large in violation of its ordinance. *N. Y. Superior Ct.*, 1848, *Levy v. Mayor, &c.*, of *N. Y.*, 1 *Sandf.*, 465. Approved, *Ct. of Appeals*, 1853,

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Griffin v. Mayor, &c., of N. Y., 9 *N. Y.* (5 *Seld.*), 456.

81. Where a person puts an incumbrance or obstacle in a street, the Corporation is not liable for an injury occasioned thereby, unless notice of the obstruction is brought home to them. The primary duty of its removal is with him who placed it there. *Ct. of Appeals*, 1853, *Griffin v. Mayor, &c.*, of N. Y., 9 *N. Y.* (5 *Seld.*), 456.

82. Notice necessary. In an action against a municipal corporation to recover damages sustained in consequence of a grating over an area in a sidewalk being in a defective or unsafe condition, it is not enough to prove that the covering was insecurely fastened, and that by reason thereof, and without fault on his part, the plaintiff was injured. Notice to the defendant, of the defect, or negligence of duty in not ascertaining and remedying it, must be shown. *N. Y. Superior Ct., Sp. T.*, 1856, *McGinity v. Mayor, &c.*, of N. Y., 5 *Duer*, 674.

83. Wrong by officer. A municipal corporation is not liable for a nonfeasance or misfeasance committed by an independent corporate officer,—*e. g.*, for the omission of a duty specifically imposed by statute on one of its officers. In this respect the officers are *quasi* civil officers of the government, though appointed by the Corporation. The relation of master and servant does not exist between the Corporation and officers; though it is otherwise of such omissions where the duty is absolute and due from the Corporation. *Supreme Ct.*, 1841, *Martin v. Mayor, &c.*, of Brooklyn, 1 *Hill*, 545.

84. A municipal corporation is not liable for a trespass committed by an agent employed by the Common Council in a matter beyond their corporate power. A Corporation is liable for a tortious act, as a trespass, committed by an agent pursuant to its directions, in relation to matters within the scope of the objects of its incorporation; but not for any unauthorized acts of its officers, though done *colore officii*. [See *Ang. & A. on Corp.*, 250, 330.] *Supreme Ct.*, 1848, *Boom v. City of Utica*, 2 *Barb.*, 104.

85. A municipal corporation is liable in an action of tort for the irregular and illegal exercise, by its authorized agents, of a power which the Corporation possessed. [2 *Kent's Com.*, 284; *Ang. & A. on Corp.*, 250, 330.]

Ct. of Appeals, 1857, *Howell v. City of Buffalo*, 15 *N. Y.* (1 *Smith*), 512.

86. Commissioners appointed by statute. Where a municipal corporation is empowered by statute to prosecute a work, such as the construction of works for the supply of the city with water, though the statute reserves to the State the appointment of commissioners to supervise and direct its prosecution, the acceptance of the statute by the Corporation makes the commissioners the agents of the Corporation; and the Corporation is liable for injuries caused by the negligence of the commissioners in the management of the work. Such works being the property of the Corporation, it is bound to see that the same are not permitted to injure other persons. A municipal corporation, though not liable for acts requiring the exercise of discretion, when those acts are for the benefit of the public, or for the acts of independent officers whom it is obliged to appoint, and whose duties are specifically prescribed by law, yet is liable for the acts of the agents it voluntarily employs to do business for its own private benefit, the same as any other corporation or individual. Moreover, the owner of real property is liable for the acts of those he employs, directly or indirectly, to improve his property for his own benefit, and particularly if done at his expense; and the State, who merely selects the agents or makes the contract, but is not owner, and does not pay for, nor personally superintend the work, is not liable. *Ct. of Errors*, 1845, *Mayor, &c.*, of N. Y. *v. Bailey*, 2 *Den.*, 438; *affirming *S. C.*, 3 *Hill*, 531.

87. Competency of officers. The fact that a municipal corporation has employed competent officers to perform a duty specifically enjoined upon the Corporation as such, does not exonerate them, but they are liable where such duty is wholly neglected by such agents. *Supreme Ct.*, 1842, *Mayor, &c.*, of N. Y., *v. Furze*, 3 *Hill*, 612.

88. Claims for tort need not be audited. Under a municipal charter, that provides that no unliquidated accounts, or claim, or contract against the city, shall be audited without an affidavit that the services or property therein charged, have been actually perform-

* See *Bailey v. Mayor, &c.*, of N. Y., in table of CASES CITED, Vol. I., *Ante*.

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ed, &c.; and further, that it shall be a defence "to any action, or proceeding in any court, for the collection of any demand or claim," that it had not been so presented; "or, if on contract," that it was presented without affidavit, and rejected for that reason, &c.,—it is not a defence to an action against the city for damages for a tort,—*e. g.*, for taking plaintiff's property on an illegal assessment,—that the plaintiff's claim has not been presented. *Ct. of Appeals*, 1857, *Howell v. City of Buffalo*, 15 *N. Y.* (1 *Smith*), 512.

As to liability for Mobs, see Riot.

VI. LOCAL IMPROVEMENTS.

1. In General.

89. An assessment for a local improvement is not a tax within a charter authorizing a municipal corporation to sell lands "for taxes of any description." [11 *Johns.*, 77; 8 *Wend.*, 263.] *Supreme Ct.*, 1848, *Sharp v. Speir*, 4 *Hill*, 76; *Sharp v. Johnson*, *Id.*, 92.

90. Changing grade. That the authority to regulate, level, and pave streets, is a continuing power; and the Corporation may change the level of a street at any time. *Supreme Ct.*, 1886, *Matter of Furman-street*, 17 *Wend.*, 649. Compare *Matter of Wall-street*, 17 *Barb.*, 617.

91. Where a municipal corporation are authorized to "alter and amend" streets in their discretion,—they have power to alter the grades of streets they have established, and they are the judges of the necessity of such alteration. [1 *Pick.*, 418; 2 *Hill*, 466.] *Supreme Ct.*, 1850, *Waddell v. Mayor, &c.*, of *N. Y.*, 8 *Barb.*, 95. To the same effect, *Chan- cery*, 1837, *Fish v. Mayor, &c.*, of *Rochester*, 6 *Paige*, 268; but compare *Oakley v. Trustees of Williamsburgh*, *Id.*, 262.

92. A park is, under the charter of Brooklyn, a public improvement, and is within the range of subjects deemed by the Legislature proper for local taxation, and the assessment for the expenses of its improvement. *Supreme Ct.*, 1858, *Bouton v. City of Brooklyn*, 15 *Barb.*, 375, 384; affirming *S. C.*, 7 *How. Pr.*, 198.

93. What are repairs. When a street has been once put in a condition conformable to what is required at the time, whatever is subsequently done to it for the purposes of a street, whether in improving an existing constituent, or substituting a new one, or in add-

ing some material required by a new regulation,—*e. g.*, in setting new curb-stones, &c.,—comes under the head of repairs, and cannot be assessed by the Corporation, upon the property supposed to be benefited, under a charter authorizing assessments, except for repairs. *Supreme Ct.*, 1856, *People v. City of Brooklyn*, 21 *Barb.*, 484.

94. Highways, &c., across railways, how to be laid out. *Laws of 1853*, 86, ch. 62.

95. Corporation act as agents. In making an improvement, which by the statute is chargeable solely on the owners and occupants of the lands to be benefited, the Corporation is merely an agent of the landholders to distribute the burden and collect and pay the money. [28 *Wend.*, 458.] Its warrant in favor of a contractor, directing its treasurer to pay money and charge it to the account of the improvement, creates no corporate liability. *Supreme Ct.*, 1847, *Lake v. Trustees of Williamsburgh*, 4 *Den.*, 520.

96. Application. If the statute requires an application of a majority of land-owners as the foundation of the proceeding, the proceedings are to be deemed void, unless this is shown to have been made. *Supreme Ct.*, 1848, *Sharp v. Johnson*, 4 *Hill*, 92.

97. An alteration of the petition after some signatures have been obtained, avoids the proceedings, if rejecting those signatures the requisite majority are not left. *Supreme Ct.*, 1842, *Graves v. Otis*, 2 *Hill*, 466; 1843, *Sharp v. Speir*, 4 *Id.*, 76.

98. Extra work. Where the Common Council, by resolution, directed that an amount which by arbitration had been ascertained to be due for extra work to a contractor for a local improvement, be added to the assessment;—*Held*, that, the contractor having assented to it, the claim thereby became, if it were not before, valid against the Corporation, and that the Corporation could not rescind their resolution without the contractor's assent. *Supreme Ct.*, 1847, *Brady v. Mayor, &c.*, of Brooklyn, 1 *Barb.*, 584.

99. Limit on value of property taken. Where the trustees have no power to remove any building, the value of which exceeds a certain limit, the consent of the owner that they may remove it, there being no stipulation to estimate the value as within the limit, does not give the trustees jurisdiction. Those who are to be taxed, have a right to object. *Su-*

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preme Ct., 1881, *Starr v. Trustees of Rochester*, 6 *Wend.*, 564; and see *Ouyler v. Trustees of Rochester*, 12 *Id.*, 165.

100. Plan. The power of a municipal corporation to repair or rebuild a bridge, necessarily includes the right of determining upon the plan and mode of doing it. *Supreme Ct.*, 1857, *Ely v. City of Rochester*, 26 *Barb.*, 188.

101. Taking less than authorized. Where a municipal corporation is authorized to file a map of streets to be opened, and subsequently opens one of them of a less width than designated by the map, assessing the owners of the residue of the proposed width, this is a waiver of any right to take such residue for widening the street without further compensation. *Chancery*, 1841, *Seaman v. Hicks*, 8 *Paige*, 655.

102. Notice. An assessment for expense of local improvements, without notice to the owners of the land, is void. [15 *Wend.*, 874.] *Supreme Ct.*, 1848, *Jordan v. Hyatt*, 8 *Barb.*, 275.

103. The detriment to the property of an adjoining owner, resulting from a change of the grade of the street, is not a taking of his property for public use, which entitles him to compensation. *Supreme Ct.*, 1850, *Waddell v. Mayor, &c., of N. Y.*, 8 *Barb.*, 95. To similar effect, see *Radoliff v. Mayor, &c., of Brooklyn*, 4 *N. Y.* (4 *Comst.*), 195.

104. Building not prevented by the proceeding. Where, as in case of the lower part of the city of New York, there is no statute providing for the permanent establishment of the plan of streets and prohibiting compensation to an owner who builds on the site of a proposed street, the owners are left at liberty to build as they will, irrespective of any plans formed by the Corporation for taking their land. The appointment of commissioners of estimate, &c., in proceedings to widen a street, does not prevent an owner from building as if the street were not to be widened; and if he does so, he is entitled to compensation for his building, if the proceedings are carried out. *Supreme Ct.*, 1854, *Matter of Wall-street*, 17 *Barb.*, 617.

2. Estimate and Assessment.

105. Removal of commissioners. A municipal corporation, having power to appoint commissioners of estimate and assessment, may remove them and fill the vacancy by a new appointment. *Supreme Ct.*, 1848, *People v. Mayor,*

&c., of N. Y., 5 *Barb.*, 48; and see *Mayor, &c., of N. Y. v. Manhattan Co.*, 1 *Cai.*, 507.

106. Property restricted to particular use. Church edifices not likely to be soon appropriated to renting or sale, should be deemed but slightly benefited by local improvements, and should not be assessed in the same proportion as other property.* *Supreme Ct.*, 1814, *Matter of the Mayor, &c., of N. Y.*, 11 *Johns.*, 77.

To similar effect, in case of a cemetery. 1884, *Matter of Albany-street*, 11 *Wend.*, 149.

To similar effect, in case of a reservoir. 1886, *Owners of Ground, &c. v. Mayor, &c., of Albany*, 15 *Wend.*, 188.

107. Other property of the same owners which may be by possibility applied by them to other purposes, may properly be assessed for benefit. *Supreme Ct.*, 1886, *Owners of Ground, &c. v. Mayor, &c., of Albany*, 15 *Wend.*, 374.

108. If a place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reintering their remains. *Supreme Ct.*, *Sp. T.*, 1856, *Matter of Beekman-street*, 4 *Bradf.*, 508, 532.

109. Apportioning the burden. Though the apportionment of the burden among those who are chargeable is in the discretion of the commissioners, the question who are chargeable is not. The whole district with regard to the benefit of which the improvement is made, must be assessed. Thus where an open drain became a nuisance, and it was necessary to construct a common sewer to obviate it;—*Held*, that the whole ground drained by the sewer must be assessed, not merely that part which might have been alone affected by the nuisance. *Supreme Ct.*, 1828, *Le Roy v. Mayor, &c., of N. Y.*, 20 *Johns.*, 480.

110. In general, the land upon each side of a new street should pay the expense of opening; and in such a manner that each lot or parcel will pay one half of the expense of the street immediately in its front. *Supreme Ct.*, 1884, *Matter of Twenty-sixth-street*, 12 *Wend.*, 208.

111. But this is not an invariable rule. The

* Compare *Matter of William and Anthony streets* (19 *Wend.*, 678), where this rule was limited to cases where the owner cannot apply the property to general uses, and hospital grounds were held chargeable at market value.

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commissioners must take notice of the several proprietors, the nature and extent of their respective interests, the form and position of their several parcels of land, the qualified rights of the owner in reference to its enjoyment, and any other circumstances which render the proposed improvement more or less beneficial to him. *Supreme Ct.*, 1836, *Matter of Degraw-street*, 18 *Wend.*, 568.

112. On an assessment for benefit, required to be laid on the lands "in proportion to the advantage which each shall be deemed to require," a parcel is chargeable with such proportion, though it exceeds the cost of the work adjacent to its front. *Supreme Ct.*, 1840, *Exp. Mayor, &c., of Albany*, 28 *Wend.*, 277.

113. *Description of property.* The assessment and notice thereof must describe the property assessed with accuracy, so as to apprise the owner distinctly of the ground charged with the expense. In the case of a lot which was only 75 feet deep, an assessment not stating its depth, followed by a sale and conveyance describing it as 100 feet deep;—*Held*, not effectual as to the excess over 75 feet. *Supreme Ct.*, 1828, *Jackson v. Healy*, 20 *Johns.*, 495.

114. An assessment describing a lot assessed by the length of its front without specifying the sides or the depth;—*Held*, too imperfect to constitute a valid lien. *Chancery*, 1845, *Cumming v. Mayor, &c., of Brooklyn*, 11 *Paige*, 596.

115. — of owner. Where the assessment designated the person assessed, by the surname alone, and on a sale of the land the notice and advertisement designated the land merely as being near a street mentioned;—*Held*, that the sale was void. *Supreme Ct.*, 1843, *Sharp v. Speir*, 4 *Hill*, 76; *Sharp v. Johnson*, *Id.*, 92. Compare *Hubbell v. Weldon*, *Hill & D. Supp.*, 189.

116. Where the statute requires the assessment to be upon "the owners or occupants of the houses and lots intended to be benefited," an assessment upon "the estate of A." is void. *Supreme Ct.*, 1850, *Platt v. Stewart*, 8 *Barb.*, 493.

117. *Valuing* the land at a certain sum per foot is sufficient, for the gross amount is then matter of computation. Verdicts, or estimates in street cases are not scanned with the same technical strictness which is applied to the verdict of a common-law jury. *Supreme Ct.*,

1833, *Coles v. Trustees of Williamsburgh*, 10 *Wend.*, 659.

118. Where the value of the land diminishes with the distance from the starting point, it is not sufficient to assess it by large blocks. It should be by lots. *Supreme Ct.*, 1848, *Sharp v. Johnson*, 4 *Hill*, 92.

119. *Certifying.* If the statute requires that the assessment-roll shall be certified by the assessors to the Common Council, it must be so certified by their signatures, or proceedings thereon are void. *Supreme Ct.*, 1850, *Platt v. Stewart*, 8 *Barb.*, 493.

As to the *Right to compensation* for private property taken, see CONSTITUTIONAL LAW.

As to its *Measure*, see COMPENSATION.

8. *Reviewing and Confirming. Discontinuing the Proceedings.*

120. *Inadequate benefit.* If it is made to appear, on the motion to confirm, that the substantial benefits to the persons assessed are not equal to all the damage which others will sustain, the court will refuse to confirm the report. *Supreme Ct.*, 1830, *Matter of Fourth Avenue*, 8 *Wend.*, 452; 1834, *Matter of Albany-street*, 11 *Id.*, 149.

121. *Power of Corporation.* Beyond this consideration, the policy of the improvement is a matter wholly for the Corporation to determine. *Supreme Ct.*, 1839, *Matter of William and Anthony streets*, 19 *Wend.*, 678. To the same effect, 1834, *Matter of Albany-street*, 11 *Id.*, 149; 1839, *Matter of John and Cherry streets*, 19 *Id.*, 659.

122. *Who may object.* One who is assessed for benefit has a right to object to the report for an erroneous allowance of damages to another, for it enhances his burden. *Supreme Ct.*, 1841, *Matter of Thirty-ninth-street*, 1 *Hill*, 191. Compare *Coles v. Trustees of Williamsburgh*, 10 *Wend.*, 659.

123. *Confirmation.* That under the statutes relating to New York and Brooklyn, there cannot be an absolute confirmation of the report, so as to vest rights, until the damages for all the lands taken have been settled, and are properly assessed upon the owners of lands which will be benefited by the improvements. *Supreme Ct.*, 1839, *Matter of Anthony-street*, 20 *Wend.*, 618. *Chancery*, 1840, *Mese-rolle v. Mayor, &c., of Brooklyn*, 8 *Paige*, 198.

124. *Equity.* If the proceedings of the commissioners have been regular, and they

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only erred in judgment in fixing the amount of damages for the lands taken, or of the benefit to other lands of the complainant, upon erroneous principles, the Court of Chancery cannot interfere after the report has been confirmed by the Supreme Court. [20 Wend., 618.] *Chancery*, 1841, *Wiggin v. Mayor, &c.*, of N. Y., 9 *Paige*, 16.

125. That the apportionment of the burden made by the commissioners or assessors is conclusive, as to the estimates of value, &c., except in a case of error so gross as to show fraud or misconduct. [15 Wend., 874.] *Supreme Ct.*, 1858, *Lyon v. City of Brooklyn*, 28 *Barb.*, 609.

126. Allowance for contingent expenses not deemed unreasonable, unless cause is shown. *Betts v. City of Williamsburgh*, 15 *Barb.*, 255.

127. Notice. Where the Corporation have power to decide an appeal, if, after a hearing, instead of deciding it, they refer it back to the assessors, a further notice of confirmation is not necessary. *Supreme Ct.*, 1829, *Bouton v. President, &c., of Brooklyn*, 2 *Wend.*, 895.

128. Discontinuing. Individuals acquire no vested right under street proceedings, until the final confirmation of the report of the commissioners. [6 Johns. Ch., 49; 6 Cow., 571; 1 Wend., 58, 818; 11 Id., 154.] Where a report has been confirmed, with the exception of certain particulars, and sent back for correction in those particulars only, it is not finally confirmed, and the Corporation may have leave to discontinue. *Supreme Ct.*, 1839, *Matter of Anthony-street*, 20 *Wend.*, 618.

129. Persons to whom an award of damages is made by commissioners of estimate and assessment, cannot object to the discontinuance of the proceedings, unless the proceedings have so far progressed that mutual rights have vested. Thereafter their remedy is, it seems, in assumpsit, or an action on the case; but not by mandamus. *Supreme Ct.*, 1828, *People v. President, &c., of Brooklyn*, 1 *Wend.*, 318.

4. Collection of Assessments. Sale.

130. Collection. Where the statute provided that the expense of certain improve-

ments should be a tax on the owner and a lien on the land, and might be collected as other taxes; and other taxes were to be collected, if payment were neglected and no personal property was found, by sale of the real estate taxed;—*Held*, that a sale was not authorized before a tax-warrant had been issued, and an attempt made to collect the tax of the owner of the land. *Supreme Ct.*, 1854, *Rathbun v. Acker*, 18 *Barb.*, 383.

131. Whole must be sold. Where the charter authorizes a sale of the lands for an unpaid assessment thereon for a term of years, the Corporation cannot sell an undivided half, for a term. *Supreme Ct.*, 1848, *Jordan v. Hyatt*, 8 *Barb.*, 275.

132. Notice. If the statute requires a notice to the owner previous to the sale, or previous to the assessment of damages, it must be given, or the sale is void. *Supreme Ct.*, 1848, *Sharp v. Johnson*, 4 *Hill*, 92.

133. Such a requirement is not satisfied by posting a notice on land supposed to belong to unknown owners. *Id.*

134. If the statute requires an affidavit of the collector of his inability to collect the tax, preliminary to the sale, the sale is void without it. *Id.*

135. One claiming title under a municipal sale for an assessment, must show that all the proceedings have been regular and legal, and in full compliance with the statute. *N. Y. Superior Ct.*, 1848, *Kennedy v. Newman*, 1 *Sandf.*, 187.

Consult, also, for Further illustration of these principles, as well as for matters peculiar to Particular municipalities, VILLAGES, and the following titles:—ALBANY; BROOKLYN; BUFFALO; CANAJOHARIE; KINGSTON; NEW YORK CITY; ROCHESTER; SAG HARBOR; SENECA FALLS; SOUTH HAMPTON; SYRACUSE; TROY; UTOCA; WILLIAMSBURGH.

MURDER.

HOMICIDE.

N.

NAMES.

Changing. The County Court of any several counties, and in the county of New York, the Common Pleas, may grant application of resident of such county to change name. *Laws of 1847, 682, ch. 484; amended, Laws of 1860, 125, ch. 80.*

As to **What constitutes a Name**, and as to **Mistakes in names**, see **MISNUMBER**.

As to names of **Partnerships**, see **PARTNERSHIP**.

NATURALIZATION.*

1. Power of State courts. That, under the act of Congress of 1802, the State courts have a constitutional and competent power to

* Consult an article upon this subject in the *New American Encyclopedia*, title, **NATURALIZATION**. It is from the pen of Hon. Charles P. Daly, and states not only the law of our country, but also, quite elaborately and fully, the law of foreign nations. We extract from it the following statement of the substance of our Federal statutes upon naturalization, and of the practice which is pursued in the New York courts upon applications.

"The qualifications requisite, and the mode of obtaining naturalization, are at present (1860) as follows: The applicant must be a free white person, and must have resided in the United States for the continued term of five years next preceding his admission, and one year at least within the State or Territory where the court is held that admits him. Two years at least before his admission he must declare on oath or affirmation, before a court of record having common-law jurisdiction and a seal and clerk, or before a circuit or district court of the United States, or before a clerk of either of the said courts, that it is *bona fide* his intention to become a citizen, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name the prince, potentate, state, or sovereignty of which he is at the time a citizen or subject.

"This declaration is recorded by the clerk, and a certificate under the seal of the court and signed by the clerk that he has made such a declaration is given him, which is received thereafter as evidence of the fact. If the applicant was a minor under the age of 18 years when he came to the country, this previous declaration of intention is dispensed with, and he is entitled to be admitted after he has arrived at the age of 21 years, if he has resided five years in the United States, including the three years of his minority, and has so continued to reside up to the

naturalize. *Matter of Ramsden, 18 How. Pr., 429; People v. Sweetman, 8 Park. Cr., 358.*

2. In entertaining an application for naturalization, the State courts act as courts of the United States; so that perjury committed by a witness upon such examination can be tried only in the Federal courts. *Supreme Ct., 1857, People v. Sweetman, 8 Park. Cr., 358.*

time when he makes his application, upon complying with the law in other respects. * * * *

"When the applicant has completed the necessary residence, he must prove the fact, before one of the courts previously named, by other testimony than his own oath. One witness, if he knows the fact, is sufficient. If entitled to admission without a previous declaration of intention, the alien must declare upon oath, and prove to the satisfaction of the court, that, for the three years next preceding his application, it was *bona fide* his intention to become a citizen; and every applicant must prove (which may be done by his own oath, unless the court should require other testimony) that he has behaved during the period of his residence as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.

"The mode of admission is as follows: The applicant goes to the clerk of the court, and exhibits the certificate of his having declared his intention. The clerk then prepares a written deposition for the witness, setting forth his knowledge of the applicant's residence and of his good character, and another for the applicant, declaring that he renounces all allegiance to every foreign power, and particularly that of which he is a citizen or subject, and if he has borne any title of nobility, that he renounces it, and that he will support the Constitution of the United States. The parties are then taken before the judge, who examines each of them under oath; and if he is satisfied that the applicant has resided in the country for the requisite period, and is a man of good character, he makes an order in writing for his admission. The depositions are then subscribed by the parties and publicly sworn to in court in presence of the judge; and the certificate of the declaration of intention, the depositions, and the order of the judge are filed, and constitute the record of the proceeding. A final certificate under the seal of the court, signed by the clerk, is then given the alien, declaring that he has complied with all the requisites of the law, and has been duly admitted a citizen, which certificate is conclusive evidence thereafter of the fact. In the case of a minor, the previous declaration of intention is dispensed with, but in all other respects the course of procedure is the same."

Clerks.

Record conclusive.

3. Clerks. The powers conferred by Congress upon the courts of the States, in respect to admitting aliens to citizenship, are in their nature *judicial*, and cannot be delegated to the clerks, but must be exercised by the courts. The court must be satisfied, in each case, by appropriate evidence that the requisite facts creating the right to naturalization exist. *Supreme Ct., Sp. T., 1854, Matter of Clark, 18 Barb., 444; S. O., 1 Abbotts' Pr., 90; 10 How. Pr., 246.*

4. The practice of permitting clerks of court to grant applications for naturalization, condemned. *Ib.*

5. The construction of the United States statutes on the subject of naturalization, considered. *Ib.*

6. Nature of proof. The application for naturalization must be supported by legal proof of the necessary facts. The proceedings are strictly judicial. Affidavits are not admissible. The applicant's own oath may be received as to his good character and behavior, but not as to his residence. That fact must be proved by the oral testimony of witnesses. *Supreme Ct., 1845, Matter of ———, 7 Hill, 137.*

7. Affidavits inadmissible. *People v. Sweetman, 8 Park. Cr., 358.*

8. Temporary absence. The act of April 14, 1802 [8 Bio. U. S. L., 476, § 27], allowed an alien to be admitted notwithstanding he had temporarily travelled out of the United States during his five years' residence. But the act of March 3, 1818 [4 Bio. U. S. L., 514, § 12]* precludes the applicant from becoming a citizen if he has been out of the territory of the United States at any time during the period. *So held*, where the absence was of but two or three minutes only. *Supreme Ct., 1844, Eap. Paul, 7 Hill, 56.*

9. Married women, and infants, if they have sufficient capacity to understand their rights, and the nature and obligation of an oath, may be naturalized. *Ct. of Errors, 1838, Priest v. Cummings, 20 Wend., 388.*

10. Under the act of Congress of April 14, 1802, infant children of an alien, though born out of the United States, if dwelling within the United States at the time of his naturalization, become citizens by such naturalization.

* The restrictive clause of the section on which the decision above was based, was struck out by act of June 26, 1848. *Dunl. U. S. L., 1167.*

So held, in respect to children of a father naturalized in 1830. *Chancery, 1840, West v. West, 8 Paige, 438.* Compare *Young v. Peck, 21 Wend., 389; affirmed, 26 Id., 613; CITIZEN, 1.*

11. An alien wife of a citizen cannot claim dower. Hence where husband and wife are aliens, and the husband is naturalized, this does not render the wife capable of taking dower. Naturalization merely removes the disability of the alien to hold; it leaves, unimpaired, the right of the government to enter, if the person naturalized dies without heirs, or leaving alien heirs only. The naturalization of the husband does not naturalize the wife. *Supreme Ct., 1823, Sutliff v. Forjay, 1 Cow., 89; affirmed, on other points, 5 Id., 713.* Compare *Priest v. Cummings, 20 Wend., 388.*

12. Retroactive effect. Naturalization before office found, has a retroactive effect, so as to confirm a former title. *Supreme Ct., 1800, Jackson v. Beach, 1 Johns. Cas., 399.* Compare *Jackson v. Green, 7 Wend., 333; Priest v. Cummings, 20 Id., 388.*

13. The cases in which it has been held that naturalization has a retroactive effect, and confirms a defective title previously vested in the alien, are cases in which the alien had acquired lands by *purchase*, and was naturalized before office found. The rule does not apply where the alien claims by *descent*. *Supreme Ct., 1841, People v. Conklin, 2 Hill, 87.* Compare *Jackson v. Green, 7 Wend., 333.*

14. The naturalization of a married woman has not such a retroactive effect as to entitle her to demand dower in lands which her husband conveyed previous to her naturalization. *Ct. of Errors, 1838, Priest v. Cummings, 20 Wend., 388.*

15. Record conclusive. A record of the judgment of a competent court, admitting an alien to citizenship, which recites the necessary facts to entitle him to admission, is conclusive. It is not necessary that the evidence upon which the court acted should appear by the record. Nor can the recitals be contradicted by evidence outside the record. *Ct. of Appeals, 1851, McCarthy v. Marsh, 5 N. Y. (1 Seld.), 268.* S. P., *Supreme Ct., 1885, Ritchie v. Putnam, 18 Wend., 524. Chancery, 1848, Banks v. Walker, 8 Barb. Ch., 488.*

16. Thus where the record recited that proof had been made that the applicant had duly made a previous declaration of his inten

Nature.	Naval Officer.	Navigation.	Navigation Companies
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tion to become a citizen of the United States, —*Held*, that evidence that he had not made such declaration was inadmissible. *Ct. of Appeals*, 1851, *McCarthy v. Marsh*, 5 *N. Y.* (1 *Seld.*), 268.

NATURE

Crime against, punishable. 2 *Rev. Stat.*, 689, § 20.

NAVAL OFFICER.

1. **Void agreement.** An officer of the navy entered into an agreement, for compensation, to secure for a private ship, extraordinary protection from the commander of the squadron, and to sail in and represent her as a government store-ship;—*Held*, void. Such an agreement an officer has no power to make, for his compensation is fixed by law, and all private compensations for employment of the national force are corrupt and illegal. *Chancery*, 1828, *Weaver v. Whitney*, *Hopk.*, 11.

2. **Trespass will not lie against a naval officer** for bringing to, and taking out of her course, a neutral vessel, in pursuance of instructions from the secretary of the navy. *Supreme Ct.*, 1805, *Ruan v. Perry*, 8 *Cai.*, 120. Compare *Percival v. Hickey*, 18 *Johns.*, 257.

NAVIGATION.

1. **Navigable streams.*** A stream which is navigable by rafts, and has been used by the public for such purpose for twenty-six years, is a public highway for that purpose; and an action may be maintained against the owner of a mill-dam for obstructing the stream so as to injure the plaintiff's raft in the passage. *Supreme Ct.*, 1818, *Shaw v. Crawford*,† 10 *Johns.*, 236.

2. But the fact that a stream is capable, for a few weeks in the year, in time of freshets, of carrying down logs, does not make it a public highway. *Supreme Ct.*, 1849, *Munson v. Hungerford*, 6 *Barb.*, 265; *Sp. T.*, 1852, *Curtis v. Keesler*, 14 *Id.*, 511.

* Four chapters of part I. of Lord Hale's treatise *De jure maris*, &c., are printed in 6 *Cow.*, 587, *note*.

† Explained as not turning on the fact that fish were accustomed to pass. *People v. Platt*, 17 *Johns.*, 195.

3. So much of a stream as is navigable, whether affected by tide or not, is a public highway. *Supreme Ct.*, 1822, *Hooker v. Cummings*, 20 *Johns.*, 90; and see *Palmer v. Mulligan*, 8 *Cai.*, 807.

4. Rivers of sufficient capacity to float to market the products of the country, are public highways. [8 *Cai.*, 807; 20 *Johns.*, 90; 10 *Id.*, 286; 5 *Wend.*, 428; 18 *Id.*, 855; 20 *Id.*, 158; S. C., 4 *Hill*, 878; 3 *Kent's Com.*, 411, 418.] *Supreme Ct.*, 1850, *Browne v. Seofield*, 8 *Barb.*, 289.

5. A river is deemed navigable as far as the tides rise and fall, though the water be fresh. *Ct. of Appeals*, 1859, *People v. Tibbetts*, 19 *N. Y.*, 528. Compare *Morgan v. King*, 18 *Barb.*, 277; *Lowber v. Wells*, 18 *Hov. Pr.*, 454.

6. **Albany Basin** said to be a highway. *Hart v. Mayor, &c.*, of Albany, 9 *Wend.*, 571; affirming S. C., 3 *Paige*, 218.

7. **Statutes** regulating night-lights, &c., on Hudson and East rivers and Lake Champlain (1 *Rev. Stat.*, 686; *Laws* of 1839, 322, ch. 349), extended to Lake Ontario, and the Niagara and St. Lawrence. *Laws* of 1837, 141, ch. 163. On rafts on the Hudson. *Laws* of 1841, 89, ch. 65.

8. Negligence, causing loss of life, punished. 2 *Rev. Stat.*, 662, § 15; 694, § 24.

NAVIGATION COMPANIES.

1. **General act** for formation of companies to navigate the ocean, by steam, caloric, &c. *Laws* of 1852, 302, ch. 228; amended by *Laws* of 1853, 202, ch. 124. Same state., 2 *Rev. Stat.*, 5 ed., 791.

2. — to navigate lakes, rivers, and the waters about Long Island. *Laws* of 1854, 518, ch. 232; amended, *Laws* of 1856, 94, ch. 65; 1 *Laws* of 1857, 187, ch. 83; *Laws* of 1858, 20, ch. 10; 1861, 561, ch. 288; same stat., 2 *Rev. Stat.*, 5 ed., 796.

3. — to navigate Lake George. *Laws* of 1854, 9, ch. 3.

4. **Liability of stockholders.** Under section 6 of the act for formation of ocean steamship companies,—which makes the stockholders, severally, individually liable to the creditors of the corporation, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such corporation, until the amount of its capital stock is paid in, &c.,—each stockholder is liable for the debts of the company in his individual capacity, severally, and not jointly with the others. And the fact that he has paid his stock in full, while others have not paid theirs, is no defence. *Supreme Ct.*, 1857, *Abbott v. Aspinwall*, 26 *Barb.*, 202.

In what Cases it may issue.

5. Under that section, even if a stockholder has fully paid up his subscription, or is an assignee of full-paid stock, he is responsible up to the entire amount he holds for all debts contracted while he owned the stock, until not only the stock is fully paid up, but also until the certificate is duly filed. *N. Y. Superior Ct.*, 1856, *Eaton v. Aspinwall*, 6 *Duer*, 176; *S. C.*, 3 *Abbotts' Pr.*, 417; 18 *How. Pr.*, 184; affirmed, *Ct. of Appeals*, 1859, 19 *N. Y. (5 Smith)*, 119.

6. FILING a copy of the articles of association,—*Held*, sufficient compliance with section 1. *Id.*

NE EXEAT.

I. IN WHAT CASES IT MAY ISSUE.

II. THE APPLICATION. THE WRIT. DISCHARGING.

III. THE SECURITY.

I. IN WHAT CASES IT MAY ISSUE.

1. **Right.** The writ of *ne exeat* is not a prerogative writ, but as much a writ of right as any other process used in the administration of justice. *Chancery*, 1825, *Gibert v. Colt*, *Hopk.*, 496; and see *Mitchell v. Bunch*, 2 *Paige*, 606.

2. To entitle the complainant to the writ, there must be a present debt, or duty, or some existing right to relieve against the defendant or his property, either at law or in equity. *Chancery*, 1833, *De Rivafloli v. Corsetti*, 4 *Paige*, 264; *S. P.*, 1835, *Brown v. Haff*, 5 *Id.*, 235.

3. **Equitable demands only.** A *ne exeat* cannot be granted for a debt due and recoverable at law. It is applied only to equitable demands [*Dick.*, 82, 154, 503, 609; *Amb.*, 75; 2 *Atk.*, 210; 10 *Ves.*, 165], in the nature of debts actually due. [6 *Ves.*, 283.] *Chancery*, 1814, *Seymour v. Hazard*, 1 *Johns. Ch.*, 1. *Supreme Ct.*, 1850, *Forrest v. Forrest*, 10 *Barb.*, 46; *S. C.*, 5 *How. Pr.*, 125; 9 *N. Y. Leg. Obs.*, 89.

4. A writ of *ne exeat* will not be granted where the plaintiff's demand is purely legal; nor where defendant is an executor or administrator, and it is not shown that assets have come to his hands. [2 *Ves.*, 489.] *Chancery*, 1822, *Smedberg v. Mark*, 6 *Johns. Ch.*, 188.

5. **Necessity.** A *ne exeat* may be granted

where from the necessity of the case it is indispensable to prevent a failure of justice; although the defendant has been arrested at law, and there is doubt whether the case is one of equitable jurisdiction. *Chancery*, 1816, *Porter v. Spencer*, 2 *Johns. Ch.*, 169.

6. **Another suit.** A *ne exeat* will be discharged if the defendant be under bail for the same cause in another court, unless plaintiff will discontinue such other suit. *Chancery*, 1831, *Mitchell v. Bunch*, 2 *Paige*, 606.

7. The fact that defendant had been previously held to bail in an action at law, and discharged, is good ground to discharge the writ. In general, it does not lie where the defendant can be held to bail at law. [2 *Myl. & K.*, 5; 3 *Meriv.*, 472.] *Supreme Ct., Sp. T.*, 1847, *Pratt v. Wells*, 1 *Barb.*, 426.

8. **Specific performance.** The vendor, on his bill for a specific performance, is not entitled to a *ne exeat* unless it clearly appears that he can make the title contracted for. *Chancery*, 1835, *Brown v. Haff*, 5 *Paige*, 235.

9. A demand against the vendor for specific performance, not being a money-demand, is not a case for a *ne exeat*. *V. Chan. Ct.*, 1838, *Cowdin v. Cram*, 8 *Edw.*, 231.

10. A surety in a strictly penal bond which has been broken by his principal, is not entitled to a *ne exeat*, where the liability has not been judicially ascertained. *Chancery*, 1837, *Gibbs v. Meanard*, 6 *Paige*, 258; affirming *S. C.*, 2 *Edw.*, 482.

11. The act to abolish imprisonment for debt does not prevent a *ne exeat* in any case of equitable cognizance in which it was previously proper; though in cases of mere legal cognizance, in which the writ would not have been granted before the act, it will not now, however imperfect the remedy under the act may be. *Chancery*, 1835, *Brown v. Haff*, 5 *Paige*, 235.

12. In a case in which the defendant could not, under the act to abolish imprisonment for debt, be arrested, a *ne exeat* cannot be granted. *V. Chan. Ct.*, 1840, *Gleason v. Bisby, Clarke*, 551. To the same effect, *Supreme Ct.*, 1850, *Forrest v. Forrest*, 10 *Barb.*, 46; *S. C.*, 5 *How. Pr.*, 125; 9 *N. Y. Leg. Obs.*, 89.

13. On a bill against a foreign executor or administrator for an account, he may be held to bail by a *ne exeat*, as in other cases. *Chancery*, 1838, *McNamara v. Dwyer*, 7 *Paige*, 239.

The Application. The Writ. Discharging.

14. A creditor's bill, whether to reach equitable assets or to remove obstructions to legal process, seeks to enforce an equitable demand, and not a legal one; and a *ne exeat* may be had in the suit. *V. Chan. Ct.*, 1846, *Ellingwood v. Stevenson*, 4 *Sandf. Ch.*, 866.

15. If the amount of the demand is less than \$100, so as not to give the Court of Chancery jurisdiction, a *ne exeat* should be denied. *V. Chan. Ct.*, 1884, *Palmer v. Van Doren*, 2 *Edw.*, 425.

16. On a petition for alimony in a divorce case, the allowance of a *ne exeat* when the husband threatens to leave the State, and his wife without any support, is essential to justice. [2 *Atk.*, 210; *Amb.*, 76; *Dick.*, 154.] *Chancery*, 1815, *Denton v. Denton*, 1 *Johns. Ch.*, 364; and again, *Id.*, 441. *S. P.*, *Supreme Ct.*, 1850 [citing, also, 2 *Story Eq. Jur.*, § 1, 472, n. 1], *Forrest v. Forrest*, 10 *Barb.*, 46; *S. C.*, 5 *Hov. Pr.*, 125; 9 *N. Y. Leg. Obs.*, 89.

17. But to authorize its issue, the application must show facts to warrant granting it. Mere fears and apprehensions of the applicant are not sufficient. *Supreme Ct.*, 1850, *Forrest v. Forrest*, 10 *Barb.*, 46; *S. C.*, 5 *Hov. Pr.*, 125; 9 *N. Y. Leg. Obs.*, 89; and see *Bushnell v. Bushnell*, 7 *Hov. Pr.*, 889; affirmed, 15 *Barb.*, 399.

18. It may be granted before decree for alimony, though the English rule is otherwise. *Id. Chancery*, 1815, *Denton v. Denton*, 1 *Johns. Ch.*, 441.

19. It may be granted before the service of the summons in the action. The later English practice, refusing it till after decree, does not prevail here. *Supreme Ct.*, 1858, *Bushnell v. Bushnell*, 15 *Barb.*, 899; affirming *S. C.*, 7 *Hov. Pr.*, 889; and see *Forrest v. Forrest*, 10 *Barb.*, 46; *S. C.*, 5 *Hov. Pr.*, 125; 9 *N. Y. Leg. Obs.*, 89.

20. Discharge from imprisonment. If the defendant has obtained a discharge which exempts him from imprisonment for the same matter, and there is no allegation of fraud, a *ne exeat* cannot be sustained. The mere fact that a certiorari is pending is no answer, unless the ground of error is shown. *Chancery*, 1828, *Ashworth v. Wrigley*, 1 *Paige*, 301.

21. — from debt. An insolvent discharge, regular on its face, which bars the complainant's debt, entitles defendant to a discharge of the *ne exeat*. *V. Chan. Ct.*, 1888, *O'Connor v. Debraine*, 3 *Edw.*, 230.

22. Foreigner. *Ne exeat* may issue against a foreigner, or citizen of another State, and on demands arising abroad. *Chancery*, 1818, *Woodward v. Schatzell*, 8 *Johns. Ch.*, 412; 1825, *Gibert v. Colt*, *Hopk.*, 496. Followed, 1881, *Mitchell v. Bunch*, 2 *Paige*, 606.

23. Privilege of witness. A resident of another State, who came into this State exclusively to attend a trial at law as a witness, at the request of a party;—*Held*, not liable to arrest on *ne exeat*, though no subpoena had been served upon him. *V. Chan. Ct.*, 1844, *Dixon v. Ely*, 4 *Edw.*, 557.

24. Code. The writ of *ne exeat* is not abolished by the Code. It is essentially unlike the arrest provided for by § 178, and not being abolished in express terms, remains a provisional remedy, which cannot be denied in a proper case. It is not merely a way of requiring equitable bail for equitable debts, but has other offices,—e. g., to compel payment for alimony. *Supreme Ct.*, 1850, *Forrest v. Forrest*, 10 *Barb.*, 46; *S. C.*, 5 *Hov. Pr.*, 125; 9 *N. Y. Leg. Obs.*, 89; 1858, *Bushnell v. Bushnell*, 15 *Barb.*, 899; affirming *S. C.*, 7 *Hov. Pr.*, 889; and see *Rogers v. Michigan S. & N. I. R. R. Co.*, 28 *Barb.*, 539.

To the contrary, *N. Y. Superior Ct.*, 1849, *Fuller v. Emerie*, 2 *Sandf.*, 626; *S. C.*, 2 *Code R.*, 58; 7 *N. Y. Leg. Obs.*, 800.

II. THE APPLICATION. THE WRIT. DISCHARGING.

25. When. A *ne exeat* may be applied for in any stage of the suit,—e. g., pending an appeal. [1 *Ball & B.*, 78.] *Chancery*, 1829, *Dunham v. Jackson*, 1 *Paige*, 629.

26. Clear case must be shown. To entitle a party to a writ of *ne exeat*, his debt or demand must be satisfactorily ascertained; a mere declaration of belief of the existence and amount of his claim is not in all cases sufficient. There must also be a positive affidavit of a threat or purpose of the party against whom the writ is prayed, to go abroad. [7 *Ves.*, 417, 410; 16 *Id.*, 470; *Beam's Ne Exeat*, 25.] Also, that the debt would be lost, or at least endangered. [7 *Ves.*, 417; 8 *Id.*, 38.] *Chancery*, 1817, *Mattocks v. Tremain*, 8 *Johns. Ch.*, 75.

27. Mere apprehension that the defendant will misapply funds in his hands, or abuse his trust, is not sufficient. *Chancery*, 1818, *Woodward v. Schatzell*, 8 *Johns. Ch.*, 412.

The Security.

28. Plaintiff must swear positively that a debt or balance is due him; though he may state his belief as to the amount. *Chancery*, 1823, *Thorne v. Halsey*, 7 *Johns. Ch.*, 189.

29. Information. Upon an application for a *ne exeat*, the fact that the information of defendant's intention to depart came from those who would most probably have informed him of the intended application for a *ne exeat*, if they had been asked for an affidavit, is a sufficient reason for not producing their affidavits. *Chancery*, 1848, *Ordranax v. Helie*, 2 *Ch. Sent.*, 69.

30. Wife's affidavit. On the wife's application for *ne exeat* against her husband, her affidavit is admissible, on the same ground as that of any other plaintiff. [7 *Ves.*, 171; overruling 1 *Id.*, 49.] *Chancery*, 1815, *Denton v. Denton*, 1 *Johns. Ch.*, 441.

31. Answer. The court may, in its discretion, allow an answer to be read on a motion to discharge a writ of *ne exeat*, though the time for filing exceptions to it has not expired. *Chancery*, 1823, *Thorne v. Halsey*, 7 *Johns. Ch.*, 189.

32. Where the answer of the defendant is before the court, it should be taken into consideration. *Chancery*, 1825, *Gibert v. Colt*, *Hopk.*, 496.

33. Denying debt. In case of a bill for an account, the affidavit of indebtedness is open to explanation or contradiction by affidavit on the other side, upon a motion to discharge it. *V. Chan. Ct.*, 1838, *Cowdin v. Cram*, 3 *Edw.*, 231.

34. If defendant is in contempt for a breach of the injunction, he cannot move to dissolve a *ne exeat*. *V. Chan. Ct.*, 1839, *Evans v. Van Hall*, *Clarke*, 22.

35. Attachment. It seems, that a *ne exeat* may be by attachment as well as by writ. *Forrest v. Forrest*, 10 *Barb.*, 46; *S. C.*, 5 *How. Pr.*, 125; 9 *N. Y. Leg. Obs.*, 89; *Bushnell v. Bushnell*, 15 *Barb.*, 399; affirming *S. C.*, 7 *How. Pr.*, 389.

36. Service. If a subpoena is issued in good faith, and the *ne exeat* happen to be served before it, the service is not irregular; for the defendant may enter his appearance at once, and demand a copy of the bill. *Chancery*, 1841, *Georgia Lumber Co. v. Bissell*, 9 *Paige*, 225.

37. That it is of course to discharge a *ne exeat*, upon the defendant's giving security.

Chancery, 1838, *McNamara v. Dwyer*, 7 *Paige*, 239. To the same effect, 1831, *Mitchell v. Bunch*, 2 *Id.*, 606.

38. Giving security waives right to move. If the defendant, upon a voluntary agreement with the other party to discharge the writ, gives the ordinary bond to answer the bill and to abide the decree, as well as where he gives it on application to the court, without having leave reserved, he cannot object that the writ was improvidently issued. If in custody, he should apply to the court for leave to execute the bond without prejudice. *Chancery*, 1838, *Jesup v. Hill*, 7 *Paige*, 95.

III. THE SECURITY.

39. The sum in which the defendant shall be held to bail is determined by the court, at a sum sufficient to cover a reasonable amount of future interest; and the sheriff must take a bond for that sum without any addition. *Chancery*, 1825, *Gibert v. Colt*, *Hopk.*, 496; and see *McNamara v. Dwyer*, 7 *Paige*, 239.

40. The sheriff must take bail at his peril, as his own indemnity; if he refuses it, the court will take security and exonerate the sheriff. If the sheriff takes bail, the court will give him time to produce the defendant, or, if the sureties be sufficient, a reasonable time to collect the bond, before compelling him to pay the debt absolutely. *Chancery*, 1837, *Brayton v. Smith*, 6 *Paige*, 489.

41. Surrender. The surety in a *ne exeat* bond has not, at common law, like bail on arrest in law courts, a right to surrender his principal. But this right is given by the act of 1845 (*Laws of 1845*, ch. 214), and that act applies to sureties in bonds previously given, as well as to subsequent cases. *N. Y. Superior Ct., Chambers*, 1845, *Matter of Wolfe*, 3 *N. Y. Leg. Obs.*, 388.

42. It is no ground for discharging the principal after such surrender, that he was induced by false promises to come within the jurisdiction of the court. Bail have, it seems, the right to take their principal wherever they can. *Id.*

43. Lost bond. Where the bond given on discharge of a *ne exeat* was lost,—*Held*, that the complainant had no remedy on petition in equity against the sureties, but must sue them on the lost bond. *V. Chan. Ct.*, 1842, *Franceschi v. Marino*, 3 *Edw.*, 536.

44. Suit without leave. The objection

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that a suit at law on a bond given on issuing a *ne exeat*, was commenced without leave of the Court of Chancery, must be made at the earliest opportunity after suit brought. It is too late after verdict. *Supreme Ct.*, 1842, *Harris v. Hardy*, 8 *Hill*, 393.

43. In a suit at law, upon the bond taken on a *ne exeat*, the amount of the bond, as fixed by the Court of Chancery, is conclusive. *Id.*

NEGLIGENCE.

1. **Defined.** Negligence is a violation of the obligation which enjoins care and caution in what we do. Even when gross, it is but an omission of duty. *Supreme Ct.*, 1843, *Tonawanda R. R. Co. v. Munger*, 5 *Den.*, 255, 266; affirmed, *Ct. of Appeals*, 1850, 4 *N. Y. (4 Comst.)*, 349. *N. Y. Superior Ct.*, 1853, *Carroll v. N. Y. & New Haven R. R. Co.*, 1 *Duer*, 571, 588; *S. C.*, 11 *N. Y. Leg. Obs.*, 144.

2. Of the various degrees of negligence and diligence. *Mayor, &c., of N. Y. v. Bailey*, 2 *Den.*, 433; *Brand v. Schenectady & Troy R. R. Co.*, 8 *Barb.*, 368; *Chase v. N. Y. Central R. R. Co.*, 24 *Id.*, 273.

3. **Nonfeasance.** A mandatary, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages are averred. And this rule equally applies to commercial questions; as where one of two part-owners of a vessel voluntarily undertook to get it insured, but neglected to do so, and it was lost: though it would be otherwise of one who was in reality a factor or broker. *Supreme Ct.*, 1809, *Thorne v. Deas*, 4 *Johns.*, 84. To similar effect, 1828, *Smedes v. Bank of Utica*, 20 *Id.*, 372; affirmed, *Ct. of Errors*, 1824, 3 *Cow.*, 662.

4. **Common injury.** In cases of tort, the damage sustained must be shown to be the legal and natural consequence of defendant's acts. Injury to the market for a commodity, —e. g., lottery tickets,—from the want of public confidence, caused by the mismanagement of defendants in their trust, is too vague. *Supreme Ct.*, 1821, *Butler v. Kent*, 19 *Johns.*, 228.

5. **Packing goods.** A merchant sending

goods to his customer upon his order, is answerable for his neglect to pack and secure them in the usual manner of the trade, where there are no express instructions. *Supreme Ct.*, 1826, *Dickey v. Grant*, 6 *Cow.*, 310.

6. **Towboat.** The owners of a steamboat engaged in the business of towing, though they agree to tow a boat, "at the risk of the master and owners thereof," are liable for an injury to it occasioned by gross negligence in the management of their steamboat. *Ct. of Errors*, 1844, *Alexander v. Greene*, 7 *Hill*, 538; reversing *S. C.*, 8 *Id.*, 9. Followed, *Ct. of Appeals*, 1853, *Wells v. Steam Navigation Co.*, 8 *N. Y. (4 Seld.)*, 375.

7. **Accident.** No liability results from the commission of an act arising from inevitable accident, or which ordinary human care and foresight are unable to guard against. [*Hob.*, 134; 4 *Mbd.*, 405; 1 *Bing.*, 218; 3 *Wend.*, 391.] Accordingly, in an action for throwing a stone at the plaintiff's daughter, and putting out her eye, where it did not appear that the injury was inflicted by design or carelessness, but was accidental,—*Held*, that the plaintiff could not recover. *Supreme Ct.*, 1843, *Harvey v. Dunlop*, *Hill & D. Supp.*, 193. Compare *Center v. Finney*, 17 *Barb.*, 94; affirmed, *Seld. Notes*, No. 2, 44.

8. In order to excuse a collision upon the highway, upon the ground of inevitable accident, it must appear that the collision was unavoidable, and without any blame imputable to the defendant. [*Hob.*, 134.] *Supreme Ct.*, 1852, *Center v. Finney*, 17 *Barb.*, 94.

9. **Consequences.** The defendant with a weapon pursued a boy, with whom he had quarrelled, into plaintiff's store, and the boy, in his terror, ran against a wine cask and spilled the wine. *Held*, that the defendant was liable for the damages. In general, one who does an illegal or mischievous act, likely to prove injurious to others, or who does a legal act so carelessly that injury may probably ensue, is answerable for all the direct and natural consequences. [2 *W. Bl.*, 892; 3 *Wils.*, 408; 19 *Johns.*, 381.] *Supreme Ct.*, 1847, *Vandenburgh v. Truax*, 4 *Den.*, 464.

10. That gaslight companies are bound to supply pipes of sufficient strength to stand all lawful use of the streets, though not responsi-

* Affirmed, *Ct. of Appeals*, 1853, *Seld. Notes*, No. 2, 44.

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ble for damages resulting from extraordinary and mischievous use of the streets; but when pipes are broken by any cause, and the company is notified, and negligently delay to repair, they are responsible for ensuing damage. *Brown v. N. Y. Gaslight Co., Anth. N. P.*, 351.

11. Selling poison as harmless. The defendant, who prepared drugs for the market, by his servant sold a jar of poison, labelled, with the name of a harmless substance, as prepared by himself; and after it had passed through the hands of several dealers, a portion of the contents of the jar was sold and administered, and seriously injured the patient. *Held*, that the defendant had been guilty of a breach of duty to the public, and was liable in an action for damages. Since, in such a case, negligence puts human life in imminent danger, the negligent person is liable generally, without reference to privity of contract. *Ct. of Appeals*, 1852, *Thomas v. Winchester*, 6 *N. Y. (3 Sold.)*, 397.

12. Machine. The owner of a vessel employed shipwrights to repair it, and hired the defendants' dry-dock for the purpose. The shipwrights erected a scaffolding upon standards attached to the dock, and belonging to the defendants, and which, by the rules of the defendants, they were required to use for that purpose. Owing to the insufficiency of the standards the scaffolding gave way, and the plaintiff, who was employed upon it by the shipwrights in making repairs, fell upon the dock, and was injured. *Held*, that the defendants were liable to him in an action for damages therefor, although there was no privity of contract between him and them. The owner of a machine, made by him to be hired out to others for a particular purpose, is under an obligation to make such machine sufficiently strong to answer the purpose intended. If an injury occurs through a defect in it, the owner is liable. *N. Y. Com. Pl.*, 1857, *Cook v. N. Y. Floating Dry-Dock Co.*, 1 *Hill.*, 436. Compare *supra*.

13. Excavation. Persons who cause to be constructed an area under the highway, are bound at their peril to keep it so covered that the way would be as safe as before the area was built; and when the covering from any cause becomes unsafe, they are responsible. It is no defence that the covering was done by contractors who agreed to make it safe; or that the covering became unsafe by the wrong-

ful act of a third party. *Ct. of Appeals*, 1858, *Congreve v. Smith*, 18 *N. Y. (4 Smith)*, 79; *Congreve v. Morgan, Id.*, 84.

14. Where it did not clearly appear that the area was under the highway, and it was not shown that the defendants were negligent in making the contract for the construction;—*Held*, that plaintiff could not recover. *N. Y. Superior Ct.*, 1855, *Congreve v. Morgan*, 4 *Duer*, 439.

15. A turnpike company not liable for damages sustained by plaintiff in jumping from a wagon in an emergency created by the acts of third persons. *Supreme Ct.*, 1855, *Wilson v. Susquehanna Turnpike Road Co.*, 21 *Barb.*, 68.

16. The proprietor of an omnibus line liable for the negligence of the driver, or the defective construction of the coach. *Harpell v. Curtis*, 1 *E. D. Smith*, 78.

17. Runaway horse. Where a servant negligently omits to tie or restrain his employer's horse, and a third person frightens him, the employer is liable to one who, without his own fault, is injured by the horse in running away. *N. Y. Com. Pl.*, 1854, *McCa-hill v. Kipp*, 2 *E. D. Smith*, 413.

18. Unfinished building. Where the owner of several lots, upon the rear of which were tenements, commenced to build upon the front, and opened a way through an adjoining lot for his tenants, of which he notified them,—*Held*, that a visitor who, in attempting to enter the tenements, passed into the unfinished building in the night time and fell through the floor and was injured, could not recover for his injuries. *N. Y. Com. Pl.*, 1854, *Roulston v. Clark*, 8 *E. D. Smith*, 366.

19. Plaintiff's negligence. An action for damages caused by the defendant's negligence cannot be sustained, if negligence on the part of the plaintiff co-operated with defendant's misconduct to produce the injury. *Supreme Ct.*, 1848, *Tonawanda R. R. Co. v. Munger*, 5 *Den.*, 255; to the same effect is a further decision in *S. C.*, *Ct. of Appeals*, 1850, 4 *N. Y. (4 Comst.)*, 349. To the same effect, *N. Y. Superior Ct.*, 1829, *Burckle v. N. Y. Dry-Dock Co.*, 2 *Hall*, 151. *Supreme Ct.*, 1843, *Brownell v. Flagler*, 5 *Hill*, 282; 1844, *Brown v. Maxwell*,* 6 *Id.*, 592; 1845, *Cook v. Champlain*

* See this case in table of CASES CRITICISED, Vol. I. *Ante*.

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Infants, &c.

Transportation Co., 1 *Den.*, 91; 1850, *Brand v. Schenectady & Troy R. R. Co.*, 8 *Barb.*, 368; 1855, *Terry v. N. Y. Central R. R. Co.*, 22 *Id.*, 574; 1856 [citing 18 *Barb.*, 9; 11 *Id.*, 112; 5 *Id.*, 387], *Sheffield v. Rochester & Syracuse R. R. Co.*,* 21 *Id.*, 339; 1858, *Dascomb v. Buffalo & State Line R. R. Co.*, 27 *Id.*, 221; and see *Barnes v. Cole*, 21 *Wend.*, 168; *Fowler v. Dorlon*, 24 *Barb.*, 384; *Roulston v. Clark*, 3 *E. D. Smith*, 366.

20. The question on which the right to damages depends, in an action to recover for injuries sustained by reason of the defendant's negligence, is not, which party was most to blame, but has one suffered damage from the fault of the other, without having contributed thereto by his own fault, or want of ordinary care and prudence. *N. Y. Com. Pl.*, 1855, *Clark v. Kirwan*, 4 *E. D. Smith*, 21.

21. Where defendant negligently left maple sirup in his uninclosed shed, and plaintiff's cow, running at large, drank it and died,—*Held*, that defendant was not liable. *Supreme Ct.*, 1823, *Bush v. Brainard*,† 1 *Cow.*, 78.

22. A judgment-creditor cannot recover against one who has intermeddled with property the former had levied on, if he has voluntarily released the property from the levy, or lost his lien by his own gross negligence. *Supreme Ct.*, 1848, *Marsh v. White*, 3 *Barb.*, 518.

23. The owners of a machine for raising vessels from the water, who let it for that purpose, are not liable to the persons hiring it, for injury by a fire caused by the latter. The owners are, at most, only bound to keep their machine in a situation of being safely used, for the purposes for which it was intended, by those who should manage it with ordinary care. [1 *Cow.*, 78; *Oro. J.*, 158; 11 *East*, 60.] *N. Y. Superior Ct.*, 1829, *Burckle v. N. Y. Dry-Dock Co.*, 2 *Hall*, 151.

24. Where the horse of the plaintiff escaped from his stable at night, and fell into a cut in the public highway through which the railroad track of the defendants passed,—*Held*, that it was the duty of the plaintiff so to secure his horse that he could not stray into the public streets, and plaintiff must suffer the consequences of his escaping. *N. Y. Com. Pl.*,

1857, *Mentges v. N. Y. & Harlem R. R. Co.*, 1 *Hill.*, 425.

25. Erecting buildings on one's own land, in an exposed and hazardous situation, is not negligence, within the rule that if the plaintiff's negligence concurs with the defendant's in producing the injury, he cannot recover. By so doing, the plaintiff assumes the risk of mere accident, but not the risk of negligence on defendant's part. *Supreme Ct.*, 1845, *Cook v. Champlain Transportation Co.*, 1 *Den.*, 91.

26. Exposure to danger. A railroad passenger, injured by a collision resulting from defendant's gross negligence, is entitled to recover, although at the time of the collision he was in the baggage-car; if he was lawfully there, notwithstanding he knew the position to be much more dangerous, in the event of such a collision, than a seat in the passenger-car, and that too, though the result may demonstrate that he would not have been injured if he had been in a passenger-car. His imprudence or want of care does not contribute to cause the accident which occasioned the injury. [Reviewing many cases.] *N. Y. Superior Ct.*, 1858, *Carroll v. N. Y. & New Haven R. R. Co.*, 1 *Duer*, 571; *S. C.*, 11 *N. Y. Leg. Obs.*, 144. To similar effect, 1857, *Colegrove v. N. Y. & Harlem R. R. Co.*, 6 *Duer*, 382.

27. Negligence of guardians of infant. Although a wilful or grossly negligent injury is never tolerated, be the negligence on the side of the party injured what it may; yet where an injury arises from mere inadvertence, and there is an equal or greater neglect on the part of the injured, an action cannot be maintained. In this respect, the negligence of one who permits an infant of tender years to wander into the highway where it is run over by a traveller, is to be imputed to the infant, and the infant cannot recover against the traveller, especially if the latter was not guilty of negligence. *Supreme Ct.*, 1829, *Hartfield v. Roper*,* 21 *Wend.*, 615. Followed, *N. Y. Com. Pl.*, 1850, *Kreig v. Wells*, 1 *E. D. Smith*, 74; and see *Munger v. Tonawanda R. R. Co.*, 4 *N. Y. (4 Comst.)*, 349.

28. — of insane persons. A lunatic was travelling on a railroad, in charge of his father, and the father left him in one car and took a

* Approved in *Mackey v. N. Y. Central R. R. Co.*, 27 *Barb.*, 528, 541.

† See this case in table of CASES CRITICISED, Vol. I., *Ante*.

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

Degree of Negligence.

Employees.

Passenger

seat in another. The lunatic not paying his fare after repeated requests, the conductor, in ignorance of his condition, put him off the train, and he wandered about the track, and was run over by another train and killed. *Held*, that there was negligence on the part of the father, which was attributable in law to the lunatic, and none in the conductor; and the father, as administrator of the lunatic, could not recover against the company. [21 Wend., 615.] *Supreme Ct.*, 1853, Willetts v. Buffalo & Rochester R. R. Co., 14 Barb., 585.

29. Concurring negligence. Although negligence on the part of the plaintiff does not shield the defendant from a recovery, when it appears that but for the defendant's own subsequent negligence the accident would not have occurred; that is, when it appears that his own negligence was the sole proximate cause; yet if the negligence of both concurred,—as where plaintiff was negligent in getting his vehicle in the way of defendant's cars, and defendant's cars might have been stopped in season to avoid a collision but for the want of adequate brakes,—plaintiff cannot recover. *N. Y. Superior Ct.*, 1858, Owen v. Hudson River R. R. Co., 2 Bosw., 374.

30. Ordinary care enough. A person sustaining an injury through the negligence of another, may recover therefor, if he could not have avoided the collision by the use of ordinary care. If plaintiff uses ordinary care, he cannot be deemed to have contributed to the negligence. *Supreme Ct.*, 1852, Center v. Finney,* 17 Barb., 94. *S. P.*, *N. Y. Com. Pl.*, 1850, Eakin v. Brown, 1 E. D. Smith, 36.

31. The rule that the plaintiff cannot recover where his own fault contributed to the injury, is to be applied with caution where the fault of the defendant is clearly established. *N. Y. Com. Pl.*, 1855, Clark v. Kirwan, 4 E. D. Smith, 21.

32. Proof of negligence. In actions brought to recover damages for an injury alleged to have been occasioned by the negligence of the defendant, whether the defendant be an individual or a corporation, to entitle the plaintiff to recover, he must show some fault on the part of the defendant. And that fault will not be inferred merely from the injury, unless the defendant is a common carrier of persons

and the plaintiff was a passenger. [Citing many cases.] *Supreme Ct.*, 1855, Terry v. N. Y. Central R. R. Co., 22 Barb., 574.

33. The plaintiff cannot succeed if it appears that the injury complained of was received by him while he was trespassing upon the defendant, without proving that such injury was wilful and intentional on the part of the defendant. *Id.*

34. Of the duty of plaintiff to use reasonable means to prevent the injurious effects of defendant's negligence. Chase v. N. Y. Central R. R. Co., 24 Barb., 278.

35. Servant of same employer. The plaintiff was employed by an agent of the defendant to labor in gravelling and ballasting a new track, which was on the same road-bed with, and about six feet distant from, the old track; and when walking in the new track from his house to his work, was injured by a train of cars of the defendants running on the new track, on which no train of cars had before been run. *Held*, that this was a case for the application of the rule that an employer is not responsible to one employee for injury occasioned by another employee, engaged in the same general undertaking. [17 N. Y., 184, 158; 10 Cush., 228.] The plaintiff who suffered and the persons who caused the injury were in the service of one employer, both in the common enterprise of maintaining and operating the railroad. *Ct. of Appeals*, 1858, Boldt v. N. Y. Central R. R. Co., 18 N. Y. (4 Smith), 432.

36. A passenger by railroad is not so identified with the proprietors of the train conveying him, or their servants, as to be responsible for negligence on their part. He may, therefore, recover against the proprietors of another train for damages from a collision through their negligence, though there was such negligence in the management of the train conveying him as would have defeated an action by its owners. *Ct. of Appeals*, 1859, Chapman v. New Haven R. R. Co., 19 N. Y. (5 Smith), 341. To the same effect, *N. Y. Superior Ct.*, 1857, Colegrove v. N. Y. & Harlem R. R. Co., 6 Duer, 382.

37. Who liable. The liability to make compensation for an injury arising from the negligent act of another, attaches only on the person doing the act, or on the person employing him. The liability of any one other than the party actually guilty of any wrong-

* Affirmed, *Ct. of Appeals*, 1853, *Seld. Notes*, No. 2, 44

Liability for Negligence.

ful act, proceeds on the maxim that he who does an act through the medium of another, is, in law, considered as doing it himself—*qui facit per alium facit per se*. The party employing has the selection of the agent employed; and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from his want of skill or want of care. But neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned. [6 M. & W., 499; 9 Id., 711; 12 A. & E., 787; 5 Barn. & Cr., 547; 4 Wels. Hurls. & Gord., 254; 5 N. Y., 48.] *Ot. of Appeals*, 1852, *City of Buffalo v. Holloway*, 7 N. Y. (3 *Seld.*), 498.

38. Thus, where A. bought of B. a box in the upper story of B.'s store, and sent a porter for it, who, in using, with B.'s consent, the fall to lower the box to the sidewalk, through negligence let the box drop into the street, and it struck the plaintiff. *Held*, that B. was not liable for the porter's negligence. *Ot. of Appeals*, 1852, *Stevens v. Armstrong*, 6 N. Y. (3 *Seld.*), 435.

39. The mere architect or builder of a work is answerable only to his employers for negligence in its execution. *Ot. of Appeals*, 1849, *Mayor, &c., of Albany v. Ounliff*, 2 N. Y. (2 *Comst.*), 165; reversing S. C., 2 *Barb.*, 190.

40. Work done by contractor. Where a person contracts with another to do a lawful and innocent work, whether in respect to personal or real property, in such terms that the employer has no control or authority over the mode of performance, he is not liable for the negligence of the contractor in the manner of its performance. [5 N. Y., 48; 8 Id., 222.] *N. Y. Com. Pl.*, 1853, *Gourdiere v. Cormack*, 2 *E. D. Smith*, 254.

41. The mere fact that the owner, before the work commences, gives written notice, in his own name, of his intention to perform it, and is present from time to time during its progress, will not change the case. *Id.*

42. The defendants had contracted to build a house for the owners, and employed a blacksmith at a stipulated price to provide a grating on the front area. The opening was left without a guard, and plaintiff fell through it.

Nature of New Promise.

Held, that as it did not appear that the blacksmith had agreed to guard the opening except while engaged in his own work, the defendants were liable. *N. Y. Superior Ct.*, 1854, *McCleary v. Kent*, 8 *Duer*, 27; distinguishing *Blake v. Ferris*, 5 N. Y. (1 *Seld.*), 48.

As to matters Peculiar to particular persons, relations, or employments, see those several titles, such as CORPORATIONS, MUNICIPAL CORPORATIONS, OFFICERS, &c.; PRINCIPAL AND SURETY, PRINCIPAL AND AGENT, MASTER AND SERVANT, &c.; BANKING, CARRIERS, RAILROAD COMPANIES, &c.

As to Pleadings and Evidence, see those titles.

As to the Statute giving a cause of action for negligence, &c., causing death, see DEATH.

NEW PROMISE.

1. After discharge. That a promise, after discharge, must be to the plaintiff, or a promise to pay the plaintiff; and a promise to plaintiff's assignor, is not enough. *Supreme Ct.*, 1830, *Moore v. Viele*, 4 *Wend.*, 420.

2. Negotiable security. By an insolvent discharge, the negotiable quality of the debtor's note is destroyed. The debt is discharged; a new promise is a new contract, and suit can be brought only in the name of the person to whom it was made. Though the plaintiff is allowed to declare on the old cause of action, it is only resorted to for the purpose of making out a consideration. *Supreme Ct.*, 1829, *Depuy v. Swart*, 8 *Wend.*, 185. Followed, 1830, *Moore v. Viele*, 4 *Id.*, 420; 1832, *Souliden v. Van Rensselaer*, 9 *Id.*, 293.

3. Conditional promise. To maintain an action on a promise to pay when able, proof of the ability to pay must be given. [3 *Wend.*, 185; 1 *Stark. N. P. Cas.*, 370.] *Supreme Ct.*, 1844, *Ingersoll v. Rhoades*, *Hill & D. Supp.*, 371.

4. After release. That to recover, by virtue of a new promise, a debt that has once been released by the creditor, the action should be founded upon the new promise, and not, as in the case of a debt barred by limitations, upon the original demand. Such a promise does not revive the original debt, but is a new contract, creating a new and distinct cause of action. [3 *Wend.*, 185; 5 *Mass.*, 509; 4

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Wend., 420; 5 Id., 267.] *N. Y. Superior Ct.*, 1856, *Stearns v. Tappin*, 5 *Duer*, 294.

5. **Distinction** between new promise of an infant, and that of a bankrupt, and that of one whose debt is barred by limitations. *Depuy v. Swart*, 3 *Wend.*, 185; *Purdy v. Austin*, *Id.*, 187; *Dean v. Hewit*, 5 *Id.*, 267; *Soulden v. Van Rensselaer*, 9 *Id.*, 298.

As to what amounts to an **Affirmance** of his contract by a minor after he comes of age, see **INFANT**.

As to the new promise of a **Bankrupt** or **Insolvent**, see **DISCHARGE**.

As to the right of **Partners**, after dissolution, to bind each other by a new promise, see **PARTNERSHIP**.

As to what acknowledgment or new promise takes a debt out of the **Statute of Limitations**, see **LIMITATIONS**.

NEW TRIAL.

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I. THE MOTION IN GENERAL.

1. **Judge's certificate.** Under Rule 4 of 1799, notice of motion for a new trial, accompanied by a judge's certificate, is a substitute for the former practice of a rule to show cause. If the party neglects to obtain a certificate, and a judgment is consequently duly entered up, the court will not then hear an argument to set the verdict aside. *Supreme Ct.*, 1800, *Shepherd v. Case*, *Col. & C. Cas.*, 94.

2. **Affidavit.** The court will not set aside a regular verdict on a mere affidavit of merits.

Supreme Ct., 1808, *Gilliland v. Morrell*, 1 *Cal.*, 154. See *Col. & C. Cas.*, 214.

3. **Rehearing.** After granting a new trial, a reargument may be ordered, in the discretion of the court, upon an *ex-parte* application. *Ct. of Errors*, 1848, *Slocum v. Fairchild*, 7 *Hill*, 292.

4. **Amendment.** A verdict for plaintiffs, in a case in which one of them had no interest, there being no allegation or proof of an assignment to him by the others, cannot be sustained without an amendment, and this can only be had on motion at the trial or afterward. The court will not order the amendment on the argument for a new trial. *Supreme Ct.*, 1853, *Travis v. Tobias*, 8 *How. Pr.*, 383.

5. **Reviewing decision upon nonsuit.** Where no violation of any rule of law upon the trial appears, a motion for a new trial is not to be deemed a renewal of a motion for a nonsuit. The right to move for a nonsuit never exists after verdict, except when leave is expressly reserved on the trial to renew it. Where the proceedings are of an adverse character throughout, and the question is one of fact, the verdict disposes of the motion for a nonsuit; and, there being no violation of any rule of law, the verdict should not be set aside, unless against the weight of, or unsupported by the evidence. *N. Y. Com. Pl.*, 1854, *Downing v. Mann*, 3 *E. D. Smith*, 86; *S. C.*, 9 *How. Pr.*, 204.

6. If the plaintiff, instead of going to the jury upon the evidence, insists upon being nonsuited, and is nonsuited accordingly, he cannot move, on his exceptions, or a case, to set the nonsuit aside. *N. Y. Superior Ct.*, 1829, *Forbes v. Luyster*, 3 *Hall*, 408.

7. A nonsuit will not be set aside on a special motion, on the grounds that the judge received evidence prematurely, or refused to submit to the jury a question of fact proper for their determination. Erroneous decisions of the judge on the trial can only be corrected on a case or bill of exceptions. *Supreme Ct.*, *Sp. T.*, *Craig v. Fanning*, 6 *How. Pr.*, 386.

8. **Entry and service of rule.** Where a new trial is granted on the plaintiff's motion, he must take notice of it, and proceed to trial without notice from the defendant, or he may be nonsuited. [Distinguishing 9 *Johns.*, 265.] *Supreme Ct.*, 1827, *Jackson v. Johnson*, 7 *Cow.*, 419.

9. Where the plaintiff's motion for a new

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trial is decided in his favor, and the rule is entered on the last day on which he can give notice of trial for the ensuing term, it is his duty to take notice of the rule, and give the notice, or he will be liable for the default, in omitting to bring his cause to trial. *N. Y. Superior Ct.*, 1848, *Mottram v. Mills*, 1 *Sandf.*, 671.

10. That defendant may enter rule granted to plaintiff for new trial, if plaintiff delays. *Supreme Ct., Sp. T.*, 1847, *Gale v. Hoysradt*, 8 *How. Pr.*, 47.

11. Where defendant obtains an order for a new trial, he must serve a copy of the rule upon plaintiff before he can move for judgment, as in case of nonsuit for not trying. *Supreme Ct.*, 1812, *Jackson v. Wilson*, 9 *Johns.*, 265.

12. Rule 2 of May, 1832,—regulating the entry of orders for new trials,—construed. *Muir v. Demaree*, 9 *Wend.*, 449; *People v. Ten Eyck*, 18 *Id.*, 558.

13. Moving after judgment. Motion for new trial cannot be made after judgment has been regularly perfected. *Supreme Ct.*, 1800, *Case v. Shepherd*, 1 *Johns. Cas.*, 245; *Jackson v. Chace*, 15 *Johns.*, 354.

14. Where there was an excusable mistake in practice, the court entertained the motion. *Supreme Ct.*, 1800, *Case v. Shepherd*, 1 *Johns. Cas.*, 245; 1824, *Grant v. Root*, 3 *Cow.*, 354.

15. The rule is now as formerly, that the motion for a new trial on a case should be made before final judgment. If made afterwards, it can only be by the leave of the court. *N. Y. Com. Pl.*, 1850, *Hastings v. McKinley*, 3 *Code R.*, 10.

16. After judgment has been entered and has become final, the only remedy is by appeal. *Supreme Ct., Sp. T.*, 1851, *Ball v. Syracuse & Utica R. R. Co.*, 6 *How. Pr.*, 198.

17. After judgment entered on a verdict, the unsuccessful party cannot move before another judge than the one before whom the cause was tried, for a new trial, on exceptions taken to the ruling of the judge and his charge at the trial. Although the justice before whom the cause was tried may entertain such motion, another justice cannot: nor can it be made in any way after judgment is perfected. The only mode of reviewing the judgment is by appeal. *Supreme Ct., Sp. T.*, 1859, *Jackson v. Fassit*, 17 *How. Pr.*, 453; *S. C.*, 9 *Abbott's Pr.*, 187.

18. The fact that a plaintiff is allowed to enter judgment as security on a verdict, does not preclude defendant from moving to set aside the verdict on a case made, on the ground it is against evidence. *N. Y. Superior Ct.*, 1854, *Benedict v. Caffé*, 3 *Duer*, 669; *S. C.*, 12 *N. Y. Leg. Obs.*, 262.

19. Moving on judge's minutes. The judge who tries the cause may in his discretion entertain a motion to be made on his minutes to set aside a verdict, and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion, if heard upon the minutes, can only be heard at the same term or circuit at which the trial is had. *Code of Pro.*, § 264.

20. — on case or exceptions. A motion for a new trial on a case or exceptions, or otherwise, must in the first instance be heard and decided at the circuit or special term, except that when exceptions are taken, the judge trying the cause may at the trial direct them to be heard in the first instance at the general term, and the judgment in the mean time suspended: and in that case, they must be there heard in the first instance, and judgment there given. *Code of Pro.*, § 265.

21. Verdict subject, &c. Where a verdict was taken subject to the opinion of the court on a point reserved, under section 264 of the Code of Procedure, and the judge afterwards determined the point in favor of the defendant, —*Held*, that he might set aside the verdict and order a new trial. *Supreme Ct., Sp. T.*, 1849, *Willis v. Welch*, 2 *Code R.*, 64.

22. When a cause comes before the general term on a motion for judgment upon a verdict taken subject to the opinion of the court upon questions specially submitted to the jury at the trial, the general term cannot entertain a motion to set aside the finding of the jury upon one or more of the questions submitted, as against evidence. Such a motion must be made in the first instance at special term, and it is only upon an appeal that it can be considered at general term. When no such motion is before the court at general term, the finding of the jury upon questions of fact submitted to them must be regarded as conclusive, and the duty of the court, as it is upon a special verdict, is merely to declare the law arising upon the facts as found. *N. Y. Superior Ct.*, 1857, *Purvis v. Coleman*, 1 *Bow.*, 321.

23. Special term. A justice at special term has the power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence. *Supreme Ct.*, 1850, *Lusk v. Lusk*, 4 *How. Pr.*, 418; *S. C.*, 3

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Code R., 118; *Chambers*, 1850, *Graham v. Millman*, 4 *How. Pr.*, 435; *Sp. T.*, 1851, *Ball v. Syracuse & Utica R. R. Co.*, 6 *Id.*, 198. *N. Y. Superior Ct.*, 1850, *Droz v. Lakey*, 2 *Sandf.*, 681; *Haight v. Prince*, *Id.*, 720.

24. A single justice can grant a new trial on the merits, where the verdict is against evidence. This power is not forbidden by the Constitution of 1846, and is impliedly conferred by the Code of Procedure. *Supreme Ct.*, 1850, *Lusk v. Smith*, 8 *Barb.*, 570.

25. A hearing at special term is not necessary to authorize the granting of a new trial for errors of fact in a report of referees. Such errors may be reviewed and corrected on appeal. *Supreme Ct.*, *Sp. T.*, 1849, *Pepper v. Goulding*, 4 *How. Pr.*, 810; *S. C.*, 3 *Code R.*, 29.

26. **General term.** The trial of an action commenced before the amendments of the Code in 1851 took effect, was had afterward, and the judge directed the motion for a new trial to be made at general term (under § 265), — *Held*, that the order was proper, and that the court might pass upon questions of law as well as those of fact embraced in the case. *Supreme Ct.*, 1852, *Fellows v. Emperor*, 18 *Barb.*, 92.

27. A motion for a new trial, on the ground of newly discovered evidence, cannot be heard in the first instance at the general term. It must be made at special term, and if denied, an appeal may be taken. *N. Y. Superior Ct.*, 1855, *Clarke v. Ward*, 4 *Duer*, 206.

28. **Preparing the case.** Whenever it shall be intended to move for a new trial (except for irregularity, surprise, or upon the minutes of the judge), or a case or exceptions, or case containing exceptions, shall be prepared by the moving party, and a copy served on the opposite party within ten days after the trial, if by jury, or after a written notice of the filing of the decision or report, if the trial be by the court or by referees; the party served may within ten days thereafter propose amendments and serve a copy. Notice of settlement to be given. The justice or referee shall correct and settle the case as he shall deem to consist with the truth of the facts. The lines of the case shall be so numbered that each copy shall correspond. *Supreme Ct.*, *Rule 33 of 1847*; 84 of 1858.

29. The old practice of moving on a case or bill of exceptions to set aside a verdict of non-

suit, and all the proceedings to review by the Supreme Court at general term the rulings and decisions of a single justice thereof at circuit, are still in force as respects all suits commenced before the Code of Procedure took effect, and must be adopted and pursued in such cases. *Supreme Ct.*, 1850, *Thompson v. Blanchard*, 4 *How. Pr.*, 260.

30. On a motion for a new trial upon a case, the court will not in general examine rulings made at the trial *in favor* of the party against whom the verdict passed. The rule is to examine the decisions made by the circuit judge *against* such party, and to grant or refuse a new trial according as they are erroneous or otherwise. If a point ruled against the successful party, if rightly determined, would present an obstacle impossible to be overcome, then, and only then, can it be relied on to prevent a new trial. *Supreme Ct.*, 1845, *Elsley v. Metcalf*, 1 *Den.*, 828.

31. **Serving case.** Where, after verdict, a case is made and settled, the party whose right it is to make it up must serve a copy of it as settled on the opposite party, as early, at least, as the time allowed for noticing it for argument; and if the opposite party notices the cause for argument, and has not been served with such copy, he may take judgment. *Supreme Ct.*, 1817, *Peck v. Peck*, 14 *Johns.*, 219.

32. **Exhibits.** Plaintiff's attorney having refused to furnish defendant's attorney with certain papers read in evidence, whereby the latter was unable to make up a case, the court, on application of the latter, ordered the plaintiff's attorney to furnish the papers, or allow extracts to be taken from them, and granted a stay of proceedings. *Supreme Ct.*, 1800, *Jackson v. Platt*, 2 *Johns. Cas.*, 71.

33. **Amendments.** Every amendment must be on the case made, or refer to the line and page in which it is proposed to be inserted. *Supreme Ct.*, 1808, *Milward v. Hallett*, 1 *Cai.*, 344.

34. The right to propose amendments to a case, does not authorize preparing and proposing a new case by way of substitute for the one served. *Supreme Ct.*, 1800, *Eagle v. Alner*, 1 *Johns. Cas.*, 332; 1808, *Milward v. Hallett*, 1 *Cai.*, 344.*

* See *Grah. Pr.*, 2 ed., 332, where a limitation to this rule is stated, on authority of an unreported decision.

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35. Where amendments to defendant's case were sent by plaintiff's attorney to counsel in season, but by accident did not reach the counsel in time for the settlement, a motion to amend the case was entertained. *Supreme Ct.*, 1808, *Hun v. Bowne*, 1 *Cal.*, 28.

36. The charge. The judge has a right to see that his charge is correctly inserted in the case; and the parties cannot prevent this by agreement. *Supreme Ct.*, 1827, *Root v. King*, 6 *Cow.*, 569.

37. In settling a case, the circuit judge may insert such facts, which transpired on the trial, as he conceives necessary to render his charge intelligible, although not insisted upon by either party; and may state his charge in his own words; and may insert opinions expressed by him in the hearing of the jury, though not embodied in a formal charge. *Supreme Ct.*, 1832, *Walsworth v. Wood*, 7 *Wend.*, 483.

38. Refusal of the judge to allow counsel to be heard in relation to settling the case, is ground for granting a resettlement. *Supreme Ct.*, 1827, *Root v. King*, 6 *Cow.*, 569.

39. Effect of the case. A case, though conclusive against the parties making it, is not conclusive as to third persons; and hence is not admissible on a second trial, as evidence of what a witness swore to before, to discredit or impeach him upon the new trial. *Supreme Ct.*, 1806, *Neilson v. Columbian Ins. Co.*, 1 *Johns.*, 301.

40. Verdict subject, &c. Where verdict is taken for plaintiff, subject to the opinion of the court, it is incumbent on plaintiff to make up the case. He cannot move for judgment until the point reserved is disposed of. *Supreme Ct.*, 1800, *Eagle v. Alner*, 1 *Johns. Cas.*, 332.

41. Moving on case or on bill of exceptions. The Code of Procedure has not abrogated the different modes of reviewing the proceedings had upon a trial, by motion upon a case made, and by bill of exceptions. The history of the practice of making a "case," as basis of a motion for a new trial, stated. *N. Y. Com. Pl.*, 1850, *Hastings v. McKinley*, 3 *Code R.*, 10.

42. Where points of law are raised and decided on the trial of an action, the party dissatisfied with the ruling of the judge may review the same at special term by a motion for a new trial on a case. The motion for a

new trial on a case brings before the court the evidence, the finding of the jury thereon, the ruling of the court, and the judge's charge, with all exceptions taken at the trial. *Id.*

43. The reason why the court will not always grant a new trial on a case, notwithstanding it appears improper evidence was given against the objection of the defeated party, and an exception taken to the decision admitting it, is, that a case is supposed to contain the whole evidence, and if the court of review is satisfied that substantial justice has been done, and that the verdict ought to, and would, have been the same, if the evidence excepted to had not been given, it will not disturb the verdict.

On the other hand, the theory of a bill of exceptions is, that it contains only so much of the evidence given as is necessary to properly raise the points sought to be reviewed on error, and therefore the court has not the means before it of accurately judging whether the objecting party may or may not have been prejudiced by the improper evidence whose admission is complained of. *N. Y. Superior Ct.*, 1853, *Murray v. Smith*, 1 *Duer*, 412, 438.

44. Where a bill of exceptions purports to contain the whole of the evidence, though it contains an exception to testimony erroneously admitted, the court will not grant a new trial, if it is satisfied that the verdict ought to and would have been the same if the testimony had been excluded. *Id.*

45. Turning case into bill of exceptions. A case can never be turned into a bill of exceptions, or special verdict, unless the right to do so is reserved at the trial. *N. Y. Superior Ct.*, 1829, *Lewis v. Stevenson*, 2 *Hall*, 248.

46. Under what circumstances leave, not reserved at the trial, to turn a case into a bill of exceptions, may be granted on a subsequent motion. *N. Y. Com. Pl.*, 1850, *Benedict v. N. Y. & Harlem R. R. Co.*, 3 *Code R.*, 15.

47. Objections presented upon a case must be as specific as if presented upon bill of exceptions. The reason in both cases is the same: to apprise the opposite party, so that he may supply the defect, and the court, in order that the question of law may be seen. *Supreme Ct.*, 1837, *Norman v. Wells*, 17 *Wend.*, 186.

48. The provision of the Code as to appeals to the Court of Appeals, from orders granting new trials, is confined to that class of cases

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where the party prevailing at the trial is satisfied either to sustain his verdict by the judgment of this court, or fail altogether in his action or defence. It is only in that class of cases in which the merits are all presented on the motion for a new trial that this sort of appeal can be safely brought. *Ot. of Appeals*, 1859, *Lauman v. Lewiston R. R. Co.*, 18 *N. Y.* (4 *Smith*), 498.

II. UPON WHAT GROUNDS GRANTED.

1. In General.

49. The importance and novelty of the case relied on, in part, as reasons for granting a new trial. *Abbott v. Sebor*, 2 *Johns. Cas.*, 89.

50. Absence of counsel. A new trial will not be granted because one of the party's counsel was absent at the trial. *Supreme Ct.*, 1905, *McKay v. Marine Ins. Co.*, 2 *Cas.*, 384; *S. P.*, 1808, *Post v. Wright*, 1 *Id.*, 111.

51. A new trial will not be granted because a juror was challenged by the opposite party, in consequence of which he did not serve, when the counsel of the party moving, who was present when the cause was brought on, had gone out of court. *Supreme Ct.*, 1804, *Steinbach v. Columbian Ins. Co.*, 2 *Cas.*, 129.

52. To allow proof to be supplied. The declaration on a guaranty of S.'s notes set up a sale by the plaintiff to S. as the consideration, and the guaranty did not set forth any consideration, but set forth S.'s notes, which were of the same date as the guaranty. On a demurrer to evidence,—*Held*, that this was not sufficient proof of the consideration averred; but a new trial was awarded, to enable the plaintiff to supply the defect by parol proof. *N. Y. Superior Ct.*, 1828, *Wheelwright v. Moore*, 1 *Hall*, 201.

53. Mistake, &c. Where a verdict is taken, subject to the opinion of the court upon a case, the fact that the defeated party supposed that the cause would turn upon questions of law, whereas it was decided upon a question of fact, is no ground for granting a new trial. *N. Y. Superior Ct.*, 1829, *Lewis v. Stevenson*, 2 *Hall*, 248.

54. New trial granted, on terms, where plaintiff had erred in practice through erroneous advice of counsel. *Rogers v. Niagara Ins. Co.*, 2 *Hall*, 559.

55. Compromise. New trial refused, when sought on the ground that the plaintiff had

offered to accept, in compensation for damages from a breach of warranty, a sum less than that recovered on trial. *Supreme Ct.*, 1884, *Beebe v. Robert*, 12 *Wend.*, 418.

56. That disorderly conduct on the part of spectators of a trial,—e. g., applauding plaintiff's counsel,—which is calculated to influence the jury as being a manifestation of popular feeling, or which prevents the jury from hearing the charge, may be ground for a new trial. *Supreme Ct.*, 1844, *Conrad v. Williams*, 6 *Hill*, 444.

57. Action for chattels. It is not necessary to set aside the verdict in an action for possession of personal property, and order a new trial, merely because the jury have not found the value of the property separate from the damages. If necessary to ascertain the value as basis of an extra allowance of costs, this can be done by the court. *N. Y. Com. Pl.*, 1852, *Archer v. Boudinet*, 1 *Code R.*, *N. Y.*, 372.

58. The fact that in an action for chattels plaintiff obtained a judgment for the value of his property in them, instead of an alternative judgment for a return of the chattels, or for the value of his property, is not ground for a new trial. The judgment may be modified and affirmed. *Ot. of Appeals*, 1854, *Fitzhugh v. Wiman*, 9 *N. Y.* (5 *Seld.*), 559.

59. Amendment of complaint. Where the complaint declares upon a contract which is entire, and is void as to a part of the consideration, the complaint must be dismissed as to the whole claim. But where, a complaint of this description having been dismissed, the plaintiff procures an order allowing him to amend his complaint by striking out all averments basing his claim upon the illegal consideration, it is proper to grant a motion upon the complaint as amended, to set aside the order of dismissal, and to grant a new trial. *Brooklyn City Ct.*, 1857, *Bigelow v. Law*, 5 *Abbotts' Pr.*, 455.

60. Defect of declaration. A motion for a new trial cannot be founded upon the fact that the declaration does not disclose a cause of action; that is ground for a motion in arrest. *Supreme Ct.*, 1825, *Sargent v. —*, 5 *Cow.*, 106. See, also, *Nonsuit*, I.

2. Error.

61. Proof addressed to the court. The plaintiff cannot object that improper evidence

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was admitted to establish his own witness's interest, if the judge admit him, though the judge remark that he shall submit his credibility to the jury. Such evidence is addressed exclusively to the court. *Supreme Ct.*, 1828, *Ackley v. Kellogg*, 8 *Cow.*, 228.

62. Judge's discretion. The order of proof is wholly in the discretion of the judge, and his decision thereon cannot be reviewed on motion for new trial on exceptions. *Supreme Ct.*, 1852, *Bedell v. Powell*, 18 *Barb.*, 188.

63. Cross-examination. The right to inquire into collateral facts on a cross-examination, with a view to discredit the witness, is in the discretion of the judge, and his refusal to allow inquiry is not ground for allowing a new trial, except in a clear case of abuse. *Supreme Ct.*, 1849, *Allen v. Bodine*, 6 *Barb.*, 388.

64. Re-opening the cause. A witness who was regularly subpoenaed by the defendant, did not attend when the trial of the cause commenced, and did not appear in court until after the testimony on both sides had closed, and the counsel for the defendant had proceeded to sum up. Leave was asked to examine the witness, but was refused by the judge, and a verdict found for the plaintiff;—*Held*, not ground for allowing a new trial. The admission of the witness was altogether discretionary with the judge, who, under the circumstances of the case, acted reasonably in refusing to admit him. *Supreme Ct.*, 1801, *Alexander v. Byron*, 2 *Johns. Cas.*, 318.

65. If a witness, duly subpoenaed, neglects to attend, or leaves the court after trial commenced, suspending the trial is in the discretion of the judge, and his decision is not reviewable on motion on a bill of exceptions. *Supreme Ct.*, 1843, *Rapelye v. Prince*, 4 *Hill*, 119.

66. Where the plaintiff has rested, and the defendant has disproved his case, whether the court will permit the plaintiff to make out a new case rests in its discretion, and its decision cannot be reviewed. *Supreme Ct.*, 1843, *Wright v. Henry*, 4 *Hill*, 205, *note*; *Leland v. Bennett*, 5 *Hill*, 286.

67. In slander, after the parties had rested, the judge refused to permit the plaintiff to call a witness to prove slanderous words, laid in the declaration, but not before attempted to be proven, though the witness had been subpoenaed, and in attendance, and absented him-

self without the plaintiff's consent. *Held*, that a motion for a new trial should be denied. It was in the discretion of the judge to receive or exclude the testimony at that stage of the trial, and that discretion was not reviewable. *Supreme Ct.*, 1841, *Ford v. Niles*, 1 *Hill*, 800.

68. The counsel on one side, after he had summed up to the jury, and while the opposite counsel was addressing them, discovered new and material evidence, and offered to produce it, but the judge denied leave, on the ground of want of power. *Held*, that it was in the discretion of the judge to admit the evidence; and that as it ought, in a sound discretion, to have been admitted, a new trial should be granted. *Supreme Ct.*, 1810, *Mercer v. Sayre*, 7 *Johns.*, 306.

69. Recalling a witness. It is in the discretion of the judge who tries the cause, to permit or refuse the re-examination of a witness, who has been examined and cross-examined, and permitted to leave the stand; and the court at the general term will not in general review the exercise of his discretion. *Supreme Ct.*, 1851, *Meakim v. Anderson*, 11 *Barb.*, 215. *N. Y. Superior Ct.*, 1857, *Sheldon v. Wood*, 2 *Bow.*, 267.

70. The judge, in charging the jury, recapitulated the testimony, when the counsel for defendant insisted that the judge had misunderstood the testimony of one of the witnesses, and requested that the witness be recalled to restate his testimony; but the judge denied the request. *Held*, that the refusal was matter of discretion, and under the circumstances was not reviewable as error. *Ct. of Errors*, 1830, *Law v. Merrill*, 6 *Wend.*, 268; reversing *S. C.*, 9 *Cow.*, 65.

* **71.** The plaintiff rested, and the court recalled a witness, and drew from him new material testimony adverse to the plaintiff, and then refused to permit the plaintiff to rebut it;—*Held*, error. *Supreme Ct.*, 1843, *Shepard v. Potter*, 4 *Hill*, 202.

72. Sickness of witness. Plaintiff's witness was taken ill during cross-examination, and could not be re-examined. Plaintiff proceeded with the trial without asking a postponement, and a verdict was found against him. *Held*, that his motion for a new trial, on account of his having been prevented from re-examining, should be denied. *Supreme Ct.*, 1804, *De Peyster v. Columbian Ins. Co.*, 2 *Cai.*, 85.

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73. Counsel's opening. The judge cannot exclude evidence material to the issue because it is not embraced in the case stated by the plaintiff's counsel in opening. *Supreme Ct.*, 1848, *Nearing v. Bell*, 5 *Hill*, 291.

74. Accordingly, where, on a trial for slander, the plaintiff's counsel opened by stating that his client had already obtained one judgment against the defendant for similar words, and that the object of the present suit was to recover damages for a repetition of them since the former trial, and proceeded to ask a witness what he had heard the defendant say of the plaintiff, and the circuit judge observed that the answer must be confined to the case presented in the opening; whereupon the counsel proposed to modify his opening so as to embrace words spoken since the commencement of the first suit, but before the trial thereof, and he offered evidence accordingly. *Held*, on motion for new trial on a case, that the judge erred, and a new trial should be granted. *Ib.*

75. Judge's comments on evidence. The fact that the judge's comments upon the evidence strongly indicate an opinion against one of the parties, is not ground for a motion on his part for a new trial if there was no error in law in the charge, and it does not appear but that the evidence was fairly stated. *Supreme Ct.*, 1884, *Jackson v. Timmerman*, 12 *Wend.*, 299; 1888, *Gardner v. Pickett*, 19 *Id.*, 186; 1882, *Lansing v. Russell*, 18 *Barb.*, 510.

76. An observation of the judge that the variance between a witness's former statement and his testimony seemed naturally enough accounted for, is a mere expression of opinion and no cause for a new trial. *Supreme Ct.*, 1881, *Jackson v. Packard*, 6 *Wend.*, 415.

77. The plaintiff having rested his case, the defendant's counsel called a witness, who was sworn; but on an intimation from the presiding judge that "it was hardly necessary for defendant to give any evidence," the counsel forebore to examine him. The jury, however, notwithstanding a charge favorable to defendant, found for the plaintiff. *Held*, no ground for a new trial. *Supreme Ct.*, 1827, *Beekman v. Bemus*, 7 *Cow.*, 80; reversed on other grounds, 8 *Wend.*, 667.

78. Directing a verdict. On motion for a nonsuit the judge declared the evidence sufficient to entitle the plaintiff to recover, and he charged the jury to find a verdict for plaintiff.

Held, that the evidence being sufficient to warrant the verdict, the court would not interfere. *Supreme Ct.*, 1830, *Dean v. Hewitt*, 5 *Wend.*, 257.

79. The judge denied a motion for a nonsuit, declaring the evidence sufficient to entitle plaintiff to recover, and with that direction left the cause to the jury. *Held*, equivalent to a direction to find for the plaintiffs; and the case presenting a question which ought to have been left to the jury, a new trial was awarded. *Supreme Ct.*, 1888, *Fitzgerald v. Alexander*, 19 *Wend.*, 402.

80. Error in charge. That a qualification in the charge, not called for by any item of evidence, is ground for a new trial. *Small v. Smith*, 1 *Den.*, 588; *Gall v. Wells*, 9 *Barb.*, 84.

81. Where the judge instructed the jury, under exception, that they must come to a certain conclusion if they believed the testimony of the witness to certain facts, and the case showed the witness did not testify to any such facts.—*Held*, a misdirection, for which a new trial might be granted, on motion. *Supreme Ct.*, *Sp. T.*, 1855, *Dolsen v. Arnold*, 10 *How. Pr.*, 528.

82. New trial granted on the ground that the judge submitted to the jury to determine upon a fact as to which there was no evidence before them. *Supreme Ct.*, 1828, *Harris v. Wilson*, 1 *Wend.*, 511.

83. Where proof of the handwriting of an indorser was so light that it would scarcely uphold a verdict, a new trial was granted, on the ground that the question was not left to the jury. *Supreme Ct.*, 1829, *Utica Ins. Co. v. Badger*, 8 *Wend.*, 102.

84. In an action brought by a father to recover for expenses incurred in the care of his infant son, in consequence of an injury resulting from the negligence of the defendants, and for his loss of the services of his son, also alleged to have resulted from the injury, although no evidence was offered upon the trial tending to show loss of service, yet the jury were instructed that the plaintiff might recover for loss of service, if any were shown. *Held*, that this instruction, as calculated to mislead the jury, was erroneous; and as the verdict plainly covered damage for loss of service, although none had been rendered, that a new trial must be granted, unless plaintiff would consent to reduce his verdict. *N. Y.*

Upon what Grounds granted;—What Errors may be Cured or Disregarded.

Superior Ct., 1854, *Castanos v. Ritter*, 8 *Duer*, 370.

85. Omission to charge. In an action for the seduction of a daughter, where the counsel for the plaintiff claimed damages for the parent for bringing up the child, the silence of the judge on that point was *Held*, equivalent to a misdirection; and affidavits of jurors that such damages were allowed in their verdict were received. *Supreme Ct.*, 1825, *Sargent v. —*, 5 *Cow.*, 106.

86. Questions of pleading. The judge at the trial is not to decide on the pleadings. Where the defendant put in a plea with notice of special matter,—*Held*, that plaintiff by going to trial admitted the plea to be valid, and the judge was right in admitting the evidence noticed. Plaintiff could not move for a new trial on the ground the plea was bad. *Supreme Ct.*, 1806, *Meyer v. McLean*, 1 *Johns.*, 509; S. P., 1849, *Welch v. Lynch*, 7 *Barb.*, 381.

87. After verdict against him, defendant cannot set up that the issue was upon an insufficient plea. He can take no advantage of his own bad pleading. *Supreme Ct.*, 1826, *Parsons v. Parsons*, 5 *Cow.*, 476.

88. — of form of action. On a motion for a new trial, the defendant cannot object to the form of action. The judge at trial is only authorized to try the issue of fact; not to decide whether the facts set out in the declaration, if true, entitle the plaintiff to judgment. *Supreme Ct.*, 1808, *Smith v. Elder*, 3 *Johns.*, 105.

8. What Errors may be Cured or Disregarded.

89. Record supplied on trial. Although a party omits to introduce record evidence requisite as introductory to other testimony which he adduces, yet if the record is subsequently introduced by his antagonist, the error is obviated. *Supreme Ct.*, 1837, *Rich v. Rich*, 16 *Wend.*, 668.

90. Record may be supplied on motion. It is a well-settled and useful practice, in respect to documents which speak for themselves, and on which no questions can arise except such as are apparent on their face, to permit them to be produced on the argument, when they have been inadvertently or unadvisedly omitted at the trial. As, for example, the record of a judgment, when the execution only was produced at the trial. *N. Y. Supe-*

rior Ct., 1850, *Bank of Charleston v. Emeric*, 2 *Sandf.*, 718. S. P., *Supreme Ct.*, 1835, *Ritchie v. Putnam*, 18 *Wend.*, 524.

91. Record of judgment, omitted to be regularly read at trial, allowed to be produced in answer to motion for new trial. *Supreme Ct.*, 1806, *High v. Wilson*, 2 *Johns.*, 46; 1830, *Armstrong v. Percy*, 5 *Wend.*, 535.

92. Irregularity in the proof of a judgment-record on the trial, may be cured, on the argument of a case, by the production of an exemplification. *So held*, where the original was produced at the trial, without proof that it was a record. *Supreme Ct.*, 1835, *Williams v. Wood*, 14 *Wend.*, 126.

93. — of proceedings. The judge at the trial having erroneously allowed parol proof of what occurred at a former trial to be made, plaintiff was allowed to introduce the record of the *nisi-prius* roll and postea, in his motion for judgment on his verdict. *Supreme Ct.*, 1830, *Burt v. Place*, 4 *Wend.*, 591.

94. Discharge. On a motion for a new trial, upon the ground of the admission at the trial of an imperfectly authenticated exemplification of a bankrupt discharge, the objection may be cured by the production of a proper exemplification. *Supreme Ct.*, 1848, *Dresser v. Brooks*, 8 *Barb.*, 429.

95. On the trial of cause, defendant produced a discharge in bankruptcy; which was objected to, but solely upon the ground of alleged defects in the form and manner of authentication of the copy. The objection having been overruled, and defendant having moved for a new trial, on exceptions, plaintiff produced on the argument a discharge authenticated in the precise form required by the objection. *Held*, that the objection, if well taken, was obviated. *Id.*

96. Record of naturalization erroneously proved by parol on the trial, allowed to be read in opposition to motion for new trial. *Supreme Ct.*, 1835, *Ritchie v. Putnam*, 18 *Wend.*, 524.

97. Statute. A new trial will not be granted because a private act was irregularly permitted to be read from the printed statute-book,* when it appears on the motion, from an exemplification of the act, that the printed book was correct. *Supreme Ct.*, 1802, *Duncan v. Dubois*, 3 *Johns. Cas.*, 125.

* Compare EVIDENCE, 1326.

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98. The plaintiff read in evidence an act of the Legislature from a newspaper, which was admitted, although objected to. But defendant, after a motion for a nonsuit, denied, read an exemplified copy of the same act. *Held*, he could not complain of the admission of the act read by the plaintiff, though not legal evidence. The court would judge the motion for nonsuit from the whole record. *Supreme Ct.*, 1810, *Hearsey v. Pruyn*, 7 *Johns.*, 179.

99. *State grant*. An exception, at trial, to defective proof of a grant from a State, may be met, at the argument, by copies of the resolutions and act of cession, duly authenticated according to the act of Congress. *So held*, on a motion on bill of exceptions. *Supreme Ct.*, 1850, *Duke of Cumberland v. Graves*, 9 *Barb.*, 595; affirmed, on other points, 7 *N. Y.* (3 *Seld.*), 805.

100. *Charter*. A motion for a nonsuit, upon the ground that the plaintiff, a foreign corporation, had not proven its charter, was denied; on the argument of a motion for a new trial upon a case, the court received in evidence an exemplification of the act of incorporation. *N. Y. Superior Ct.*, 1850, *Bank of Charleston v. Emeric*, 2 *Sandf.*, 718.

101. *Record of mortgage*. Where a copy of the record of a mortgage recorded in another State, which was insufficiently attested, had been erroneously admitted upon the trial, but the proper certificates were produced and filed upon the motion for a new trial,—*Held*, that a new trial would not be granted. *Supreme Ct.*, 1854,* *Markoe v. Aldrich*, 1 *Abbotts' Pr.*, 55.

102. *Verdict set aside*. Where defendants had a verdict, under the Statute of Limitations, in consequence of plaintiffs' failure to produce a certain record, and the plaintiffs produced the needed record upon a motion to set aside the verdict,—*Held*, that though the verdict was correct, yet as the statute would bar a new suit, the verdict should be set aside on payment of costs. *Supreme Ct.*, 1835, *Bank of Orange County v. Haight*, 14 *Wend.*, 83.

103. *Deposition*. After a new trial has been ordered, for error in admitting a deposition taken *de bene esse* upon insufficient proof that the witness was absent from the State, a motion for leave to supply such proof, and thus cure the defect, will not be granted.

The practice of allowing a party to read a document upon the motion for a new trial, which was admitted on insufficient authentication below, does not extend to allowing this to be done, *after* the motion for new trial has been determined. Nor does it apply where the question is to be determined by any evidence which in its nature is controvertible. *N. Y. Superior Ct.*, 1855, *Fry v. Bennett*, 4 *Duer*, 651; *S. C.*, 1 *Abbotts' Pr.*, 289, 809.

104. *Assessment of damages*. Where, in an action on a bond with a condition, the declaration is bad (under 2 *Rev. Stat.*, 278, § 5), for want of an assignment of breaches, so that the assessment of substantial damages is erroneous, the court will not, for such error, grant a new trial, but will simply reverse the judgment, leaving the plaintiffs to sue again. *Supreme Ct.*, 1848, *Nelson v. Bostwick*, 5 *Hill*, 37; but compare *Reed v. Drake*, 7 *Wend.*, 846.*

105. *Errors in respect to pleading*. Where the general issue and special pleas have been pleaded, and a verdict is found on the general issue only, for the plaintiff, without regarding the other issues, if it is apparent that the verdict on the general issue could not have been found, if the special pleas had been supported, the omission to specify the issue is merely matter of form, and is not a ground for impeaching the verdict. *Supreme Ct.*, 1817, *Thompson v. Button*, 14 *Johns.*, 84.

106. Defendant in assumpsit pleaded non-assumpsit and payment, and the jury found in favor of the plaintiff on the former plea, without noticing the issue on the latter. *Held*, no ground of reversal. *Ct. of Errors*, 1830, *Law v. Merrills*, 6 *Wend.*, 268. *S. P.*, *Supreme Ct.*, 1839, *Hanna v. Mills*, 21 *Id.*, 90.

107. An erroneous finding on an immaterial issue is no cause for a new trial, if the verdict on the material issues be correct. *Supreme Ct.*, *Beekman v. Satterlee*, 5 *Cow.*, 519.

108. The issues were on *non cepit* and a plea of property in a third person, and the jury found for the plaintiff on the former only. *Held*, fatally defective, and a new trial was ordered. *Supreme Ct.*, 1835, *Boynton v. Page*, 18 *Wend.*, 425.

109. The issue being informal, rather than immaterial, the verdict was sustained. *Sup-*

* In *Reed v. Drake*, 1831, a new trial was granted, under a defective declaration like that in *Nelson v. Bostwick*.

* The date, 1847, in the report is a misprint.
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preme Ct., 1880, *Soulden v. Van Rensselaer*, 8 *Wend.*, 472.

110. Uncertain verdict. The judge directed the jury to find whether a will had been altered, and, if so, by whom. They found that 't had been altered "by some interested person." The verdict was held uncertain, and a new trial was granted. *Supreme Ct.*, 1818, *Jackson v. Malin*, 15 *Johns.*, 293.

111. Two defendants. If, in an action against maker and indorser, the defendants have a verdict which is rightful as to one, but not as to the other, it should be set aside only as to the latter. *Supreme Ct.*, 1888, *People v. N. Y. Common Pleas*, 19 *Wend.*, 118.

112. Variance. A verdict will not be set aside for a variance between the declaration and the circuit roll, unless the defendant alleges surprise. *Supreme Ct.*, 1881, *Kimball v. Huntington*, 7 *Wend.*, 472.

113. Objection to venire man. The statutory provision as to folding the ballots is directory to the officer drawing them, and non-compliance with it, if there were no abuse, and no objection at the time, is no cause for setting the verdict aside. *Supreme Ct.*, 1827, *Cole v. Perry*, 6 *Cow.*, 584.

114. Though an objection to the juror's age, if taken in time, would have been a good one, yet after verdict, it is too late to interpose the objection. *Supreme Ct., Sp. T.*, 1845, *Seacord v. Burling*, 1 *How. Pr.*, 175.

115. Objections not taken at trial. If an objection which might have been obviated by further proof, was not taken and persisted in at the trial, it cannot be made ground of a motion for a new trial. *Supreme Ct.*, 1825, *Jackson v. Davis*, 5 *Cow.*, 123; 1837, *Doane v. Eddy*, 16 *Wend.*, 522; 1841, *Ryerss v. Wheeler*, 25 *Id.*, 437; affirmed, 4 *Hill*, 466.

116. Upon a case made, a party cannot move for a new trial or for leave to enter a nonsuit, on a point not distinctly taken at the trial, if it be such as might have been obviated by proof, if then raised. *N. Y. Superior Ct.*, 1850, *N. Y. & Erie R. R. Co. v. Cook*, 2 *Sandf.*, 732.

117. It is a salutary rule, and applicable, as well to cases as to bills of exception, that a party shall not be permitted, on a motion for a new trial, to avail himself of an objection made on the trial, unless the ground of the objection was so particularly stated, as to enable the opposite party to supply, if possible,

the alleged defect. It is due to the party offering the evidence, that he should understand distinctly the ground of objection. He may choose to acquiesce in its correctness, and withhold the evidence. He may introduce other equivalent evidence not liable to the objection. If it be on the ground of a defective pleading, he may perhaps obtain leave to amend. If the objection go to the entire exclusion of a demand offered by way of set-off, he may withdraw it, and bring a cross-action. It is equally due to the tribunal before which the trial is had, that the ground of objection should, in all cases, be frankly and specifically stated. The court and party have a right to suppose that a ground of objection not thus pointed out, is waived. *Supreme Ct.*, 1849, *Merritt v. Seaman*, 6 *Barb.*, 880.

118. Although a motion for a new trial is addressed, in some degree, to the discretion of the court, and it is not essential, on such motion, that a formal exception should in all cases have been entered to a ruling on a question of evidence; yet the court will not feel called upon to relieve a party in a case where counsel, while testimony has been given which may be strictly inadmissible, have remained silent, without calling attention thereto, or making any objection, and where there is no pretence of fraud or surprise. *N. Y. Com. Pl.*, 1854, *Richards v. Sandford*, 2 *E. D. Smith*, 849; *S. C.*, 12 *N. Y. Leg. Obs.*, 94.

119. Omission to reply. A party will not be allowed to take an objection for the first time upon a motion for a new trial, which, if it had been made at the circuit, might have been obviated. Therefore, where a cause went to trial upon a complaint and answer, and the defendant examined witnesses to prove the facts alleged as a defence in his answer, and the plaintiff had a verdict, and the defendant, upon appeal from an order at special term denying his motion for a new trial, for the first time raised the objection that the plaintiff was concluded by the allegations in the answer, in consequence of his failure to reply;—*Held*, that it was now too late to raise the objection. Defendant should have raised the objection at the trial; in which case he would have had a verdict upon the pleadings,—or the point would have been ruled against him, giving him the right to appeal upon exceptions,—or more properly,

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leave would have been given to the plaintiff to withdraw a juror, and file a reply upon terms. *Supreme Ct.*, 1854, *Smith v. Floyd*, 18 *Barb.*, 522.

120. Insufficiency of proof. In an action against a master for the negligence of his servant, it cannot be urged on a motion for a new trial, that the evidence did not establish the relation of master and servant, if such objection was not taken on the trial, either by motion for a nonsuit, or by calling the attention of the judge to the points in his charge to the jury. *Supreme Ct.*, 1888, *Ford v. Monroe*, 20 *Wend.*, 210.

121. Nature of title. One who moves for a new trial upon a bill of exceptions, can only avail himself of the grounds he took at the trial. Thus if he claimed only as devisee, he cannot object, on the argument, that he was erroneously nonsuited, because the proof showed title in him by descent. *Supreme Ct.*, 1849, *Staring v. Bowen*, 6 *Barb.*, 109.

122. Objection to set-off. Defendant having offered a receipt as evidence of set-off, the plaintiff objected that the receipt was not competent; and the objection being overruled, he submitted to a nonsuit, with leave to move, &c. *Held*, that it was too late for plaintiff to object on the motion that the debt was not a subject of set-off against his demand. *Supreme Ct.*, 1814, *Sherman v. Crosby*, 11 *Johns.*, 70.

123. Technical objection. Where justice has been done, a new trial will not be granted to enable defendant to start a technical objection which he did not make at the proper time;—*e. g.*, that the jury found a general verdict on both issues, instead of finding for plaintiff on the first only. *Supreme Ct.*, 1848, *Prentz v. Sackett*, *Hill & D. Supp.*, 118.

124. Adverse possession. Where a question of adverse possession was not, at the trial, submitted to the jury, it cannot be made the ground for moving for a new trial, but will be presumed to have been abandoned at the trial. *Supreme Ct.*, 1816, *Jackson v. Stephens*, 13 *Johns.*, 495.

125. Insufficient objection. An objection that "the proof did not sustain the declaration, and that upon the testimony the plaintiff was not entitled to recover," taken before referees,—*Held*, not specific enough to raise the question, whether the common counts were sufficient to cover the cause of action

proven. *Ct. of Errors*, 1844, *Pomeroy v. Underhill*, 7 *Hill*, 388.

126. Fact assumed. Although the evidence to an essential fact was very slight, yet if the judge and both parties assumed at the trial that the fact was proved, and no objection was made to the sufficiency of proof, the party moving for a new trial is not at liberty then to object that from the case made it does not appear that the fact was proved. *Supreme Ct.*, 1837, *Patterson v. Westervelt*, 17 *Wend.*, 548.

127. Where the judge and both parties on motion for a nonsuit, assume a fact as proved, and no objection is then made to the want of proof on that point, the court will not hear an objection to the want or insufficiency of the proof as to that fact, taken for the first time in opposition to an application for a new trial. *Supreme Ct.*, 1838, *Beekman v. Bond*, 19 *Wend.*, 444.

128. Motion for nonsuit. On a motion for a nonsuit, the judge, for the time being, unites, like a referee, the character of judge and jury. As jury he ascertains the facts; as judge he applies the law to them; and when he announces his decision, it is the compound result of an ascertainment of the facts and the application of the law. The details do not necessarily appear in the decision of the motion, any more than they appear in the verdict of a jury, or the report of a referee. And if a party wants these details, he must get them by a special application, at the time, to the court for that purpose. In this way only can the several questions which properly arise be distinctly presented and intelligently passed upon, and the rights of all parties be carefully guarded. [2 *Kern.*, 22; 4 *Seld.*, 78; 3 *Barb.*, 81; 19 *Wend.*, 444; 6 *Id.*, 415; 12 *Id.*, 299; 6 *Hill*, 410.] *Supreme Ct.*, 1859, *Bidwell v. Lament*, 17 *How. Pr.*, 357.

129. After the reception of evidence from both sides on a trial before a jury, where questions of fraud were involved, the defendant moved for a nonsuit, which was opposed by the plaintiff, and granted by the court; and the plaintiff excepted, but made no request that the question of fact be submitted to the jury. *Held*, that he had waived the submission of the case to the jury; his exception to the nonsuit did not avail to save the objection. *Id.*

130. Objection to charge. On a motion

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for a new trial, a party cannot take an objection to the charge, which he did not raise at the trial; nor can he then first object that proper instructions were omitted in the charge. *N. Y. Superior Ct.*, 1849, *Cook v. Hill*, 8 *Sandf.*, 341.

131. Impertinence or obscurity cannot be objected to the charge as ground for a new trial, unless the judge's attention was called to it at the time, and he refused to explain. *Supreme Ct.*, 1888, *Gardner v. Picket*, 19 *Wend.*, 186.

132. What objections will be entertained. On motion for a new trial on a case, if the court entertains any objection not taken at the trial, it is only when necessary to prevent a failure of justice, and not because the party has any right to have such exception noticed. *N. Y. Com. Pl.*, 1850, *Hastings v. McKinley*, 8 *Code R.*, 10.

133. Where it appears on motion for a new trial on a case, that the plaintiff ought not to have recovered, for reasons which could not have been obviated if objection had been taken at the trial, the verdict for plaintiff should be set aside, notwithstanding the objection was not so taken. *Supreme Ct.*, 1828, *Rich ads. Penfield*, 1 *Wend.*, 380.

134. On a motion for a new trial on a case, objections may be urged on the argument which were not raised at the trial, but they must be such as could not have been obviated had they been taken at the trial. *Supreme Ct.*, 1830, *Lawrence v. Barker*, 5 *Wend.*, 301.

135. New trial allowed on motion on a case, on the ground of misdirection of the judge, though no exception to the charge was taken on the trial. *Supreme Ct.*, 1880, *Archer v. Hubbell*, 4 *Wend.*, 514.

136. So held, where the misdirection was but a repetition of a previous ruling which had been duly objected to. *Supreme Ct.*, 1880, *People v. Holmes*, 5 *Wend.*, 191.

137. Offer of proof omitted. When the court erroneously directs a verdict for the defendant upon facts which in law constitute no defence, it is no objection to granting a new trial that certain facts which were essential to the plaintiff's case in the true view of the case, but might have been proved had they not been rendered immaterial by such erroneous direction, were not proved by him. *Ct. of Appeals*, 1857, *Requa v. Holmes*, 16 *N. Y. (2 Smith)*, 193, 202.

138. In an action to recover real property, founded on a legal title, the defendant offered to prove, as a defence, certain facts which he contended would show an equitable title to the land in himself. The evidence was excluded by the presiding judge, on the ground that no equitable defence could be interposed in this action to the plaintiff's right to recover upon the legal evidence. *Held*, 1. That the defendant might avail himself of an equitable right to defeat the legal title, by way of defence in the suit. 2. That the defendant was entitled to a new trial, notwithstanding that the offer of proof made by the defendant might appear insufficient to show an equitable right; inasmuch as under the distinct ruling of the court, no alteration in the terms or substance of the defendant's offer would have availed him. *Ct. of Appeals*, 1855, *Crary v. Goodman*, 12 *N. Y. (2 Kern.)*, 266.

139. Superior Court rule. That the practice, indicated in some Supreme Court cases, of sustaining a motion for a new trial upon a case where an error of law appears to have been committed on the trial, though objection was not then taken,—does not prevail in the New York Superior Court. *N. Y. Superior Ct.*, 1849, *Cook v. Hill*, 8 *Sandf.*, 341; 1851, *Stoddard v. Long Island R. R. Co.*, 5 *Id.*, 180.

140. Court will look at whole case together. A new trial will not be granted on the ground that the verdict or report allows a larger sum than that specified in a bill of particulars, if the evidence on which it is founded was given without objection, and the court see that no more has been recovered than is just. *Ct. of Errors*, 1885, *Delaware & Hudson Canal Co. v. Dubois*, 15 *Wend.*, 87; affirming *S. C.*, 12 *Id.*, 334.

141. In an action on contract, a judgment entered on the report of a referee which does not exceed that claimed in the complaint, will not be set aside, although he received proof of items and value more than the complaint or bill of particulars specified, when no objection was made at the trial to the reception of the evidence, and there is no reason to suppose that injustice has been done. In such a case the complaint may be conformed to the facts proved, without requiring plaintiff to consent to a new trial and pay costs. [5 *Cow.*, 503; 6 *Id.*, 360-368; 12 *Wend.*, 228.] *N. Y. Superior Ct.*, 1855, *Barth v. Walther*, 4 *Duer*, 228.

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142. A new trial need not be granted to plaintiff for defect in defendant's evidence, where the court is of opinion that upon the whole case, the plaintiff clearly ought not to recover. *Supreme Ct.*, 1806, *High v. Wilson*, 2 *Johns.*, 46.

143. Thus, in trespass against a sheriff, for taking the goods of a stranger, where it appeared that there had been a fraudulent transfer of the property, and a verdict was found for the defendant, the court would not set it aside because the judgment, under which the sheriff acted, had not been produced at the trial. *Id.*

144. The judge charged the jury, that in his opinion the weight of evidence was in favor of the defendant, and the jury found a verdict accordingly. A new trial, on ground of misdirection, was refused, the court being satisfied that the plaintiff ought not to recover. *Supreme Ct.*, 1800, *Goodrich v. Walker*, 1 *Johns. Cas.*, 250.

145. A motion to set aside a nonsuit should be denied if it appears that plaintiff is not entitled to recover; as where the action was on a note payable to bearer, and it appeared from plaintiff's proofs that the note was lost,* although the objection was not taken at the trial, it being one which could not have been obviated. *Supreme Ct.*, 1829, *Kirby v. Sisson*, 2 *Wend.*, 550.

146. A new trial will not be granted where the plaintiff has been nonsuited, although there was some evidence to establish the case, if the court, on a motion for a new trial, are satisfied that the evidence, as well that adduced as that offered and rejected, was not sufficient to warrant a verdict in favor of the plaintiff. *Supreme Ct.*, 1835, *Wilson v. Williams*, 14 *Wend.*, 146.

147. Where a plaintiff is nonsuited for a defect of proof, the nonsuit may be set aside on payment of costs, although properly granted by the circuit judge, if the court have reason to believe that without such relief the cause of action will be lost. *Supreme Ct.*, 1834, *People v. Barnes*, 12 *Wend.*, 492.

148. A motion for a new trial upon a case may be denied, although the point taken at the circuit was valid, if it appears from other considerations that upon a new trial the result

cannot be changed. *Supreme Ct.*, 1841, *Horton v. Hendershot*, 1 *Hill*, 118.

149. Although, on a motion for new trial upon a bill of exceptions, it appears that error was committed, yet if the bill of exceptions presents a case upon the whole of which it is impossible for the moving party to recover, the motion will be denied. *Ct. of Errors*, 1843, *Hayden v. Palmer*, 7 *Hill*, 385.

150. Thus, in an action on his bond for the limits, the jury found for the defendant on his plea of an insolvent discharge, and his consequent release by the sheriff; and improper evidence was admitted and excepted to, under his special notice setting up that the escape was voluntary, upon which the jury found a special verdict;—*Held*, that the plaintiff was not entitled to a new trial on a bill of exceptions. *Id.*

151. Granting new trial on appeal. On reversing a judgment on appeal, if the appellate court can see that no possible state of proof applicable to the issues in the case will entitle the party to a recovery, it is not necessary or even proper that a new trial should be awarded. *Ct. of Appeals*, 1858, *Edmonston v. McLoud*, 16 *N. Y. (2 Smith)*, 548.

152. On appeal to the general term, extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate court should be exercised in that direction only in cases where it is entirely plain, either from the pleadings or from the very nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit. Otherwise they are bound to grant a new trial; and if the general term fail to do so, the Court of Appeals will, on appeal to them, review the error, and grant a new trial. *Ct. of Appeals*, 1858, *Griffin v. Marquardt*, 17 *N. Y. (3 Smith)*, 28.

153. Nominal damages. A new trial will not be granted to plaintiff, where if it were awarded he would be entitled to recover only nominal damages. *Supreme Ct.*, 1800, *Brantingham v. Fay*, 1 *Johns. Cas.*, 255; 1808, *Malin v. Brown*, 3 *Id.*, 2 ed., 566; 1808, *Hyatt v. Wood*, 3 *Johns.*, 239; *Fleming v. Gilbert*, *Id.*, 528; 1858, *Hopkins v. Grinnell*, 28 *Barb.*, 533.

154. Controversy as to costs. Where the plaintiff dies after nonsuit, the cause dying with him, the court will not hear a motion to set it aside; for the only effect of the motion

* For the statute now allowing a recovery on lost paper, see *BILLS, NOTES, AND CHECKS*, 538.

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is to unsettle the question of costs. *Supreme Ct.*, 1826, *Seymour v. Deyo*, 5 *Cow.*, 289.

155. Where the action was wrongly brought, but on the trial the whole defence had been let in, and plaintiff recovered only nominal damages, so that defendant was entitled to costs, the court held it unnecessary to grant a new trial. *Supreme Ct.*, 1810, *Van Slyck v. Hogeboom*, 6 *Johns.*, 270.

156. There was a misdirection at the trial in excluding a valid defence; but the plaintiff recovered only nominal damages, so that the only contest was upon the costs of suit. *Held*, that a new trial ought not to be granted merely to allow defendant to obtain costs. The plaintiff was allowed to waive his verdict and discontinue, without costs. *Supreme Ct.*, 1808, *Fleming v. Gilbert*, 8 *Johns.*, 528.

157. Trifling recovery. The judge excluded evidence for defence which ought to have been received; but the plaintiff recovered only \$5, under which verdict he was liable to pay costs to defendant. *Held*, that the court would not grant a new trial for the error of law, merely to save \$5 to defendants. *Supreme Ct.*, 1809, *Hunt v. Burrell*, 5 *Johns.*, 187.

158. Harmless evidence. Where, upon motion for a new trial, it appears that although incompetent evidence was admitted, it cannot by any legal possibility have affected the verdict to the injury of the party objecting, the error may be disregarded and the new trial denied. *Supreme Ct.*, 1884, *Benjamin v. Smith*, 12 *Wend.*, 404. *N. Y. Com. Pl.*, 1858, *Patterson v. O'Hara*, 2 *E. D. Smith*, 58; 1854, *Beach v. Raymond*, *Id.*, 496; 1855, *Hunt v. Bennett*, 4 *Id.*, 647; affirmed, on other grounds, 19 *N. Y. (5 Smith)*, 178. *N. Y. Superior Ct.*, 1856, *Forrest v. Forrest*, 6 *Duer*, 102; 8 *O.*, 8 *Abbotts' Pr.*, 144.

159. Thus, the admission of evidence of the value of the husband's estate, "for the purpose of submitting to the jury the question what amount of alimony ought to be allowed," and limited to that purpose, is no ground for setting aside the verdict upon the main is sued upon which the right to a divorce depends. It could not bear in the least degree upon the question whether either or which of the parties had committed adultery, and could not have influenced the verdict upon that question. *N. Y. Superior Ct.*, 1856, *Forrest v. Forrest*, 6 *Duer*, 102; 8 *Abbotts' Pr.*, 144.

160. Although the judge erred in admitting testimony, yet if the jury would have been bound to render the same verdict independently of that testimony, a new trial will not be granted. To induce the granting of a new trial, there should be strong probable grounds to believe that the merits have not been fully and fairly tried, and that injustice has been done. *Supreme Ct.*, 1884, *Crory v. Sprague*, 12 *Wend.*, 41.

161. In an action for slander, a witness, after he had testified to an attempt made by the parties to arbitrate, was asked whether the defendant did not say, during the negotiations to effect an arbitration, that he had satisfied the plaintiff by writing to his (the defendant's) brother, exculpating the plaintiff. The witness answered in the affirmative. *Held*, that this evidence was not competent; but that, although it tended to prove one branch of the defence,—viz., an accord and satisfaction,—yet as that defence had already on the trial been made out by competent and uncontroverted evidence, so that the testimony objected to could not have affected the verdict, a new trial ought not to be granted for the error, the motion being upon a case. *Supreme Ct.*, 1847, *Smith v. Kerr*, 1 *Barb.*, 155.

162. That improper evidence of one item of damages was admitted, is no ground for granting a new trial, on appeal, if it is clear that the judgment cannot have embraced any damages arising from that cause. *Supreme Ct.*, 1849, *Deifendorff v. Gage*, 7 *Barb.*, 18.

163. Upon motion for a new trial upon a case, it appeared that an incompetent witness had been permitted to testify to material facts; but there was sufficient evidence independent of his testimony to have authorized the judge to direct a verdict, and no exception was taken at the trial to his ruling admitting the witness. *Held*, that the motion should be denied. *Supreme Ct.*, 1889, *Gardeneir v. Tubbs*, 21 *Wend.*, 169.

164. Evidence stricken out. Where evidence was erroneously stricken out, but the exclusion clearly could not have injured the party, as the evidence tended only to disprove an item which was disallowed upon other testimony, the exclusion was *Held*, no cause for new trial, on appeal. *Supreme Ct.*, 1858, *Beekman v. Platner*, 15 *Barb.*, 550.

165. Possible injury. If incompetent evidence was admitted on the trial, and was duly

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excepted to, the party is entitled to a new trial, if it appears that he may have been injured by it. That he probably was not, is not sufficient. *Supreme Ct.*, 1881, *Gillet v. Mead*, 7 *Wend.*, 198; 1888, *Clark v. Vorce*, 19 *Id.*, 282; 1886, *Underhill v. N. Y. & Harlem R. R. Co.*, 21 *Barb.*, 489.

166. Where it appears, on motion for a new trial upon a bill of exceptions, that incompetent evidence was admitted which may have had an effect upon the verdict, a new trial must be granted. *Supreme Ct.*, 1844, *Myers v. Malcolm*, 6 *Hill*, 292.

167. Where the cause comes before the court upon a bill of exceptions, a new trial must be granted, if irrelevant evidence was admitted, unless the court can see beyond doubt that it cannot possibly have prejudiced the party excepting. It is not enough that the evidence was immaterial, and that there was evidence without it sufficient to warrant the verdict. Upon a case made, the court has a broader discretion. *Supreme Ct.*, 1840, *Farmers & Manufacturers' Bank v. Whinfield*, 24 *Wend.*, 419; *S. P.*, 1850, *Dresser v. Ainsworth*, 9 *Barb.*, 619; 1852, *Boyle v. Colman*, 13 *Id.*, 42.

168. Where evidence, bearing with directness and force upon the question at issue, has been erroneously admitted by a referee, a new trial must be granted, although there may be unobjectionable evidence sufficient to sustain his conclusion. *Ct. of Appeals*, 1859, *Williams v. Fitch*, 18 *N. Y. (4 Smith)*, 546.

169. Instances. If improper evidence be admitted, though the other evidence, in the opinion of the court, may be fully sufficient to entitle the plaintiff to a recovery, the verdict must be set aside; because the court is not authorized to say that the jury were not influenced by the improper evidence. *So held*, where the letters of the plaintiff were admitted to prove a sale and account, and the jury were instructed to consider them as part of the evidence to prove that fact, and found that fact for the plaintiff. *N. Y. Superior Ct.*, 1829, *Anthoine v. Coit*, 2 *Hall*, 40.

170. In an action for seduction, the judge allowed the female to testify to a promise of marriage, as evidence of seduction; but charged the jury that they could not consider it in assessing the damages. *Held*, that the jury might have been influenced by it, even against their own determination not to con-

sider it, and therefore a new trial should be granted. [1 *Johns.*, 299; 2 *Wend.*, 464; 8 *Campb.*, 519; disapproving 8 *Wils.*, 18.] *Supreme Ct.*, 1881, *Gillet v. Mead*, 7 *Wend.*, 198.

171. In an action on negotiable paper, the defendant was admitted, subject to exception, to testify on his own behalf, upon the ground that an indorser, who had been examined, was to be deemed an assignee within the meaning of section 899 of the Code. The plaintiff had judgment. *Held*, 1. That the plaintiff could not take advantage of the error to resist a motion for a new trial. 2. That the defendant having been admitted as a witness, although improperly, if it appeared that any material question put to him, that ought to have been allowed, was overruled, a new trial must be granted, since the court could not say, that, had the evidence thus excluded been received, the same verdict or judgment would have been rendered. *N. Y. Superior Ct.*, 1856, *Anderson v. Busted*, 5 *Duer*, 485.

172. Though a verdict upon conflicting testimony should not be set aside for being against evidence unless it is very clearly so, yet, since in such cases, very slight considerations may influence the jury to accept the testimony of one witness in preference to that of another, the admission of irrelevant evidence, calculated in any respect to prejudice a party, is ground for setting aside a verdict. *N. Y. Superior Ct.*, 1867, *Whiting v. Otis*, 1 *Bow.*, 420.

173. On references. Where upon trial of a reference illegal evidence has been received, and there is room for question whether the legal evidence is sufficient, and the court cannot say the referee would have made the same report if he had not received the illegal evidence, they will not disregard its admission. *Supreme Ct.*, 1848, *McGuire v. O'Hallaran*, *Hill & D. Supp.*, 85.

174. Where on a reference improper evidence, which is essentially material, has been admitted, the safe rule is to grant a new trial, without reasoning as to the effect it may have had. *Supreme Ct.*, 1848, *Clark v. Crandall*, 8 *Barb.*, 618.

175. Erroneous ruling corrected. Although on a trial in a court of record the judge has received incompetent evidence, and an exception has been recorded, yet if he subsequently strikes it from his minutes and directs the jury

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to disregard it, the error is cured and the exception falls to the ground. The cases to the contrary [10 Johns., 128; 18 Id., 350; 15 Id., 289; 2 Cow., 436] are all cases from justices' courts, where the opinions of the presiding officer have not the same influence as in courts of record. It would be most inconvenient to hold that a mistake in receiving evidence could only be corrected by discharging the jury and commencing the trial anew. *Supreme Ct.*, 1847, *People v. Parish*, 4 *Den.*, 153.

176. Where, upon the trial of a cause, objectionable testimony is given in answer to a question which is not objected to, and which does not necessarily call for any such evidence, and the judge immediately declares the testimony inadmissible, and in his charge to the jury directs them to disregard it, the giving of such testimony affords no ground for granting a new trial. *Supreme Ct.*, 1857, *Travis v. Barger*, 24 *Barb.*, 614.

177. Although the judge retracts his ruling, admitting incompetent evidence, and directs the jury to disregard such evidence, yet if it appears probable that it influenced the verdict, a new trial should be granted. When illegal evidence, properly excepted to, has been received during a trial, it must be shown that the verdict was not affected by it, or the judgment will be reversed. If the evidence may have affected the verdict, the error cannot be disregarded. It does not follow that impressions thus obtained will have no effect, although the judge directs them to disregard the evidence. *Ct. of Appeals*, 1859, *Erben v. Lorillard*, 19 *N. Y.* (5 *Smith*), 299; reversing 28 *Barb.*, 82.

178. Evidence disavowed. A witness was permitted to detail a conversation with the defendant touching the failure of P.'s title (which had been guaranteed by him), and the inability of the plaintiff to procure recompense from P., the plaintiff disavowing it as evidence of the failure of title, which was afterwards properly proven;—*Held*, no ground for a new trial. *Supreme Ct.*, 1837, *Morris v. Wadsworth*, 17 *Wend.*, 103.

179. — conditionally received. If testimony is received, reserving the question of its admissibility until the close of the evidence, and the party against whom it is received, makes at the time no objection to that course, he cannot afterwards take an objection that it

was error to receive it conditionally. *Ct. of Appeals*, 1851, *McKnight v. Dunlop*, 5 *N. Y.* (1 *Seld.*), 587.

180. — subsequently admitted. A new trial ought not to be granted, on exceptions, for the refusal of the judge to allow a party to put in certain evidence, where the party, instead of standing upon his exception, makes further preliminary proof, renews his offer, and the evidence is then admitted. *N. Y. Superior Ct.*, 1856, *Forrest v. Forrest*, 6 *Duer*, 102. *S. P.*, *Supreme Ct.*, 1858, *Morgan v. Reid*, 7 *Abbotts' Pr.*, 215.

181. A witness, generally competent, was sworn specially to prove the loss of a deed, the other party objecting that he ought to be sworn in the cause generally; but such party subsequently had him sworn generally, and examined him. On motion for a new trial on a case,—*Held*, that under the circumstances, the party had not been prejudiced by the error, and the motion should be denied. *Supreme Ct.*, 1830, *Jackson v. Parkhurst*, 4 *Wend.*, 369.

182. Unimportant error in charge. On motion for a new trial on a case, an error in the judge's charge, consisting merely in the words used, and not resulting in injury to the party, will be disregarded. *Supreme Ct.*, 1840, *Mansfield v. Wheeler*, 28 *Wend.*, 79.

183. Harmless error. Where the application for a new trial is upon a case, it should be denied if the court can see that the error of the judge could not have injured the defendant. *Supreme Ct.*, 1848, *Vallance v. King*, 3 *Barb.*, 548.

184. Although the charge of the judge was incorrect upon a particular point, yet if the error has no bearing upon the issue, so that it can in no manner prejudice the defendants, it should be disregarded on a motion for a new trial. *Supreme Ct.*, 1858, *Horner v. Wood*, 16 *Barb.*, 386.

185. A new trial will not be granted on motion upon a case made for an error in the judge's charge, which clearly could not have had any material influence upon the verdict. *Supreme Ct.*, 1847, *Smith v. Kerr*, 1 *Barb.*, 155.

186. Although there may have been some misdirection to the jury; yet if it was not upon a material point, and did not affect the merits of the case, it may be disregarded on a motion for a new trial. *Supreme Ct.*, 1808, *Fleming v. Gilbert*, 3 *Johns.*, 528; 1813, *Dole*

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v. Lyon, 10 *Id.*, 447; 1848, *Hunt v. Fish*, 4 *Barb.*, 824; 1854, *Gardner v. Clark*, 17 *Id.*, 588.

187. A mistake in the judge's charge is not always ground for ordering a new trial. If the result of the trial, from the testimony, would probably have been the same, had the proper direction been given, the error can be no reason for granting a new trial. *Supreme Ct.*, 1804, *Depeyster v. Columbian Ins. Co.*, 2 *Cal.*, 85; 1858, *Alston v. Jones*, 17 *Barb.*, 276.

188. Charge as to damages. Though the judge stated the rule of damages too favorably for the plaintiffs, yet, if the verdict is for a less amount than the plaintiff, upon conceded facts, is entitled to recover, a new trial will not be granted to the defendant, even on a bill of exceptions. *Ct. of Appeals*, 1858, *Ledyard v. Jones*, 7 *N. Y. (3 Seld.)*, 550.

189. The jury were told that the law allowed exemplary damages in certain cases; but that the case before them was not a proper case for such damages, no actual malice, &c., being shown. *Held*, that notwithstanding the court deemed the verdict very large, they would not inquire whether the proposition of the judge relative to exemplary damages was incorrect; he having plainly instructed the jury that it had no bearing on the case. *N. Y. Com. Pl.*, 1855, *Hunt v. Bennett*, 4 *E. D. Smith*, 647; affirmed, on other points, 19 *N. Y. (5 Smith)*, 178.

190. Where in an action for breach of promise, there was evidence of grossly improper conduct on the part of the plaintiff, and the judge charged that she was entitled to exemplary damages or nothing, a verdict for \$180 was set aside. *Supreme Ct.*, 1881, *Palmer v. Andrews*, 7 *Wend.*, 142.

191. Directing verdict. A new trial will not be granted on the ground that the judge directed a verdict instead of submitting the sufficiency of the evidence to the jury, when the evidence was competent, was uncontradicted, and was sufficient to warrant the verdict. *Supreme Ct.*, 1881, *Nichols v. Goldsmith*, 7 *Wend.*, 160.

192. Submission of question to jury. A new trial will not be granted on a case merely because the presiding judge, under an exception, submitted to the jury a question which he ought to have determined himself, if the court can see that the judge could not have determined the question otherwise than as the

jury have found. *N. Y. Com. Pl.*, 1854, *Miller v. Eagle Life & Health Ins. Co.*, 2 *E. D. Smith*, 268.

193. A general verdict ordered for the plaintiff will not be set aside, merely because the judge at the trial submitted to the jury special questions, and which they answered affirmatively; when, upon the evidence given, the judge might have ruled, with propriety, that the propositions, which the answers of the jury to such questions affirmed, had been satisfactorily established, and entitled the plaintiff to a verdict. *N. Y. Superior Ct.*, 1857, *Cook v. Litchfield*, 2 *Bosw.*, 187.

194. If the only material question was one of fact, and that was properly submitted to the jury by the judge, no previous mistakes of law in the charge can have influenced the verdict; and they will, therefore, be disregarded as grounds of ordering a new trial. *So held*, on motion upon a case. *N. Y. Superior Ct.*, 1851, *Stoddard v. Long Island R. R. Co.*, 5 *Sandf.*, 180.

195. Usury. The judge refused a request to charge in respect to the defence of usury, that it must be proved beyond a reasonable doubt, but told the jury that it was enough, if they were satisfied of the fact of usury. *Held*, that his refusal of the charge requested was no ground for a new trial, the instruction given being identical in effect with that requested. *Supreme Ct.*, 1841, *Asby v. Rapelye*, 1 *Hill*, 9.

196. Error which may have done harm. Where in submitting a cause to a jury, the judge instructed them that they might find a verdict for the defendant, upon either of two distinct grounds, and the charge upon one of the questions was erroneous in point of law, a verdict for the defendant was set aside, as, for aught appearing, it might have been based on the untenable ground. *Supreme Ct.*, 1836, *Sayre v. Townsends*, 15 *Wend.*, 647.

197. A new trial will be granted where there has been misdirection of the judge, which may have decided the verdict. *Supreme Ct.*, 1829, *Wardell v. Hughes*, 8 *Wend.*, 418.

198. A new trial will be granted if the material points of the cause have not been submitted to the jury, although it is not improbable that upon the testimony given the jury might have found a verdict, such as has already been rendered. *Supreme Ct.*, 1848,

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199. New trial ordered on this ground, in a peculiar case. *Id.*

4. Irregularities on the Part of the Jury.

200. A mere informality or mistake of an officer in drawing a jury, or an irregularity or misconduct in the jurors themselves, will not be a sufficient ground for setting aside a verdict, either in a civil or criminal case, where the court are satisfied that the party complaining has not or could not have sustained any injury from it. *Supreme Ct., Sp. T.*, 1857, *Hardenburgh v. Crary*, 15 *How. Pr.*, 307.

201. Injury must be shown. Where there is misbehavior of the jury, under circumstances affording any probability of abuse to the injury of either party, the court will set aside the verdict; but not where no injury has resulted. *Supreme Ct.*, 1823, *Smith v. Thompson*, 1 *Cow.*, 221; 1824, *Horton v. Horton*, 2 *Id.*, 589; 1826, *Oliver v. First Presbyterian Ch.*, 5 *Id.*, 283; 1841, *Wilson v. Abrahams*, 1 *Hill*, 207.

202. Mere matter of evidence against a juror, such as might be adduced on trial of a challenge for favor, unaccompanied by proof that the juror was unduly influenced, is not ground for setting aside the verdict. *Supreme Ct.*, 1827, *Cain v. Ingham*, 7 *Cow.*, 478.

203. Juror not sworn. A juror arrived at the court-house after the panel had been called and sworn for the term, and consequently sat as a juror without having been sworn at all, and without objection on the part of the defendants;—*Held*, that the defendants not having shown themselves prejudiced by the irregularity, they could not take advantage of it to have the verdict against them set aside. *Supreme Ct., Sp. T.*, 1857, *Hardenburgh v. Crary*, 15 *How. Pr.*, 307.

204. Absence of juror. A juror left the court without leave, but the examination was suspended as soon as his absence was discovered, and when he returned the parties proceeded with the trial without objection, re-examining the witness who was under examination when he left;—*Held*, there was no objection to the verdict. *Supreme Ct.*, 1823, *Eastman v. Tuttle*, 1 *Cow.*, 248; *S. P., Exp. Hill*, 3 *Id.*, 355.

205. Where a jury procured their separation by pretending that they had sealed a

verdict, and heard conversation relating to the cause, and then agreed upon a verdict, it was set aside. *Supreme Ct.*, 1826, *Oliver v. First Presbyterian Church*, 5 *Cow.*, 283.

206. Before the jury had agreed, two of them left the jury-room and were absent some time. But there was no improper communication, and nothing to indicate that their misbehavior had any influence upon the verdict. *Held*, no ground for setting the verdict aside. The ancient strictness in relation to the conduct of jurors has been somewhat relaxed. *Supreme Ct.*, 1823, *Smith v. Thompson*, 1 *Cow.*, 221.

207. The jury agreed, separated without leave of the court, dined, and came into court with their verdict; and there being no evidence of any further misconduct, or of any injury to the party, the verdict was sustained. *Supreme Ct.*, 1824, *Horton v. Horton*, 2 *Cow.*, 589.

208. Drinking spirits. In a civil case, after the judge had charged the jury, they were permitted to retire in charge of an officer; and one of them, misunderstanding the directions of the court, left his fellows, and while absent drank a little brandy, as a remedy for disease. *Held*, that though there had been no mischief the verdict must be set aside. *Supreme Ct.*, 1827, *Brant v. Fowler*, 7 *Cow.*, 562.*

209. In civil cases, where the court adjourns for refreshment during the progress of the trial, and the jurors separate by permission, the mere fact that one of them drinks spirits, is not sufficient cause to set aside the verdict, unless there is some reason to suppose that he drank to excess, or at the expense or invitation of one of the parties. *Supreme Ct.*, 1841, *Wilson v. Abrahams*, 1 *Hill*, 207.

210. Mode of arriving at verdict. Any agreement between jurors which in effect makes their verdict depend on chance,—*e. g.*, where they agree to unite in a verdict for the average of sums privately written down by each, or that if nine agree on a verdict the other three shall unite with them,—renders the verdict irregular, and it will be set aside. But such agreement cannot be proved by affidavits on hearsay from the jurors themselves.

* See this case doubted in *Wilson v. Abrahams*, 1 *Hill*, 208, 211.

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Gen. Sess., 1822, *People v. Barker*, 8 *Wheel. Cr.*, 19; and see 5 *City H. Rec.*, 85.

211. Where the jurors mark on ballots the amount which each is willing to find for the plaintiff, and the several amounts thus marked are drawn from a hat, added together, and the aggregate divided by 12, and the sum thus ascertained is rendered as their verdict; this is not irregular, if it was done for the purpose of ascertaining how near the jury could come together, and without making any agreement beforehand that the average amount thus ascertained should be their verdict, but it was left optional with each juror to agree to such amount or not, as he pleased. *Supreme Ct., Sp. T.*, 1845, *Oonklin v. Hill*, 2 *How. Pr.*, 6.

212. Sundry objections to the regularity of a sealed verdict—that it appeared by affidavit of a juror, that the verdict was assented to merely as a ruse to enable the jury to separate,—that it appeared by affidavit of the constable, that he permitted the jury to separate before they had agreed,—that the direction given by the judge to the jury to bring in a sealed verdict, was given without consent of plaintiff's counsel,—that after the jury had gone out, the judge sent an instruction to them by the sheriff, instead of recalling them and giving it personally,—that each juror did not sign the verdict before they separated,—that all the jury did not definitely assent to the verdict when they were polled,—overruled. *Supreme Ct., Sp. T.*, 1856, *Green v. Bliss*, 12 *How. Pr.*, 428.

213. Taking out papers. The jury took out with them, without consent of counsel, a paper which had been read in evidence; but it appeared by affidavits of the jurors that the paper was not read by the jury. *Held*, no ground for setting aside the verdict. *Supreme Ct.*, 1808, *Hackley v. Hastie*, 8 *Johns.*, 252. Compare *Mitchell's Case*, 1 *City H. Rec.*, 147.

214. Dissent. The jury having found a sealed verdict, brought it into court the next morning; but on being polled, one of them dissented. On being sent out for further deliberation, they returned, and all concurred in the same verdict. *Held*, no irregularity. *Supreme Ct.*, 1808, *Bunn v. Hoyt*, 8 *Johns.*, 255; 1829, *Douglass v. Tousey*, 2 *Wend.*, 352.

215. Improper communication with jury. Although a verdict will not generally be set aside merely because the jury have been approached, if it clearly appears that no injustice

has been done, and the interference did not affect the result; yet if it appears that they have been approached in such a manner as might have influenced their verdict, it should be set aside without reference to the source or the motive of the interference. *N. Y. Superior Ct., Sp. T.*, 1858, *Nesmith v. Clinton Fire Ins. Co.*, 8 *Abbotts' Pr.*, 141.

216. Where the interference complained of was not by the plaintiffs, and there is no evidence that they knew of it at the time, or promoted it in any manner, the court do not feel bound, as a matter of course, to set aside the verdict. If it clearly appears that no injustice has been done, and that the conversations with the juror did not influence the verdict, the court will not disturb the finding, although they may severely censure or punish any attempt to tamper with the jury. *Id.*

217. During the trial of an action turning upon much conflicting testimony, a juror listened to the statements of a third party attacking the credibility of the defendant's witnesses. *Held*, that a verdict for the plaintiff must be set aside. *Id.*

218. A motion for a new trial, on the ground of the misbehavior of the jury, should be made before the judge who tried the cause; or if before another judge, it should be made upon a case actually settled. *Id.*

219. Affidavits of jurors are not admissible to impeach their verdict, either for error or mistake in respect to the merits, nor for irregularity or misconduct of themselves or their fellows. [1 *T. R.*, 11; 2 *Id.*, 281; 4 *Bos. & P.*, 326; 4 *Johns.*, 487.] *Supreme Ct.*, 1848, *Olum v. Smith*, 5 *Hill*, 560; *Sp. T.*, 1856, *Green v. Bliss*, 12 *How. Pr.*, 428.

220. Affidavits of jurors will not be received, on motion to set aside their verdict, for the purpose of impeaching it,—*e. g.*, to show that they agreed to mark down each a particular sum, and to take an average of the sums so marked down as their verdict. *Supreme Ct.*, 1809, *Dana v. Tucker*, 4 *Johns.*, 487. Compare *Smith v. Cheetham*, 8 *Cai.*, 56.

221. Affidavits of individual jurors, to the effect that they, in making up the verdict in an action for loss of services, allowed damages for a breach of marriage promise, cannot be received to disturb the verdict. *Supreme Ct.*, 1848, *Brownell v. McEwen*, 5 *Den.*, 867.

222. Affidavits of the jurors will not be received to explain the grounds of their ver-

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dict, or to show that they intended something different from what they found. [2 Tidd, 817; 5 Cow., 121; 2 T. R., 281; 2 Blackst., 804; 5 Burr., 2667; distinguishing 1 Burr., 383.] *Supreme Ct.*, 1828, *People v. Columbia Common Pleas*, 1 *Wend.*, 297; S. P., 1817, *Jackson v. Dickenson*, 15 *Johns.*, 809.

223. Affidavits of jurors cannot be received to show mistake committed by them in making up their verdict, unless the mistake arises from circumstances passing at the trial which are equivalent to a misdirection of the judge. *Supreme Ct.*, 1826, *Exp. Caykend*, 6 *Cow.*, 58.

224. That the affidavits of jurors or evidence of their declarations, are not admissible to impeach their verdict. *Taylor v. Everett*, 2 *Hov. Pr.*, 28.

225. The constable brought to a juror an exaggerated account of an accident in his mill, in order, as was alleged, to induce him to agree hastily to a verdict. *Held*, that without evidence besides the juror's affidavit that the device affected the verdict, the verdict should not be disturbed. *Id.*

226. Declarations. Evidence of the declarations of a jurymen, after verdict, is not admissible to impeach it. *Supreme Ct.*, 1848, *Olum v. Smith*, 5 *Hill*, 560.

227. Affidavits, when admissible. Although an affidavit of a juror cannot be received to impeach the verdict for mistake or error, or for impropriety on the part of any of the jury, it may be for the purposes of showing the improper conduct of the successful party in approaching them on the subject, pending the trial. *Supreme Ct.*, *Sp. T.*, 1858, *Reynolds v. Champlain Transportation Co.*, 9 *Hov. Pr.*, 7.

228. The fact that the plaintiff, pending the trial, made remarks out of court in the hearing of some of the jurors, in reference to the case, and reflecting upon the character of the defendants, is sufficient ground for setting aside a verdict in his favor, irrespective of the question whether the jury were influenced by it, and although there appears to have been no impropriety upon their part. *Id.*

229. To sustain verdict. On motion to set aside a verdict for misbehavior of the jury, affidavits of the jurors themselves are admissible to sustain the verdict. *Supreme Ct.*, 1809, *Dana v. Tucker*, 4 *Johns.*, 487. *N. Y. Superior Ct.*, *Sp. T.*, 1858, *Nesmith v. Clinton Fire Ins. Co.*, 8 *Abbotts' Pr.*, 141.

230. On motion for a new trial, on the ground of irregularities committed by the jury, the courts receive affidavits of the jurors themselves to *disprove* the charges; though they are considered an unreliable species of evidence. *Supreme Ct.*, 1855, *Eastwood v. People*, 8 *Park. Cr.*, 25.

5. Verdict against Evidence.

231. Verdict may be set aside. It is the legal duty of courts to see that issues of fact in their courts are fully and fairly tried; and if the verdict or the finding of facts is so clearly without or against evidence as to satisfy the court that injustice has been done, the court will set aside the verdict for the purpose of a new trial before another jury. *Supreme Ct.*, 1852, *Adsit v. Wilson*, 7 *Hov. Pr.*, 64.

232. Where a jury perversely disregard the explicit directions of the court, given to them in the charge, the verdict will be set aside. *So held*, in a case where the court deemed the verdict also against law. *N. Y. Com. Pl.*, 1854, *Clark v. Richards*, 8 *E. D. Smith*, 89.

233. Where, under a proper charge from the court, the jury allow improper items in favor of plaintiff, the verdict will be set aside and a new trial ordered. And in such a case, the error being by the jury, not by the court, the party moving for the new trial must pay the costs. *N. Y. Superior Ct.*, 1829, *Birkbeck v. Burrows*, 2 *Hall*, 51.

234. Instances. Where the jury, on a second trial, find a verdict contrary to the rule of law decided by the court on granting the new trial, a rule for a third trial will be allowed. *Supreme Ct.*, 1800, *Silva v. Low*, 1 *Johns. Cas.*, 386; 1802, *Wilkie v. Roosevelt*, 8 *Id.*, 206.

235. Where the witness is unimpeached, and his testimony is uncontradicted, and intrinsically probable, neither a court nor jury can, in the exercise of a sound discretion, disregard his testimony. Hence, where a justice returned that he disregarded the testimony of two witnesses, because he "was satisfied from their manner they were biased," but there was nothing to impeach or contradict their testimony,—*Held*, that his finding was against evidence. *Supreme Ct.*, 1828, *Newton v. Pope*, 1 *Cow.*, 109. Compare *JUSTICES' COURTS*, 842.

236. In an action for money lent, the defence was that defendant received the money as an apprentice-fee with plaintiff's son; on

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an understanding that the son was taken on trial as a student of medicine with defendant, and the fee was to be returned if he did not continue. The son did not in fact serve out his term; but defendant proved admissions of the son, that he regarded himself as having become a regular student with defendant. *Held*, that admissions of the son did not conclude the plaintiff; and that a verdict for defendant was therefore against evidence, and a new trial must be granted. *Supreme Ct.*, 1808, *Hart v. Hosack*, 1 *Coi.*, 25.

237. Verdict for the insured, on a policy of marine insurance, set aside as against the weight of evidence, on the ground that the proof showed the vessel to have been unseaworthy. *Mumford v. Smith*, 1 *Coi.*, 590.

238. Where it appeared by the testimony of a single witness, whose testimony was not impeached by cross-examination or otherwise, that an accord and satisfaction, on which the defendant relied, was obtained by fraud and gross misrepresentation of his affairs,—*Held*, that the accord and satisfaction was void, and, the jury having disregarded the testimony, that the verdict should be set aside as against evidence, and a new trial ordered. *Supreme Ct.*, *Sp. T.*, 1855, *Dolsen v. Arnold*, 10 *Hov. Pr.*, 528.

239. Question of fraud. On a motion for a new trial where there is evidence on both sides, and the jury were not misdirected, on a question of fraud, the court will not set aside their verdict; fraud being a question of fact for the decision of the jury. *Supreme Ct.*, 1808, *Ward v. Center*, 8 *Johns.*, 271; *S. P.*, 1884, *Jackson v. Timmerman*, 12 *Wend.*, 299.

240. The judge submitted the validity of a conveyance to the jury, who found it valid. The court being of opinion that the conveyance was void on its face by the Statute of Frauds, granted a new trial. *Supreme Ct.*, 1858, *Stevens v. Fisher*, 19 *Wend.*, 181.

241. A new trial may be granted on the ground that the verdict was against evidence, where the question is whether a conveyance of property is fraudulent against creditors. However clear the evidence of fraud may be, the question must be left to the jury; but if the jury come to a wrong conclusion, the court will, as in other cases, grant a new trial. *Supreme Ct.*, 1844, *Vance v. Phillips*, 6 *Hill*, 493.

242. Although, under 2 Rev. Stat., 137,

fraud in a debtor's assignment is in all cases a question of fact, yet, wherever an assignment contains provisions which are calculated *per se* to hinder, delay, or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding, if in opposition to the plain inference to be drawn from the face of the instrument. [11 *Wend.*, 240.] *Ct. of Appeals*, 1858, *Dunham v. Waterman*, 17 *N. Y.* (3 *Smith*), 9; *S. C.*, 6 *Abbotts' Pr.*, 357.

243. When court will interfere. Where the weight of evidence is against the verdict, this is not in all cases a reason for granting a new trial; but if there is good reason to believe that justice has not been done, and that another examination of the case ought to be made, a new trial may be granted. *Supreme Ct.*, 1808, *Jackson v. Sternbergh*, 1 *Coi.*, 162.

244. Where the question submitted to the jury was confessedly proper for them, the court cannot undertake to weigh the testimony nicely. Thus when a number of commercial men concur in stating that a word used in their trade has acquired a certain sense, and a verdict is found upon their evidence, though in opposition to the judge's charge, the court cannot overturn it, merely because they have given some illustrations and particulars disagreeing, partially or wholly, with their general statement. *Supreme Ct.*, 1827, *Astor v. Union Ins. Co.*, 7 *Cow.*, 202.

245. Conflicting evidences. If there was a conflict of evidence on a question of fact rightly submitted to the jury, the court will not, in general, grant a new trial on the ground the verdict is against evidence, even though they deem the conclusion reached by the jury erroneous. *Supreme Ct.*, 1827, *Winchell v. Latham*, 6 *Cow.*, 682; 1849, *Fleming v. Hollenback*, 7 *Barb.*, 271; 1852, *Adsit v. Wilson*, 7 *Hov. Pr.*, 64; 1858, *Mackey v. N. Y. Central R. R. Co.*, 27 *Barb.*, 528. *N. Y. Superior Ct.*, 1851, *Stoddard v. Long Island R. R. Co.*, 5 *Sandf.*, 180.

246. Where there does not appear to have been any error of law in the course of the trial, which would sustain the court in reversing the judgment, and the questions of fact are of such a character, and the evidence in regard to most of the questions so conflicting, that they can only be disposed of by the finding of the jury, the court cannot interfere

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with their verdict. *Supreme Ct.*, 1858, *Dart v. Farmers' Bank at Bridgeport*, 27 *Barb.*, 837.

247. To set aside a verdict in a case where there was evidence on both sides, there must be such a preponderance of evidence as to satisfy the court that there was either an absolute mistake on the part of the jury, or that they acted under the influence of prejudice, passion, or corruption. *N. Y. Superior Ct.*, 1848, *Cohen v. Dupont*, 1 *Sandf.*, 260.

248. Sale of chattel. Where the evidence was contradictory, whether the sale of a chattel was absolute or not, the court refused to set aside the verdict. *Supreme Ct.*, 1808, *De Fonclear v. Shottenkirk*, 8 *Johns.*, 170.

249. Escape. Though a verdict was against the weight of evidence; yet, the action being in tort,—against a sheriff for an escape,—and the sum in controversy small, and the evidence, as to the damages, contradictory, a new trial was refused. *Supreme Ct.*, 1811, *Feester v. Whipple*, 8 *Johns.*, 869.

250. Experts. Although the testimony of witnesses of skill and of superior means of knowledge is entitled to great consideration, still, a report of referees, or a verdict of a jury, in opposition to such testimony, will not be set aside as against the weight of evidence, where the number of witnesses upon whose testimony the report or verdict is founded greatly preponderates. *Supreme Ct.*, 1884, *Dubois v. Delaware & Hudson Canal Co.*, 12 *Wend.*, 884; affirmed, 15 *Id.*, 87.

251. Corroborative documents. Upon a trial in 1831, involving the question whether a certain soldier died in the service, or survived and was discharged at the close of the Revolutionary war, fifteen witnesses testified that he survived the war: one testified that he died in 1781, and was corroborated by the balloting-book and the pay-roll of his regiment;—*Held*, that a verdict in accordance with his testimony was not against evidence, the documentary evidence being superior in character to the recollection of witnesses after so great a lapse of time. *Supreme Ct.*, 1834, *Jackson v. Loomis*, 12 *Wend.*, 27.

252. Action for breach of promise. A verdict for the plaintiff, in an action for a breach of a promise of marriage, being against the weight of the evidence, was set aside. *Supreme Ct.*, 1844, *Oonrad v. Williams*, 6 *Hill*, 444.

253. Instances in which the evidence,

though doubtful or conflicting, has been held to warrant the verdict. *Depeyster v. Columbian Ins. Co.*, 2 *Cai.*, 85; *Palmer v. Mulligan*, 3 *Id.*, 807; *De Fonclear v. Shottenkirk*, 8 *Johns.*, 170; *Ward v. Carter*, *Id.*, 271; *Sargent v. —*, 5 *Cow.*, 106; *Winchell v. Latham*, 6 *Id.*, 682; *Astor v. Union Ins. Co.*, 7 *Id.*, 202; *Wheelwright v. Beers*, 2 *Hall*, 391; *Douglass v. Tousey*, 2 *Wend.*, 352; *Lewis v. Payn*, 4 *Id.*, 428; *Smith v. Hicks*, 5 *Id.*, 48; *Rice v. Welling*, *Id.*, 595; *Jackson v. Timmerman*, 12 *Id.*, 299; *Mansfield v. Wheeler*, 23 *Id.*, 79; *Cohen v. Dupont*, 1 *Sandf.*, 260; *Cook v. Hill*, 3 *Id.*, 341; *Fleming v. Hollenback*, 7 *Barb.*, 271; *Fox v. Jackson*, 8 *Id.*, 855; *Horner v. Wood*, 16 *Id.*, 886.

254. Two trials. In two actions on two policies of insurance on the same vessel, when there had been two trials in each cause, and two verdicts for the plaintiff, on the subject of seaworthiness, the court refused to grant a third trial. *Supreme Ct.*, 1807, *Talcot v. Commercial Ins. Co.*, 2 *Johns.*, 467.

255. On motion for a new trial, in a case where there have been two concurring verdicts and much testimony on both sides upon a question of fact, though the verdict was against the weight of evidence, and the charge of the judge not entirely satisfactory, though without positive misdirection, the court refused to disturb the verdict. *Supreme Ct.*, 1831, *Fowler v. Aetna Ins. Co.*, 7 *Wend.*, 270.

256. Penal actions. In a penal action, the court will not grant a new trial after a verdict for the defendant, upon the ground that it is against evidence, if there has been no misdirection nor irregularity. *Supreme Ct.*, 1813, *Comfort v. Thompson*, 10 *Johns.*, 101; 1823, *Baker v. Richardson*, 1 *Cow.*, 77; 1836, *Overseers of Rochester v. Lumt*, 15 *Wend.*, 565. *Mayor's Ct.*, 1802, *Brotherton v. Sinclair*, *Lie. Jud. Op.*, 62.

257. Though the action be penal, and verdict be for defendant, yet if such verdict was induced by a misdirection of the judge, a new trial may be granted. *Mayor's Ct.*, 1802, *Brotherton v. Sinclair*, *Lie. Jud. Op.*, 62.

258. An action under the provisions of 1 Rev. Stat., 696, § 1,—giving treble damages to the party injured against one who negligently sets fire to his own woods,—is penal in its character within this rule. *Supreme Ct.*, 1845, *Lawyer v. Smith*, 1 *Den.*, 207.

259. The court will not grant a new trial

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for errors of judgment in the jury, in weighing the evidence in penal actions and those of a kindred character, where the verdict is for the defendant. *So held*, in an action for a statute penalty, where the court deemed the evidence very decided—almost irresistible—against the verdict. *Supreme Ct.*, 1859, *Wheeler v. Calkins*, 17 *How. Pr.*, 451.

260. Actions for wrongs. In actions for a libel and slander, and other actions vindictive in their nature, a new trial will not be granted, after a verdict for the defendant, on the ground that it was against the weight of evidence, unless some error of law has been committed, or there has been tampering with the jury. *Supreme Ct.*, 1808, *Jarvis v. Hatheway*, 3 *Johns.*, 180; *S. P.*, 1812, *Hurtin v. Hopkins*, 9 *Id.*, 36; 1824, *Exp. Baily*, 2 *Cow.*, 479; 1838, *Rundell v. Butler*, 10 *Wend.*, 119; 1842, *Lawyer v. Smith*, 1 *Den.*, 207.

261. Usury. Verdicts on question of usury sustained, although against weight of evidence. *Rice v. Welling*, 5 *Wend.*, 595; *Mansfield v. Wheeler*, 23 *Id.*, 79.

262. Finding of judge. Under the provision of the Judiciary Act (*Laws of 1847*, ch. 280, § 80),—allowing trials before a judge, without a jury,—the finding of a judge is equivalent to a verdict, and a new trial is not to be granted on the ground the finding is against evidence, except where it would be allowed on a verdict. *N. Y. Superior Ct.*, 1848, *Osborn v. Marquand*, 1 *Sandf.*, 457. *S. P.*, *Supreme Ct.*, 1858, *Mann v. Witbeck*, 17 *Barb.*, 388.

263. — of referee. There may be a motion for a new trial of a case tried by a referee, on the ground that his report is contrary to evidence. Such motion should be made at special term, and it should properly be made upon a case. A stay of proceedings may be ordered pending the motion. *Supreme Ct.*, *Sp. T.*, 1850, *Crist v. N. Y. Dry Dock Co.*, 3 *Code R.*, 118; affirmed, *Id.*, 141.

264. Unless the preponderance of testimony against the finding of a referee is so great as to warrant the presumption of partiality or bad faith, or at least unfairness, or mistake in the application of some rule of law, the court will not disturb the report. The referee, having the witnesses before him in person, has a better opportunity than the court to determine the degree of credit to which their testimony is entitled. *N. Y. Com. Pl.*, 1854, *Mazetti v.*

N. Y. & Harlem R. R. Co., 8 *E. D. Smith*, 98. *S. P.*, *Supreme Ct.*, 1849, *Spencer v. Utica & Schenectady R. R. Co.*, 5 *Barb.*, 887; *Sp. T.*, 1852, *Shuart v. Taylor*, 7 *How. Pr.*, 251.

265. Receiving evidence on motion. On motion to set aside a verdict as not warranted by the evidence, the court will not, in general, receive evidence to supply the defect of proof. Evidence may be received on such motion to show ground for opening an inquiry, but not to prevent one. [Distinguishing 3 *Johns. Cas.*, 125.] *Supreme Ct.*, 1804, *Watson v. Delafield*, 2 *Cai.*, 224.

6. Excessive or Inadequate Damages.

266. Action for lands. In an action to recover possession of real property, with damages for its detention, the jury assessed joint damages for the withholding a certain strip of land, and for an encroachment by building an overhanging wall. It appearing that the plaintiff was entitled to damages on the second of these claims, but not on the first,—*Held*, that the court could not sever or apportion the damages; but a new trial must be granted, unless plaintiff would remit them entirely. *N. Y. Superior Ct.*, 1855, *Sherry v. Freckling*, 4 *Duer*, 452.

267. Action on policy. Where a verdict for plaintiff in an action on a policy showed that the jury adopted the plaintiff's own statement of his loss, in the preliminary proofs, and gave damages for some articles which were saved and for others not proved to have been on the premises at all at the time of the fire, a new trial was awarded. *N. Y. Superior Ct.*, 1829, *Moadinger v. Mechanics' Fire Ins. Co.*, 2 *Hall*, 490.

268. The witnesses varied in estimating the damages from \$800 to \$1,500. But the jury assessed the damages at \$1,548. *Held*, excessive. New trial granted to try the question of damages only. *Supreme Ct.*, 1885, *Finch v. Brown*, 18 *Wend.*, 601.

269. Damages above claim. A new trial will not be granted because the verdict is for a larger amount than the damages laid in the declaration; for the plaintiff may remit the excess. *Supreme Ct.*, 1829, *Dox v. Dey*, 8 *Wend.*, 356. *S. P.*, *Corning v. Corning*, 6 *N. Y.*, 97.

270. If the plaintiff declares, on a special contract, and on a *quantum meruit*, for the same services, and recovers a greater amount than is claimed in either count, the verdict

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will be set aside and new trial granted. *Supreme Ct.*, 1881, *McIntire v. Clark*, 7 *Wend.*, 880.

271. Where interest is improperly allowed, the verdict will not for that cause be set aside; but the plaintiff will be allowed to remit. *Supreme Ct.*, 1840, *McLaughlin v. Washington Mut. Ins. Co.*, 28 *Wend.*, 525.

272. Remitting. Where excessive damages have been given, and the actual damages are susceptible of calculation with considerable accuracy, the court will permit the plaintiff to retain his verdict, on remitting the excess. *Supreme Ct.*, 1827, *Jansen v. Ball*, 6 *Cow.*, 628. *S. P.*, *N. Y. Superior Ct.*, 1850, *Sturgis v. Law*, 8 *Sandf.*, 451.

273. The defendant's affidavit of merits stated, also, that the verdict was taken for more than was due; and the opposite party offered to relinquish the surplus. The court refused the motion, but gave the defendant further time to show whether the excess of the verdict was the sole ground of his affidavit. *Supreme Ct.*, 1808, *Fink v. Bryden*, 8 *Johns.*, 245.

274. Two trials. Although, after two trials, with a like finding by the jury, the court would not set aside the verdict merely because the evidence is deemed greatly preponderating against it upon a question of negligence; yet the fact that the jury has also found, on a question of damages, in decided opposition to the views of the court upon the testimony, forms a coincidence which strengthens the apprehension of bias and partiality, and may require interference, even where, upon either ground alone, it might have been refused. *N. Y. Com. Pl.*, 1852, *Gilligan v. N. Y. & Harlem R. R. Co.*, 1 *E. D. Smith*, 458.

275. Actions for wrongs. The courts have an unquestionable power to grant a new trial to defendant in an action for a wrong, on the ground that the damages awarded by the verdict are excessive. But the power should be sparingly exercised. *Supreme Ct.*, 1854, *Clapp v. Hudson River R. R. Co.*, 19 *Barb.*, 461. *N. Y. Com. Pl.*, 1856, *Blum v. Higgins*, 8 *Abbotts' Pr.*, 104.

276. In an action for an assault and false imprisonment, against a military commander, for arresting the plaintiff, a private citizen, on a charge of treason, confining him for five days, and trying him before a court-martial,

the jury found a verdict for the plaintiff for \$9,000 damages; and a new trial was granted for excessiveness of the damages. *Supreme Ct.*, 1815, *McConnell v. Hampton*, 12 *Johns.*, 284.

277. Damages must show improper motive. In actions for wrongs,—*e. g.*, libel, false imprisonment, seduction,—the courts will not grant a new trial on the ground of excessive damages, unless the amount of damages be so flagrantly outrageous and extravagant, as manifestly to show that the jury must have been actuated by serious mistake, or by passion, partiality, prejudice, or corruption. *Supreme Ct.*, 1812, *Coleman v. Southwick*, 9 *Johns.*, 45; approved and followed, 1818, *Southwick v. Stevens*, 10 *Id.*, 448; 1815, *McConnell v. Hampton*, 12 *Id.*, 284; 1825, *Sargent v. —*, 5 *Cow.*, 106; 1826, *Moody v. Baker*, *Id.*, 351; 1828, *Cole v. Perry*, 8 *Id.*, 214; 1829, *Douglass v. Tousey*, 2 *Wend.*, 352; 1835, *Finch v. Brown*, 13 *Id.*, 601; 1840, *Bump v. Betts*, 28 *Id.*, 85; 1854, *Knight v. Wilcox*, 18 *Barb.*, 212; *Clapp v. Hudson River R. R. Co.*, 19 *Id.*, 461; 1855, *Curtis v. Rochester & Syracuse R. R. Co.*, 20 *Barb.*, 282; affirmed, on other grounds, 18 *N. Y. (4 Smith)*, 534; 1857, *Travis v. Barger*, 24 *Barb.*, 614; *Sp. T.*, *Hager v. Danforth*, 8 *How. Pr.*, 435; reversed, on other grounds, 20 *Barb.*, 16. *N. Y. Com. Pl.*, 1856, *Blum v. Higgins*, 8 *Abbotts' Pr.*, 104.

278. Action against justice. Defendant, as justice of the peace, rendered a judgment without jurisdiction for fifteen dollars, and issued an execution thereon, under which a constable sold plaintiff's property. In an action of trespass brought by the defendant in the judgment against the justice and constable, a verdict was given for the plaintiff for \$275 damages. There was reason to believe that the justice had acted, not maliciously, but under a mistake as to the extent of his jurisdiction; and there were strong circumstances to show that the party himself had, through his agent, purchased the goods under the execution, at a price about equal to the amount of the judgment, and therefore could not have sustained damages to a greater amount. The court, notwithstanding, refused a new trial; as the case admitted of doubt, and the question was fairly submitted to the jury. *Supreme Ct.*, 1818, *Woodward v. Paine*, 15 *Johns.*, 498.

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279. In trespass for a distress made under an insufficient affidavit, when there is evidence of special damage, and the damages are not so great as to evince passion, prejudice, or partiality on the part of the jury, a new trial will not be granted. *Supreme Ct.*, 1886, *Marquissee v. Ormston*, 15 *Wend.*, 368.

280. Malicious suit. In an action for maliciously suing out a justice's attachment upon a paid judgment, the jury gave \$750 damages, and the court refused to interfere. *Supreme Ct.*, 1840, *Bump v. Betts*, 28 *Wend.*, 85.

281. Seduction. Where, in an action for seduction, the jury found a verdict for the plaintiff for \$8,000, the court refused to grant a new trial on the ground of excessiveness of damages. [Reviewing many cases.] *Supreme Ct.*, 1854, *Travis v. Barger*, 24 *Barb.*, 614.

282. Slander. It is only in rare cases that the court will grant a new trial in an action for libel or slander because the damages allowed are excessive. To authorize a new trial for that cause, the amount must be so large as to be clearly and grossly unjust, and to make it apparent that the verdict is the result of excitement and passion, or some other influence than that of the law and the evidence. *Supreme Ct.*, 1856, *Potter v. Thompson*, 22 *Barb.*, 87; *S. P.*, 1806, *Tillotson v. Cheetham*, 2 *Johns.*, 68; 1827, *Root v. King*, 7 *Cow.*, 618; 1838, *Ostrom v. Calkins*, 5 *Wend.*, 268; *Ryckman v. Parkins*, 9 *Wend.*, 470. *N. Y. Superior Ct.*, 1849, *Cook v. Hill*, 3 *Sandf.*, 341.

283. Crim. con. The court has power to grant a new trial for excessiveness of damages in actions of *crim. con.*; but the power appears never to have been exercised in actions of that nature. *Supreme Ct.*, 1836, *Smith v. Masten*, 15 *Wend.*, 270.

284. Therefore, in such an action, although the damages were \$8,000, and there was proof of negligence on the part of the husband, yet the court refused to interfere. *Id.*

285. Enticing away wife. A verdict against defendant in an action for enticing away plaintiff's wife, will not be set aside as excessive, unless it appears that the jury were actuated by improper motives. *N. Y. Com. Pl.*, 1855, *Scherpf v. Szadeczky*, 1 *Abbotts' Pr.*, 366; *S. C.*, 4 *E. D. Smith*, 110.

286. The court will not infer this, merely from the amount of the damages awarded. *Id.*

287. Remitting. In an action for a wrong,

where the court deem the damages excessive, so that defendant is entitled to relief, they may permit the plaintiff to reduce the verdict, by remitting a part of the damages, to an amount named by the court, and refuse a new trial on this being done. *N. Y. Superior Ct.*, 1849, *Diblin v. Murray*, 3 *Sandf.*, 19. *Supreme Ct.*, 1852, *Collins v. Albany & Schenectady R. R. Co.*, 12 *Barb.*, 492; 1854, *Clapp v. Hudson River R. R. Co.*, 19 *Id.*, 461.

288. Where, in an action against husband and wife, for slander uttered by the wife, in charging the plaintiff with theft, the evidence did not show malice, circumstances were proved which were calculated to excite suspicion; and it was proved that the plaintiff himself had said, in view of the circumstances, that he did not blame her;—*Held*, that this was a case for moderate damages; and the jury having found a verdict in favor of the plaintiff for \$600, a new trial was ordered, unless the plaintiff would stipulate to reduce the amount to \$200. *Supreme Ct.*, 1856, *Potter v. Thompson*, 22 *Barb.*, 87.

289. Inadequate damages. The court may grant a new trial, as well where the damages are inadequate, as where they are excessive, if the case be such as clearly to indicate that the jury have acted under the influence of partiality, bias, or a perverted judgment. Accordingly, where a recovery was had in an action for the defendant's negligence, whereby the plaintiff was injured, and sustained severe bruises upon his mouth and face, and one of his teeth was knocked out; it was *Held*, that the verdict of the jury for \$10 only, was grossly inadequate, and that the plaintiff was entitled to a new trial, on payment of costs, unless the defendant should consent to a material increase in the amount of damages found. *N. Y. Com. Pl.*, 1854, *Richards v. Sandford*, 2 *E. D. Smith*, 349; *S. C.*, 12 *N. Y. Leg. Obs.*, 94.

7. Surprise.

290. Time of moving. A motion for a new trial on the ground of surprise merely, must be made at the special term, and without delay. It comes too late after judgment perfected. *Supreme Ct.*, 1848, *Rapelye v. Prince*, 4 *Hill*, 119.

291. A party applying for a new trial on the ground of surprise, must show that he has used reasonable diligence in making his mo-

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tion. Where more than four months had elapsed, and no excuse was shown for the delay, and judgment had been perfected in the mean time,—*Held*, that the motion must be denied. *Supreme Ct., Sp. T., 1848, Snowhill ads. Knapp, 7 N. Y. Leg. Obs., 15.*

292. What affidavits requisite. In moving for a new trial on the ground of surprise by the testimony of his own witness, the party must produce the affidavits of other persons, showing that he can make out a different case by them. *Supreme Ct., 1835, Phenix v. Baldwin, 14 Wend., 62.*

293. What is deemed "surprise." A party cannot have a new trial on the ground of surprise, to enable him to rebut testimony which he was aware before the former trial might be introduced. *Supreme Ct., 1851, Meakim v. Anderson, 11 Barb., 215.*

294. When a party alleges surprise as a ground of his application for relief, he is bound to show that some act prejudicial to him has been done, which with a proper inquiry into the facts of the case he could not have anticipated, and against which he could not, with due vigilance, have protected himself. *Supreme Ct., Sp. T., 1852, Craig v. Fanning, 6 How. Pr., 386.*

295. A motion for a new trial on the ground of surprise will not be granted where the party has submitted his cause without objection, and only asks relief after finding the verdict is against him. *Supreme Ct., Sp. T., 1854, People v. Mack, 2 Park. Cr., 678; S. C., 10 How. Pr., 261. S. P., N. Y. Com. Pl., 1857, De Leyer v. Michaels, 5 Abbotts' Pr., 208.*

296. A nonsuit will not be set aside and new trial granted, on the ground that plaintiff was surprised by the ground of objection taken at the trial, and did not come prepared to meet it. *Supreme Ct., 1812, Jackson v. Roe, 9 Johns., 77.*

297. Absence of witness. A material witness was subpoenaed by defendant, and attended, but shortly before the cause was called on absented himself, and his absence was not discovered by defendant until after the jury were sworn, by which means a verdict passed against the defendant. *Held*, that a new trial ought to be granted; especially as it appeared that as well the witness as the person answerable over to the defendant, were insolvent. *Supreme Ct., 1817, Ruggles v. Hall, 14 Johns., 112.*

298. The sudden departure from court of a witness regularly subpoenaed,—*Held*, under the circumstances, a surprise warranting a new trial. *Supreme Ct., 1841, Tilden v. Gardiner, 25 Wend., 668.*

299. Adversary's witness. A new trial will not be granted on the ground of surprise, where surprise arose from the production of an unexpected witness to certain facts, to impeach whom no preparation had been made, and the omission to call an anticipated witness, whose impeachment had been prepared for. *Supreme Ct., Sp. T., 1858, Beach v. Tooker, 10 How. Pr., 297.*

300. Party misled by adverse attorney. A new trial will not be granted, merely because the attorney for the plaintiff promises the agent of the defendant, to whom the defence is confided, to write to his client (the plaintiff), submitting the agent's propositions for settlement; but afterwards notices the cause for trial, and tries it in the agent's absence, without communicating to him the result of his proposition; especially on the general affidavit of merits. *Supreme Ct., 1838, Jackson v. Van Antwerp, 8 Cow., 278.*

301. The plaintiff's attorney put out of his possession a deed important as evidence for the defendant, and on being subpoenaed to produce it, gave no notice that it was not in his possession till the trial. *Held*, that defendant was entitled to a new trial on the ground of surprise. *Supreme Ct., 1831, Jackson v. Warford, 7 Wend., 62.*

302. The fact that the plaintiff and his counsel led defendant to believe that certain facts would be admitted, or not seriously disputed, at the trial, and so he was induced to omit preparing evidence of them, is not—there being no fraud—such surprise as calls for a new trial. *Supreme Ct., Sp. T., 1855, Taylor v. Harlow, 11 How. Pr., 385.*

303. Papers suppressed. On a motion to set aside a verdict and order a new trial, under peculiar circumstances, for irregularity,—consisting in an alleged suppression by defendant's attorney of plaintiff's exhibits, which it was agreed the jury should take out with them,—the special term deeming the affidavits conflicting, ordered an issue to try the question of irregularity. *Held*, proper. *N. Y. Com. Pl., 1851, Hastings v. McKinley, 2 E. D. Smith, 45.*

304. In an action for seduction, the fe-

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male having sworn that she became pregnant by the defendant on a particular day, affidavits showing an alibi and surprise were held good ground for a new trial. *Supreme Ct.*, 1825, *Sargent v. —*, 5 *Cow.*, 106.

305. Incorrect papers. The plaintiff had a verdict, in an action on an award, on a plea of no award, and the award, though incorrectly set forth in declaring, was correctly transcribed in the oyer. *Held*, that, the defendant could not have a new trial on the ground of surprise. *Supreme Ct.*, 1811, *James v. Walruth*, 8 *Johns.*, 410.

306. Motion for new trial, on the ground of surprise in respect to an error in the copy complaint served on defendant under peculiar circumstances, denied. *N. Y. Com. Pl., Sp. T.*, 1851, *Wilcox v. Bennett*, 10 *N. Y. Leg. Obs.*, 80.

307. Mechanics' lien. The owner of property upon which several parties claimed mechanics' liens, brought against them an action to ascertain the amount and priority of their liens upon such property, and upon a fund produced by a judicial sale thereof, and to procure a discharge of such liens, and to determine the extent of the personal liability of such owner. On the trial, one of the defendants proved only the pendency of proceedings upon his lien in another court, his counsel supposing that fact sufficient to protect his rights; but the court holding such evidence insufficient, excluded his claim. After judgment was rendered, but before it had been executed, he applied, on petition and affidavits, for leave to come in and prove his claim. *Held*, that the motion should be granted. The petitioner should be allowed a reference to establish the existence, amount, and priority of his claim, but not to question the existence and amount of others,—he giving security for costs of the reference, and stipulating to waive the trial of his proceedings on the lien elsewhere. *N. Y. Superior Ct.*, 1857, *Levy v. Joyce*, 1 *Bow.*, 622.

308. Section 174 of the Code of Procedure—allowing a party to be relieved against a judgment taken against him through mistake, surprise, &c.—was intended to allow relief from judgment taken by default, not upon trial. It does not introduce any new rule of granting new trials on the ground of surprise. *N. Y. Com. Pl., Sp. T.*, 1851, *Wilcox v. Bennett*, 10 *N. Y. Leg. Obs.*, 80.

8. Newly discovered Evidence.

309. The general rule. In respect to granting new trials, on the ground of newly discovered testimony, the following principles are settled: 1. The testimony must have been discovered since the former trial. 2. It must be such as could not have been obtained, with reasonable diligence, on the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not to impeach the character of a former witness. 5. It must not be cumulative. *Supreme Ct.*, 1833, *People v. N. Y. Superior Ct.*, 10 *Wend.*, 285. Compare *Porter v. Talcott*, 1 *Cow.*, 859.

310. Laches. To warrant granting a new trial, on the ground of newly discovered evidence, the facts ought to be strong, and the case free from laches. *Supreme Ct.*, 1805, *Hollingsworth v. Napier*, 3 *Cai.*, 182; *S. P.*, *Williams v. Baldwin*, 18 *Johns.*, 489. Compare *Kendrick v. Delafeld*, 2 *Cai.*, 67.

311. To warrant granting a new trial, on the ground of newly discovered evidence, it ought to appear that the testimony has been discovered since the last trial; or that no laches is imputable to the party, and that the testimony is material. If the party had knowledge of the existence of the testimony, but could not procure it in time, he ought to have applied to postpone the former trial. *Supreme Ct.*, 1804, *Vandervoort v. Smith*, 2 *Cai.*, 155; * *S. P.*, 1818, *Jackson v. Malin*, 15 *Johns.*, 298.]

312. A new trial will not be granted on the ground of newly discovered evidence, where the evidence, though not actually known to the party and his counsel before the former trial, might have been discovered by reasonable diligence. *Supreme Ct., Sp. T.*, 1854, *People v. Mack*, 2 *Park. Cr.*, 678; *S. O.*, 10 *How. Pr.*, 261. *S. P.*, *N. Y. Com. Pl.*, 1859, *Leavy v. Roberts*, 8 *Abbotts' Pr.*, 810.

313. Forgetting testimony. Where testimony was known to the party before the trial, but was forgotten by him, though with reasonable care it might have been remembered, he cannot, on recalling it to mind, have a new trial on the ground of newly discovered evidence. *Supreme Ct.*, 1833, *People v. N. Y. Superior Ct.*, 10 *Wend.*, 285; 1849, *Fleming v. Hollenback*, 7 *Barb.*, 271.

* To the same effect is the opinion of SPENCER, J., in *Palmer v. Mulligan*, 3 *Cai.*, 807, 818.

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314. On motion on behalf of a bank, for a new trial of an action against the bank, it appeared that the newly discovered witness was a former clerk of the bank, and that his relation to the facts in issue was known to the cashier of the bank before the former trial, and that the cashier had cautioned the witness to remember the facts. *Held*, that laches was imputable to the bank in not producing the witness on the former trial. That the cashier had forgotten the materiality of the witness was no ground for a new trial. [7 Mass., 207.] *Supreme Ct.*, 1883, *People v. N. Y. Superior Ct.*, 10 *Wend.*, 285.

315. Mistake of witness. A witness may, while under examination, explain and correct his testimony. But his affidavit will not be received, after the trial, to correct his testimony, as ground for granting a new trial. *Supreme Ct.*, 1804, *Steinbach v. Columbian Ins. Co.*, 2 *Cai.*, 129; S. P., 1808, *Jackson v. Bowen*, 8 *Johns. Cas.*, 2 ed., 596.

316. Where it clearly appears that a witness has fallen into a mistake in giving his testimony upon a material point in the cause, the court may, in its discretion, grant a new trial. But the circumstances should render it probable that the mistake decided the verdict. *Supreme Ct.*, 1844, *Coddington v. Hunt*, 6 *Hill*, 595; *Sp. T.*, 1851, *Mersereau v. Pearsall*, 6 *How. Pr.*, 298.

317. Irrelevant evidence. On a motion for a new trial, on the ground of newly discovered evidence, if the court is of the opinion that the new evidence is irrelevant or immaterial, the new trial will be refused. *Supreme Ct.*, 1804, *Vandervoort v. Smith*, 2 *Cai.*, 155; 1805, *Palmer v. Mulligan*, 3 *Id.*, 307.

318. If the court is of opinion that the newly discovered evidence, had it been before the jury, would have made no difference in the verdict, the motion for a new trial may be denied. *Supreme Ct.*, 1808, *De Foncleare v. Shottenkirk*, 8 *Johns.*, 170.

319. On the trial of an action on a policy of insurance, it was admitted that the vessel was captured *at sea*. Defendant moved for a new trial, on newly discovered evidence that she was seized, not *at sea*, but *in port*. *Held*, that the defendant was concluded by his admission, and the evidence could not be received. *Supreme Ct.*, 1804, *Vandervoort v. Smith*, 2 *Cai.*, 155.

320. Admissions. Where the action is be-

tween the original parties, a new trial will not, in general, be granted, to admit proof of admissions of a plaintiff as newly discovered evidence. But the court will be less strict when the action is against an executor, &c. *Supreme Ct.*, 1880, *Guyot v. Butta*, 4 *Wend.*, 579.

321. Testimony which could not be compelled. That a new trial will not be granted on the score of newly discovered evidence, where the witness relied on could not be compelled to testify to the facts on the new trial. *Supreme Ct.*, 1809, *Shumway v. Fowler*, 4 *Johns.*, 425.

322. Impeaching testimony. Newly discovered evidence which merely goes to impeach the credit of a witness examined on the trial, is not ground for granting a new trial. *Supreme Ct.*, 1808, *Brown v. Hoyt*, 8 *Johns.*, 255; 1809, *Shumway v. Fowler*, 4 *Id.*, 425; 1846, *Harrington v. Bigelow*, 2 *Den.*, 109; 1849, *Fleming v. Hollenback*, 7 *Barb.*, 271; 1851, *Meakin v. Anderson*, 11 *Barb.*, 215; *Sp. T.*, 1858, *Beach v. Tooker*, 10 *How. Pr.*, 297.

So held, where the witness sought to be impeached had died since the trial. *Supreme Ct.*, 1810, *Duryee v. Dennison*, 5 *Johns.*, 248.

323. Cumulative evidence. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative. *Supreme Ct.*, 1828, *Whitbeck v. Whitbeck*, 9 *Cow.*, 266. *N. Y. Superior Ct.*, 1839, *Wheelwright v. Beers*, 2 *Hall*, 891; 1848, *Brisbane v. Adams*, 1 *Sandf.*, 195; 1854, *Nason v. Cockcroft*, 8 *Duer*, 866.

324. The discovery of new witnesses to a fact controverted at the trial, is not ground for granting a new trial; except, perhaps, in rare cases. *Supreme Ct.*, 1804, *Steinbach v. Columbian Ins. Co.*, 2 *Cai.*, 129; S. O., *Col. & C. Cas.*, 874; 1811, *Smith v. Brush*, 8 *Johns.*, 84; 1818, *Pike v. Evans*, 15 *Id.*, 210.

325. A new trial will not be granted upon the ground of newly discovered evidence, where such evidence merely goes to disprove what has been sworn to on the former trial, and not to establish any new fact. *Supreme Ct.*, 1808, *Halsey v. Watson*, 1 *Cai.*, 24; S. C., *Col. & C. Cas.*, 160.

326. What evidence is "cumulative." If newly discovered evidence relates to any fact proved or controverted, whether bearing upon the issue directly or collaterally, it is cumulative, and not ground of new trial. *N. Y. Com.*

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Pl., Sp. T., 1859, Leavy v. Roberts, 8 Abbots' Pr., 810.

327. Cumulative evidence means additional evidence to support the same point, and which is of the same character with evidence already produced. Thus, where the case turned on the question whether a bill of exchange was lodged at bank before or after noon of a certain day, and on the former trial both parties produced testimony as to the time when it was left,—the testimony of a newly discovered witness, corroborating and supporting the testimony adduced to show that the bill was left after noon, is cumulative. *Supreme Ct., 1833, People v. N. Y. Superior Ct., 10 Wend., 286.* Followed, *N. Y. Superior Ct., 1848, Brisbane v. Adams, 1 Sandf., 195.* *Supreme Ct., 1849, Fleming v. Hollenback, 7 Barb., 271.*

328. Instances. Facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pretence for saying they are cumulative. Proof that plaintiff had acknowledged a settlement of the demand should not be deemed cumulative, where the former evidence of payment was presumptive merely. *Supreme Ct., 1880, Guyot v. Butts, 4 Wend., 579.*

329. On the former trial of an action of *crim. con.*, the only ground of defence contested was that of alleged negligence on the part of the husband. After the trial, defendant discovered evidence that the plaintiff had for some time previous to the trial been living in adultery. *Held*, that this evidence was material, and was not cumulative, and a new trial was granted. *Supreme Ct., 1836, Smith v. Masten, 15 Wend., 270.*

330. Where on the first trial the main fact was proved by a single witness for the plaintiff, and the defendant then sought to overcome his testimony by proof of his own statements, and of circumstances inconsistent with such fact; and the defendant moved for a new trial, on a newly discovered witness who would prove similar inconsistent acts and statements;—*Held*, that the evidence was cumulative. *N. Y. Superior Ct., 1848, Brisbane v. Adams, 1 Sandf., 195.*

331. On trial of an action for inducing plaintiff, by fraudulent representations, to loan money to a third person, the plaintiff proved conversations with the defendant constituting the representations alleged. The defendant offered no testimony on this subject. De-

fendant afterwards moved for a new trial, on the ground of newly discovered testimony to prove other portions of the same conversation. *Held*, that the testimony could not be considered cumulative, its object being to prove parts of a conversation, which the plaintiff's witness did not prove; nor was it objectionable as impeaching the testimony of plaintiff's witness. *N. Y. Com. Pl., 1850, Simmons v. Fay, 1 E. D. Smith, 107.*

332. Military bounty lands. But in actions of ejectment for military bounty lands, where the principal question in the cause is as to the identity of the soldier entitled to the bounty land, each party claiming under a person of the same name, by different deeds, the court will grant a new trial on affidavits of newly discovered evidence relative to the identity of the patentee, though such evidence consists of cumulative facts relating to the point which was the subject of inquiry at the former trial. These cases are deemed peculiar, and are not strictly governed by the rules relative to granting new trials in other cases. *Supreme Ct., 1815, Jackson v. Crosby, 12 Johns., 354.*

333. So in this description of cases where personal identity is in question, a new trial may be granted to give an opportunity of impeaching the character of a principal witness. *Supreme Ct., 1817, Jackson v. Kinney, 14 Johns., 186; S. P., 1825, Jackson v. Hooker, 5 Cow., 207.*

334. Impeaching newly discovered witness. On a motion for a new trial on the ground of newly discovered evidence, it is competent for the adverse party to show, by affidavit, that the witness whose testimony is stated to be material and newly discovered, is wholly unworthy of credit. *Supreme Ct., 1821, Williams v. Baldwin, 18 Johns., 489; 1849, Fleming v. Hollenback, 7 Barb., 271.*

335. Where on an application for a new trial on the ground of newly discovered testimony, the affidavit stated the new witness to be a man of good character,—*Held*, that counter-affidavits to this point were admissible. *Supreme Ct., 1804, Pomroy v. Columbian Ins. Co., 2 Cai., 260; S. C., Col. & C. Cas., 408.*

336. The new evidence must be stated. A party applying for a new trial on the ground of newly discovered evidence, must lay before the court the facts newly discovered, or show

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some good reason for the omission. *Supreme Ct.*, 1805, Hollingsworth v. Napier, 3 *Cai.*, 182.

337. An affidavit which merely states that the newly discovered witness has "told" the party the facts relied on, is not sufficient to move for a new trial. *Supreme Ct.*, 1809, Shumway v. Fowler, 4 *Johns.*, 425.

338. A new trial will not be granted, on the ground of newly discovered evidence, without the production of the witness's affidavit of the facts, or proof that it cannot be obtained. *N. Y. Superior Ct.*, 1828, Denn v. Morrell, 1 *Hall*, 882.

339. Case requisite. A motion for a new trial on the ground of newly discovered evidence will not be heard, unless, with the affidavits in support of the motion, there be a case showing what transpired on the trial. *Supreme Ct.*, 1831, Anonymous, 7 *Wend.*, 381.

340. Counter-affidavits. On a motion for a new trial on the ground of newly discovered evidence, counter-affidavits may be read without having been served on the party moving. *Supreme Ct.*, 1825, Strong v. Platner, 5 *Cow.*, 21.

341. Parties examined. The rules governing motions for new trials, on ground of newly discovered evidence, should be strictly applied where the parties have been examined as witnesses on the trial. *N. Y. Com. Pl.*, *Sp. T.*, 1859, Leavy v. Roberts, 8 *Abbotts' Pr.*, 810.

342. Motion after judgment. A motion for a new trial or rehearing, on the ground of newly discovered evidence, may now be made and granted after judgment is entered on the report of referees. It was otherwise before the Code of Procedure. *Supreme Ct.*, *Sp. T.*, 1851, Mersereau v. Pearsall, 6 *How. Pr.*, 298.

343. — after appeal. *It seems*, that after appeal to a higher court, and affirmance or reversal, the court below cannot grant a review for newly discovered evidence.* *Stafford v. Bryan*, 2 *Paige*, 45.

344. Justification of slander. In an action for slander, for charging the plaintiff with felony, a new trial will not be granted to let in newly discovered evidence in support of a plea of justification. Otherwise, if the new evidence goes only to the plea of not guilty.

Supreme Ct., 1812, Beers v. Root, 9 *Johns.*, 264.

9. In Ejectment.

345. Part-owner. In ejectment, plaintiff gave evidence of title to an undivided half of the premises only, but had a general verdict. *Held*, not ground for a new trial. *Supreme Ct.*, 1799, Jackson v. Van Bergen, 1 *Johns. Cas.*, 101.

346. Newly discovered evidence. On motion for a new trial in ejectment, the affidavits stated that O., who claimed title to land in the possession of B., his tenant, had the care and management of the defence of the suit, and was present at the trial; that F. was a witness at the trial, but that O. did not know, until after the trial, that F. knew or could testify the facts, stated as material; though it appeared that S., the tenant, who was not present at the trial, did know, before the trial, what F. could testify. *Held*, that a new trial should be granted on payment of costs, as the evidence was material, and the suit being to change a possession of several years. *Supreme Ct.*, 1811, Jackson v. Laird, 8 *Johns.*, 439.

347. New trials granted more liberally in actions of ejectment. *Jackson v. Dickenson*, 15 *Johns.*, 309.

348. The statute. The court in which judgment on verdict in ejectment shall be rendered, at any time within three years thereafter, upon payment of all costs and damages recovered, shall vacate judgment and grant a new trial. On subsequent application within two years after second judgment, the court, if satisfied that justice be promoted, may grant another new trial, in its discretion. Not more than two trials authorized. 2 *Rev. Stat.*, 809, § 87.

349. Within five years after docketing of judgment by default in ejectment, on payment of costs and damages recovered, the court may vacate such judgment and grant a new trial, if satisfied that justice will be promoted, &c. 2 *Rev. Stat.*, 809, § 88.

350. Plaintiff not to be disturbed in his possession pending such new trial. 2 *Rev. Stat.*, 809, § 40.

351. Upon any new trial granted as herein provided, defendant may show any matters in bar of a recovery which he might show to entitle him to the possession of the premises if he were plaintiff in the action. 2 *Rev. Stat.*, 810, § 41.

352. How construed. New trial granted in ejectment, under peculiar circumstances, as matter of course, under 2 *Rev. Stat.*, 812, §§ 86, 87. *Supreme Ct.*, 1840, Howell v. Eldridge, 21 *Wend.*, 678.

* This doctrine is doubted in *Longworth v. Sturges* [citing 1 *Verm.*, 416; *Story Eq. Pl.*, § 408.], 4 *Ohio (N. S.)*, 690.

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353. The court has no discretion to deny defendant a new trial, in ejectment, under the provisions of 2 Rev. Stat., 809, § 37. The statute is imperative. *Supreme Ct., Sp. T.*, 1850, *Rogers v. Wing*, 5 *How. Pr.*, 50.

354. No more than two new trials can be had under the statute (2 *Rev. Stat.*, 809, § 38); and if the Common Pleas have granted two, the Supreme Court will not grant a third. *Supreme Ct.*, 1845, *Brown v. Crim*, 1 *Den.*, 665.

355. Under 2 *Rev. Stat.*, 809, §§ 86, 87,—which allows new trials in actions of ejectment,—one may be granted on payment of costs, &c., without showing any cause whatever, and one where the court is satisfied that justice will be promoted, &c. But no more than two new trials can be granted under this statute. *Supreme Ct., Sp. T.*, 1858, *Bellinger v. Martindale*, 8 *How. Pr.*, 113.

356. And it is not the intention of the statute that each party shall have two new trials, although one party should succeed at one trial and the other at the next. *Id.*

357. Actions under the Code. The provisions of the Revised Statutes, authorizing new trials in actions of ejectment, on certain terms, apply to actions brought under the Code of Procedure to recover possession of real property. *Supreme Ct., Sp. T.*, 1850, *Cooke v. Passage*, 4 *How. Pr.*, 360; *S. C.*, 3 *Code R.*, 88; *Rogers v. Wing*, 5 *How. Pr.*, 50.

358. Proceedings to compel determination of claims, &c. Where a proceeding in the nature of an action of ejectment is had, upon the requirement of a defendant, to compel the determination of claims to real property, and the plaintiff has a verdict, upon which he enters judgment, the defendant is not entitled to demand, as he may do of course in an ordinary action of ejectment (under 2 *Rev. Stat.*, 812, § 86), that the judgment be vacated, and that a new trial be granted on payment of costs and damages. The judgment in such case is conclusive as to the title established in the action. A new trial may be granted in such case for errors of law or fact happening at the circuit; but the party is not entitled to it of course. *Supreme Ct.*, 1834, *Malin v. Rose*, 12 *Wend.*, 258.

358 a. No terms beyond paying costs of suit, can be imposed. *Supreme Ct.*, 1842, *Shaw v. McMaren*, 2 *Hill*, 417.

III. UPON WHAT TERMS GRANTED.

359. Paying into court. On motion for a new trial, the court will not compel the defendant to bring the amount of the verdict into court. *Supreme Ct.*, 1808, *Hallett v. Cotton*, 1 *Cai.*, 11; *S. C.*, *Col. & O. Cas.*, 150; 1804, *Shuter v. Hallett*, *Id.*, 380.

360. Defendant will not be required to pay the amount of the verdict into court, as a condition of granting a new trial, even though he has admitted a part of the demand to be due, and his bail have become insolvent. *Supreme Ct.*, 1808, *Hallett v. Cotton*, 1 *Cai.*, 11.

361. *So held*, where there was only an affidavit of danger of losing the debt. *Supreme Ct.*, 1804, *Shuter v. Hallett*, *Id.*, 518.

362. Conditions imposed by chancery. The court will not, on granting a new trial, notice conditions imposed in the Court of Chancery upon the party, on giving him leave to make the application. *Supreme Ct.*, 1840, *Howell v. Eldridge*, 21 *Wend.*, 678.

363. Costs. Where there is no question upon the evidence, but the verdict is contrary to the charge of the judge and to the law, the costs, on granting a new trial, will be directed to abide the event of the suit. *Supreme Ct.*, 1800, *Van Rensselaer v. Dole*, 1 *Johns. Cas.*, 279; 1832, *Knapp v. Curtis*, 9 *Wend.*, 60.

364. The costs of an appeal, when a new trial is granted, are in the discretion of the court. When, upon an appeal, a report of a referee, or the verdict of a jury, is set aside as clearly and palpably contrary to evidence, and the court thinks the justice of the case requires it, the party obtaining a new trial will only be required to pay, as a condition of it, the costs of the former trial, and the costs of the appeal will be ordered to be costs in the cause, and to abide the event. *N. Y. Superior Ct.*, 1854, *Kennedy v. Harlem R. R. Co.*, 8 *Duer*, 659.

365. Where the charge is correct, and the verdict is set aside as unsupported by the evidence, a new trial is granted only on payment of costs. *Supreme Ct.*, 1837, *Bank of Utica v. Ives*, 17 *Wend.*, 501; 1844, *Conrad v. Williams*, 6 *Hill*, 444; but see *Green v. Burke*, 28 *Wend.*, 490.

366. New trials granted on the ground of newly discovered evidence, or upon the ground that the verdict was contrary to evidence, are granted upon the same terms, namely, the

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payment of costs. *N. Y. Com. Pl.*, 1850, *Simmons v. Fay*, 1 *E. D. Smith*, 107.

IV. NEW TRIAL OF FEIGNED ISSUES.

367. May be granted. That a new trial may be granted of a feigned issue out of chancery, on an affidavit of newly discovered evidence. *Doe v. Roe*, 1 *Johns. Cas.*, 402.

368. The application for new trial in such cases should be made in the Court of Chancery, not in the Supreme Court. *Doe v. Roe*, 1 *Cow.*, 216; *Doe v. Roe*, 6 *Id.*, 55.

369. Though a motion for a new trial of a feigned issue, directed by chancery to try the validity of a will, has been made and denied, yet a new trial may be applied for and granted, on the final hearing of the equity reserved. *Chancery*, 1821, *Van Alst v. Hunter*, 5 *Johns. Ch.*, 148.

370. On what grounds granted. The principles upon which chancery directs a new trial of a feigned issue, are somewhat different from those which govern courts of law in granting new trials. Where chancery directs an action, although accompanied by particular directions, the parties in other respects are left to their legal rights. The application for a new trial is in that case to be made to the court in which the action is brought, and is subject to the rules which govern the proceedings of that court in other cases. But if an issue is directed, it is to inform the conscience of the chancellor; and the application for a new trial must be made to him. [2 *Rose*, 178; 2 *Dick.*, 576; *Coop.*, 96.] In such case he will not grant a new trial, merely on the ground that the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if, on the whole facts and circumstances, he is satisfied the result ought not to have been different, if such testimony had been rejected in the one case, or received in the other. [1 *Sim. & S.*, 150; *Turn. & R.*, 142; 2 *Russ.*, 68; 1 *Dow.*, *N. S.*, 189.] *Chancery*, 1831, *Apthorp v. Comstock*, 2 *Paige*, 482.

371. Discretionary. Awarding a new trial of a feigned issue is discretionary. *Chancery*, 1821, *Van Alst v. Hunter*, 5 *Johns. Ch.*, 148; 1831, *Apthorp v. Comstock*, 2 *Paige*, 482. Compare *Fellows v. Harrington*, 4 *N. Y. Leg. Obs.*, 840; *Lansing v. Russell*, 3 *Barb. Ch.*, 325; *S. C.* again, 13 *Barb.*, 510.

372. Upon a motion, in a court of equity,

to grant a new trial of a feigned issue, on the ground the verdict is against evidence, a new trial should not be ordered if the trial has been fairly conducted, and the conclusion of the jury is the same as the court itself would have come to, upon the evidence in the cause. The court is not bound by the same rules that prevail on bills of exceptions. In those, more of the testimony is set forth than is sufficient to show the materiality of the decision complained of. But in a motion for a new trial on a case, or to set aside a verdict on a feigned issue, the whole evidence is set forth at large. If the court can see, from the whole case, that no error has been committed by the presiding judge prejudicial to the complaining party, and if upon the whole case the verdict appears to be right, the court will not grant a new trial. *Supreme Ct.*, 1852, *Lansing v. Russell*, 13 *Barb.*, 510.

373. A new trial of a feigned issue awarded out of chancery, will not be granted on the ground that evidence was excluded which was immaterial, so that had it been admitted the result would have been the same. *Id.*

374. On an application for a new trial of a feigned issue in a divorce suit, the affidavits brought before the court on both sides are to be taken together, to ascertain whether there is a ground for disturbing the verdict within any principles governing the court on the granting new trials in such cases; and if not, then the only consideration for the court is, whether the judge, on the trial, erred in admitting or rejecting testimony, or in giving any directions, or in any law points, whereby injustice has been done. *V. Chan. Ct.*, 1814, *Van Cort v. Van Cort*, 4 *Edw.*, 621.

375. Error. The refusal of the judge presiding at the trial of a feigned issue in divorce to permit a witness to be re-examined, is not ground for a new trial, unless material injury is shown. *Id.*

376. Although witnesses, on a feigned issue, have been examined to matter foreign to the issue, and they have been excepted to, yet if no use is afterwards made of their testimony, it is to be presumed that it has not influenced the jury, and will not be ground to disturb the verdict. *Id.*

377. Verdict against evidence. Where a feigned issue has been awarded by a court of chancery to try the genuineness of a receipt, involving the question of payment on a bond,

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a new trial ought not to be granted solely on the ground that the judge who presided at the trial doubted the correctness of the finding of the jury on the question of fact. To entitle a party to a new trial in such case, it should appear that the verdict is so clearly against the weight of evidence as to entitle him to a new trial in a court of law. *V. Chan. Ct.*, 1846, *Fellows v. Harrington*, 4 *N. Y. Leg. Obs.*, 340.* *S. P.*, *Supreme Ct.*, 1852, *Lansing v. Russell*, 18 *Barb.*, 510, 520.

378. Will cases. It is usual to award a second trial on a feigned issue, in cases touching the inheritance, where the verdict is in favor of the will and against the heir-at-law. But there is no invariable rule requiring two verdicts in favor of a will before it can be established against the heir. [Reviewing many cases.] The granting a new trial in such a case rests in the discretion of the chancellor. *Chancery*, 1821, *Van Alst v. Hunter*, 5 *Johns. Ch.*, 148.

379. New trial of a feigned issue resulting in a verdict in favor of the will, denied. *Id.*

380. Divorce. The allegations on which a feigned issue was framed, were, of adultery with F. in Troy, on a certain day, and with divers persons unknown in New York; and the verdict was founded on proof of adultery in Troy, with a person other than F. A new trial was awarded, with leave to amend the feigned issue. *Chancery*, 1822, *Germond v. Germond*, 6 *Johns. Ch.*, 347.

381. Validity of deeds. New trial of a feigned issue awarded to try validity of two deeds; granted as to one of them under peculiar circumstances. *Lansing v. Russell*, 8 *Barb. Ch.*, 325. See *S. C.* again, 18 *Barb.*, 510.

382. New trial, when ordered. A feigned issue is merely ancillary, and, if the conscience of the judge in equity is not satisfied by the verdict, though no rule of law was violated on the trial, he may send it back for a new trial, again and again, until he is satisfied. *V. Chan. Ct.*, 1881, *Patterson v. Ackerson*, 1 *Edw.*, 96.

383. After two verdicts found against defendant, on a feigned issue, awarded in divorce, to try the question of adultery, had been set aside and new trials granted, a third verdict of guilty was found. Held, that in

view of the repeated verdicts against defendant, the court would not interfere again, although the evidence was purely circumstantial, and not entirely conclusive. *Ct. of Appeals*, 1854, *Ferguson v. Ferguson*, *Seld. Notes*, No. 6, 77.*

384. Case or exceptions, how prepared, to review verdict on feigned issue. *Supreme Ct.*, *Rule* 117 of 1847; 33 of 1858.

V. NEW TRIAL IN CRIMINAL CASES.

385. Courts of Oyer and Terminer have power to grant new trials to prisoners who have been found guilty upon insufficient evidence, or where verdicts have been rendered against evidence. So held, where the grounds urged in support of the motion were deemed insufficient. *Oyer & T.*, 1857, *People v. Goodrich*, 8 *Park. Cr.*, 518.

386. A court of Oyer and Terminer may grant a new trial, although the conviction was for felony, and the application is upon the merits. *Supreme Ct.*, 1799, *People v. Townend*, 1 *Johns. Cas.*, 104; *S. C.*, *Col. & C. Cas.*, 68; 1830, *People v. Stone*, 5 *Wend.*, 39. *S. P.*, *Oyer & T.*, 1854 [citing *Whart. Am. Cr. L.*, 374; *Id.*, 2 ed., 373; 7 *Smith's Laws*, 694; 3 *Rawls*, 207; 1 *Ashm.*, 289; 2 *Id.*, 41, 69; 7 *Watts & S.*, 415; 4 *Barr*, 264, 269; 1 *Halst.*, 148; 1 *McLean*, 429; 3 *Id.*, 573; 1 *Blackf.*, 396; 7 *Id.*, 186; 3 *Gilm.*, 363, 644; 4 *Id.*, 111; 1 *Green*, 56; 8 *Leigh*, 726; 2 *Rob.*, 790; 6 *Gratt.*, 712; 1 *Hay*, 141; 1 *Dev. & B.*, 500; 2 *Id.*, 196; 3 *Murphy*, 487; 3 *Dev.*, 485; 2 *Nott & Mc.*, 26; 2 *Bal.*, 29, 37, 565; 1 *Kelly*, 610; 3 *Id.*, 310; 4 *Ga.*, 335; 6 *Id.*, 276, 483; 2 *Humph.*, 489; 3 *Id.*, 289; 5 *Id.*, 552; 7 *Id.*, 479, 544; 10 *Sme. & M.*, 192; 17 *Mass.*, 514; 12 *Conn.*, 487; 7 *N. H.*, 287; 6 *Ala.*, 676; 1 *Wall, Jr.*, 127; 3 *Dall.*, 515; 2 *Sumn.*, 240; and disapproving 2 *Sumn.*, 19], *People v. Morrison*, 1 *Park. Cr.*, 625; approved, *People v. McMahon*, 2 *Id.*, 663, 673; and see *Noah's Case*, 3 *City H. Rec.*, 13.

387. A court of Oyer and Terminer has no power to grant a new trial after a conviction for felony. So held, where the application was at a term after that at which the conviction was had. *Supreme Ct.*, *II. Dist.*, 1847, *People v. Dutchess Oyer & Terminer*, 2 *Barb.*, 282.

388. A court of Oyer and Terminer has no

* See further proceedings in this cause, 8 *Barb. Ch.*, 652.

* For earlier proceedings in the case, see 1 *Barb. Ch.*, 60; 3 *Sandf.*, 307.

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power to grant a new trial upon the merits, after conviction for felony. *So held*, in a capital case, where the order for a new trial was granted at a term subsequent to that at which the conviction was had. *Ct. of Appeals*, 1860, *Appo v. People*, 20 *N.Y.* (6 *Smith*), 530; affirming *S. O.*, 18 *How. Pr.*, 850.

389. Felony. A new trial cannot be granted in criminal cases above the grade of misdemeanor. *So held*, where the accused had been acquitted on the first trial, the application being on the ground of misdirection. *Supreme Ct.*, 1882, *People v. Comstock*, 8 *Wend.*, 549; and see *People v. Sessions of Chenango*, 2 *Cai. Cas.*, 319; 1 *Johns. Cas.*, 179; *Harper's Case*, 4 *City H. Rec.*, 89.

390. The statute. When the Supreme Court shall reverse a judgment [in a criminal case, upon writ of error or certiorari], it shall either direct a new trial or that defendant be absolutely discharged, according to the circumstances of the case. 2 *Rev. Stat.*, 741, § 24.

391. If a new trial be ordered, it shall be had in the court in which the indictment was first tried. 2 *Rev. Stat.*, 741, § 26.

392. Power of Supreme Court. Upon writ of error to the Oyer and Terminer, in a criminal cause, the Supreme Court have no power to grant a new trial on the ground of newly discovered evidence. That court can only review the legal questions growing out of the trial, and reverse for any error that may be found to have been committed. For any mistake of fact, or for any relief on the ground of the discovery of new evidence, the party must look to the tribunal in which issue was joined. The Oyer and Terminer have power to grant a new trial upon the merits. No such power is vested in the appellate tribunal. *Supreme Ct.*, 1855, *People v. McMahon*, 2 *Park. Cr.*, 668.

393. Misjoinder of counts. An objection on the ground of misjoinder of counts in an indictment should be addressed to the court below. In cases of felony, where two or more distinct offences are contained in the indictment, the court, in its discretion, may quash it, or compel the prosecutor to elect; but, in point of law, it is no objection, that two or more offences of the same nature, and upon which the same or a similar judgment may be given, are counted on in the indictment. Such joinder forms no ground for moving in arrest of judgment. *Ct. of Errors*, 1831, *Kane v. People*, 8 *Wend.*, 203.

394. Absence of judge. The fact that one of the judges holding a court of Oyer and Terminer left the bench during the trial, a competent number of judges to hold the court remaining,—*Held*, no ground for a new trial. *Supreme Ct.*, 1839, *People v. White*, 22 *Wend.*, 167.*

395. Refusal to postpone. The refusal of the Oyer and Terminer to grant a postponement of a trial, asked to enable prisoner's counsel to make inquiries respecting venire men, is not reviewable. Granting such postponement is discretionary, and the refusal cannot enter into a bill of exceptions, because it does not arise upon the trial. *Supreme Ct.*, 1842, *People v. Colt*, 3 *Hill*, 482.

396. Irregularity in grand-jury. After trial and conviction, upon an indictment found by a grand-jury, drawn and summoned by the sheriff according to law, it is too late to raise the objection that there was an omission on the part of the district-attorney to issue a precept to the sheriff, requiring him to summon the grand-jury by whom the indictment was found. The statute has limited the grounds of challenge to individual grand-jurors, and required such challenges to be made before the jurors are sworn; and it has abolished the challenges of grand-jurors to the array. (2 *Rev. Stat.*, 724, §§ 27, 28.) It is too late to raise objections to the regularity of the impanelling of the grand jury, the qualifications of grand-jurors, &c., for the first time after conviction. [2 *Barb.*, 427; 1 *Morris' Ia.*, 332; 5 *Ired.*, 96; *Id.*, 98; 2 *Id.*, 101; 3 *Hawks*, 175; 5 *Blackf.*, 75; 4 *Id.*, 72; 6 *Id.*, 248; 4 *Dev.*, 305; 9 *Mass.*, 107; 2 *Ashm.*, 90; *Wharton's Cr. L.*, 3 ed., 226, 229, 975; *Arch. Cr. Pl.*, 67; 2 *Rev. Stat.*, 728.] *Supreme Ct.*, 1855, *People v. Robinson*, 2 *Park. Cr.*, 285.†

397. A mere informality or mistake of an officer in drawing a jury, or any irregularity or misconduct in the jurors themselves, will not be sufficient ground for setting aside a verdict, either in a criminal or civil cause, where the court is satisfied that the party complaining cannot have been injured. *Su-*

* But compare 24 *Wend.*, 520, where the decision of the Supreme Court was reversed on other grounds; and conflicting opinions were expressed as to the effect of the judge's leaving the bench.

† For the charge on the trial, see 1 *Park. Cr.*, 649.

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preme Ct., 1881, *People v. Ransom*, 7 *Wend.*, 417.

398. On the trial of a capital case, after 28 jurors had been called, and 11 of them approved and sworn, and 17 peremptorily challenged, it was discovered that the ballot containing the name of a juror who had answered on the calling of the general panel was not in the box containing the names of the jurors returned for the court. On search, the ballot was found, and was, by direction of the court, placed in the box, and was drawn out, and the juror was subsequently drawn, and served. *Held*, that the irregularity was not such as to affect the verdict, the omission to put the ballot in the box in the first place being shown to be undesigned. *Id.*

399. Papers withheld. A new trial will not be granted in a criminal case because the district-attorney withholds papers from the defendant which are important to his defence, where it does not appear that defendant used due diligence to obtain them. *Supreme Ct.*, 1837, *People v. Vermilyea*, 7 *Cow.*, 869.

400. The defendant applied to the district-attorney for the papers he required, and was told by mistake that O. had them. On applying to C., defendant was referred back to the district-attorney. But he did not renew his demand on the district-attorney, explaining the mistake, nor make any application to the court. *Held*, that he had not used diligence. *Id.*

401. Evidence excluded. A new trial should not be granted on an exception by the prisoner to the rejection of proper testimony, where the prosecutor subsequently abandoned that branch of the charge to which it related. *Supreme Ct.*, 1845, *People v. Cunningham*, 1 *Den.*, 524.

402. Refusal to charge. There being no dispute about the law, and the trial having been protracted until 11.50 P. M. on a Saturday, the judge refused a request of defendant's counsel that he should charge the jury, and submitted the case to them without any remark. *Held*, a matter within his discretion, and not reviewable, unless actual injury was shown. *Supreme Ct.*, 1880, *People v. Gray*, 5 *Wend.*, 289.

403. Error in charge. On a trial for murder, the judge, in charging the jury, adverted to the value of proof of good character in doubtful cases, and pointed out to them that

there was an absence of such testimony on the side of the prisoner. An exception was taken. *Held*, error, for which the conviction should be reversed. *Ct. of Errors*, 1840, *People v. White*, 24 *Wend.*, 520.

404. Harmless error. An error in stating law in the charge to the jury, will afford no ground for a new trial on bill of exceptions, if the error was such that it could do no legal injury. This rule applies in criminal as well as in civil cases. *So held*, in a capital case, where the judge erred in his definition of "justifiable homicide," and an exception was taken, but the case was, on the facts, clearly murder, and called for no charge as to the law of justifiable homicide. *Ct. of Appeals*, 1849, *Shorter v. People*, 2 *N. Y. (2 Comst.)*, 198. Compare *People v. Mather*, 4 *Wend.*, 229.

405. On the trial of an indictment for receiving stolen goods, which misdescribed a part of the goods, but contained a sufficient description of the residue, the jury were instructed by the court that there was no misdescription whatever; and a general verdict of guilty was rendered. *Held*, that the erroneous instruction constituted no ground for a new trial, inasmuch as it appeared by the bill of exceptions that the question of the defendant's guilt was identical in respect to the whole of the goods; he having received them, if at all, from the same person by a single act. *Supreme Ct.*, 1842, *People v. Wiley*, 3 *Hill*, 194.

406. The mere separation of the jury, in violation of the directions of the court, is not sufficient cause, even in a capital case, for setting aside the verdict; nor is the fact that, during the separation, some refresh themselves by eating. *Supreme Ct.*, 1825, *People v. Douglass*, 4 *Cow.*, 26.*

407. Drinking spirits. That some of the jury drank spirits while improperly absent from the jury-room, and conversed on the subject of the trial, is ground for a new trial. *So held*, in a capital case; although the fact of drinking was not fully proved, and the amount taken was not enough to produce any effect. *Id.*

408. Misbehavior of jury must be shown to have done injury. A new trial should not be ordered because of misbehavior of the jury, where it appears beyond all reasonable

* See this case qualified and explained, *Wilson v. Abrahams*, 1 *Hill*, 207, 211.

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doubt that no injury to the defendant has resulted from it. *Oyer & T.*, 1859, *The People v. Hartung*, 8 *Abbotts' Pr.*, 182.

409. On a trial for murder it was proved, and not contradicted nor questioned, that the deceased was drowned by being rendered insensible in the water by a blow upon the head. Before the defence was gone into, one of the jurors took up and examined a piece of the skull of the deceased, which was on the district-attorney's table. After conviction, counsel for the prisoner, on their own affidavit of this fact, moved for a new trial. *Held*, no ground for a new trial. 1. In the state of the evidence, the juror's examination could not have influenced his mind. 2. The counsel knew of it before entering on the defence, and therefore had full opportunity to offer testimony and argument on the point. *Oyer & T.*, 1859, *The People v. Wilson*, 8 *Abbotts' Pr.*, 187.

410. That the constable sworn to attend the jury was present at their deliberations, is not ground of new trial. *Oyer & T.*, 1859, *People v. Hartung*, 8 *Abbotts' Pr.*, 182; *People v. Wilson*, *Id.*, 187.

411. Communication by constable. An irregular and improper communication by the constable having the jury in charge, to the jury while out, although embracing an alleged message from the judge touching the law of the case,—*Held*, no ground for a new trial, though in a capital case. *Oyer & T.*, 1851, *People v. Carnal*, 1 *Park. Cr.*, 256.

412. A new trial was moved for on the ground that the constable, at the request of a juror, handed them a paper showing the different degrees of punishments of the crime. *Held*, that they having afterwards been explicitly instructed by the court on the question of degree, their attempt to take into consideration the punishment could not be deemed to prejudice the defendant. It could only have been an attempt in his favor, and their verdict against him could not have been influenced by it; and a new trial must be denied. *Oyer & T.*, 1859, *People v. Wilson*, 8 *Abbotts' Pr.*, 187.

413. On the trial of an indictment for murder, after the jury had retired, one of their number took the opinion of the constable as to whether they could bring in a verdict of manslaughter, and they also sent for and examined the statutes. They subsequently asked the instructions of the court, and under those

instructions brought in a verdict of guilty of murder. *Held*, that the verdict could not be deemed to be affected by the misbehavior of the jury. *Oyer & T.*, 1859, *People v. Hartung*, 8 *Abbotts' Pr.*, 182.

414. Agreement. The jury, after deliberating forty-eight hours, declared that they were unable to agree, but under the instructions of the court in a few moments afterwards rendered a verdict of guilty. *Held*, under the circumstances, not ground to impeach the verdict. *Id.*

415. Affidavits of jurors. On a motion for a new trial on the ground of irregularities during the deliberations of the jury, affidavits of the jurors are inadmissible to prove improprieties committed by themselves; but are competent to prove improper conduct of the officer having the jury in charge. *So held*, in a capital case. *Oyer & T.*, 1851, *People v. Carnal*, 1 *Park. Cr.*, 256. See *Francois' Case*, 1 *City H. Rec.*, 121.

416. The affidavits of jurors, that the constable, at the request of a juror, handed to that juror a paper showing the punishments for the different degrees of the crime, are not admissible to impeach the verdict. They go to show an act on the part of their own body, and are, therefore, within the rule excluding jurors' affidavits. *Oyer & T.*, 1859, *People v. Wilson*, 8 *Abbotts' Pr.*, 187.

417. Affidavits of counsel and others, on information from jurors themselves respecting misbehavior of the jury while considering their verdict, are not admissible to impeach the verdict. *Oyer & T.*, 1859, *People v. Hartung*, 8 *Abbotts' Pr.*, 182; *People v. Wilson*, *Id.*, 187.

418. Conflict of evidence. In criminal cases, if the evidence is conflicting and the question is one of doubt, and no error was committed by the court in its charge, a new trial will generally be denied. *Oyer & T.*, 1857, *People v. Goodrich*, 3 *Park. Cr.*, 518.

419. Testimony of co-defendant. One who has been criminally convicted is not entitled to a new trial because a co-defendant tried at the same time with him, was a material witness for him. The testimony of such co-defendant is not deemed newly discovered evidence, although it does not become competent till after his acquittal. *Supreme Ct.*, 1827, *People v. Vermilyea*, 7 *Cow.*, 869.*

* Approved in *State v. Bean*, 36 *N. H.*, 122.

In General.

420. One good count sufficient to support a general verdict of guilty, however defective the others may be. *Supreme Ct.*, 1806, *People v. Curling*, 1 *Johns.*, 820.

421. Variance. Judgment cannot be arrested for a variance between the indictment and the proofs, but only for defects apparent upon the record. *Supreme Ct.*, 1828, *People v. Onondaga Gen. Sess.*, 1 *Wend.*, 296.

422. Former acquittal. Defendant acquitted on ground of variance between indictment and proof, or on exception to indictment, may be tried upon subsequent indictment for same offence. 2 *Rev. Stat.*, 701, § 24.

423. New trial cannot be granted because acquittal was against evidence. *Supreme Ct.*, 1830, *People v. Mather*, 4 *Wend.*, 229.

424. — or conviction. Defendant acquitted or convicted on an indictment for an offence consisting of different degrees, cannot thereafter be tried for a different degree, or for an attempt. 2 *Rev. Stat.*, 702, § 28.

Consult, also, EVIDENCE; PLEADING; PRACTICE; TRIAL.

NEW YORK (City of).

[For general principles applicable also to other municipalities, see MUNICIPAL CORPORATIONS, and titles there referred to; and for the statutes, consult the Laws relating to the City of New York.]

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5. *The report. Reviewing, confirming, &c.*

6. *Applying for payment of award.*

7. *Collection of assessments. Sales. Purchaser's title.*

8. *Particular works.*

VIII. TAXES.

I. IN GENERAL.

1. The charters. Elections. Neither the Montgomerie charter, nor the amended charter of 1830, deprives the Supreme Court of the supervisory power over elections; nor of its authority to issue a mandamus touching a matter incidental to the question of election—*e. g.*, commanding the oath of office to be administered to persons appearing to the court to have been properly elected. Express words are necessary to take away the power of the court. *Supreme Ct.*, 1842, *Exp. Heath*, 3 *Hill*, 42; affirmed, *Ct. of Errors*, 1842, *Id.*, 58, *note*.

2. Free citizens. In the provision of the charter exempting the mayor, aldermen, commonalty, and free citizens, from serving on foreign juries, free citizens are such as are made free of the city. The privilege does not extend to the inhabitants generally. *Supreme Ct.*, 1806, *Cortelyou v. Van Brunt*, 1 *Johns.*, 818.

3. Amendment of 1853. The original passage of the amended charter of the city of New York, passed April 12, 1853, was a nullity; for the reason that the taking effect of the act was made dependent upon a popular election. [4 *Seld.*, 483.] But the defect was cured by the act of June 14, 1853, providing that the former act should take effect immediately. The later act was not a mere amendment, but a re-enactment, which gave it effect from that time. *Supreme Ct.*, *Sp. T.*, 1856, *People v. Stout*, 28 *Barb.*, 849; *S. Ct.*, 4 *Abbotts' Pr.*, 22; 18 *How. Pr.*, 814.

4. The act of 1853 did not repeal the ordinances of 1849. *N. Y. Superior Ct.*, *Sp. T.*, 1858, *Russ v. Mayor, &c.*, of N. Y., 12 *N. Y. Leg. Obs.*, 88.

5. Appropriations. The provisions of the charters of 1830, 1849, and 1857,—restricting the application of the funds of the Corporation to the purposes for which appropriations have first been duly made,—are designed merely to prevent usurpations, improvidences, or dishonesties in the officers of the Corporation; but cannot have the effect to defeat the operation of a subsequent statute increasing partico-

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ular expenses of the Corporation. *N. Y. Com. Pl.*, 1858, *Green v. Mayor, &c.*, of N. Y., 8 *Abbotts' Pr.*, 25.

6. The city and county of New York includes the whole of the rivers and harbors adjacent to the city, to actual low-water mark on the opposite shores, as the same may be formed, from time to time, by docks, wharves, and other permanent erections; and although the jurisdiction of the city does not extend so as to include such wharves or artificial erections, yet it extends over ships and vessels floating on the water, though they may be fastened to such wharves or docks. So that a vessel moored to a wharf of Brooklyn is within the jurisdiction of New York. *Supreme Ct.*, 1821, *Stryker v. Mayor, &c.*, of N. Y., 19 *Johns.*, 179; and see *Matter of Furman-street*, 17 *Wend.*, 649, 661.

7. Of the distinction between the powers of the city and the county of New York. *People v. Edmonds*, 15 *Barb.*, 529; *Halstead v. Mayor, &c.*, of N. Y., 8 *N. Y. (8 Comst.)*, 480; affirming S. C., 5 *Barb.*, 218.

8. Land under water. By the charter of the city of New York, the Corporation owns the fee of the land under water, to the extent of 400 feet from low-water mark. *Ct. of Appeals*, 1858, *Furman v. Mayor, &c.*, of N. Y., 10 *N. Y. (6 Seld.)*, 567; affirming S. C., 5 *Sandf.*, 16.

9. Where grants of land under water are made to owners upon the shore, although the lines of the streets are often the natural and proper basis upon which to determine the boundaries of the grants, yet they are not always to be followed; but the question is always one of the equitable apportionment of the space to which the grants are to apply, and the exact lines of division must necessarily depend upon the relative directions of the shore line, and of the exterior line to which it is intended the grants shall extend. *N. Y. Superior Ct.*, 1857, *Nott v. Thayer*, 2 *Boru.*, 10.

10. The principle on which such apportionments are to be made, discussed and applied in a peculiar case. *Id.*

11. The pre-emptive right, which, by section 4 of the act of 1837,—establishing the Thirteenth Avenue, is granted to the proprietors of all grants of land under water theretofore made by the mayor,—is not a personal independent right of the grantee of previously granted adjacent premises, capable of separate

independent conveyance, nor strictly an incident of the premises, but an incident of the plaintiff's estate in the previously granted premises, and such as to pass from him by a foreclosure of his mortgage upon those premises and a sale thereunder. *Supreme Ct.*, 1858, *Warwick v. Mayor, &c.*, of N. Y., 28 *Barb.*, 210; S. C., 7 *Abbotts' Pr.*, 265.

12. Title to Castle Garden and Battery. The Battery belongs to the city, under the act of 1821, which restricts it, and all extensions of it, to use as a public walk, and for public buildings and works of defence; but Castle Garden belongs to it under the act of Congress of 1822, and without that restriction. *N. Y. Superior Ct.*, 1855, *Phoenix v. Commissioners of Emigration*, 12 *How. Pr.*, 1; affirming S. C., 1 *Abbotts' Pr.*, 466.

13. Excursions. Masters of steamboats employed on pleasure excursions on the Sound or Hudson, must preserve list of male passengers, of age of discretion, and file with county clerk. *Laws of 1855*, 1064, ch. 556.

14. Passengers who trespass on the shore, liable to indictment and penalty. *Id.*

15. Value of property. The best criterion of the value of property in the city of New York is its rental. *V. Chan. Ct.*, 1842, *Shotwell v. Smith*, 8 *Edw.*, 588.

II. OFFICERS.

1. Mayor and Council.

16. Retiring board. The mayor can give his sanction to an act passed by a Common Council whose term has expired. *N. Y. Superior Ct.* (1843?), *Elmendorf v. Ewen*, 2 *N. Y. Leg. Obs.*, 85.

17. As a municipal corporation cannot be deemed to be in a state of interrupted existence, when one board goes out another must come in. The reasonable construction of the charter is, that the old board continues in existence until an actual change of officers takes place; and they must act, when necessary, until the new board are sworn in. *Id.* To similar effect, see *Elmendorf v. Mayor, &c.*, of N. Y., 25 *Wend.*, 698.

18. Investigations. Either Board of the Common Council of the City of New York has power to institute an examination into any matters respecting which it is entitled to legislate, or in respect to which it may be deemed advisable to apply to the Legislature of the State to act,—e. g., into the state and

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condition of the police department, into any frauds or corruption in the conduct of it, and into the management of it generally. *N. Y. Com. Pl., Sp. T., 1855, Briggs v. Mackellar, 2 Abbotts' Pr., 80.*

19. The propriety of certain questions in such case, considered. *Ib.*

20. Investigations directed by a Board of the Common Council are to be conducted generally according to parliamentary law. They are subject in particular to the following rules:—1. The examination of each witness must be confined to the subject under investigation. 2. A witness is not bound to answer any question where his answer would tend to criminate or degrade him, unless the question is essential to the direct proof of the matter under investigation. 3. If a witness objects to answer a question, the sense of the committee is to be taken, and if a majority decide that the question is proper, it is the duty of the witness to answer. 4. It is in the power, however, of the witness to refuse, for the committee have no means to coerce him. And in case of a refusal, it is in the province of the judge to whom application for an attachment (under the act of 1855) is made, to determine whether the question is proper. *Ib.* See, also, *Laws of 1860, 48, ch. 89, repealing the act of 1855.*

21. The "Common Council" of the city of New York now consists of the aldermen and councilmen only. The mayor, although an officer of the Corporation, is not a member of the Common Council. Hence powers of appointment conferred by statute upon the Common Council, may be exercised by the aldermen and councilmen without the co-operation of the Mayor; and he has no veto power upon their exercise. *Supreme Ct., Sp. T., 1856, Achley's Case, 4 Abbotts' Pr., 85.*

22. The exercise of a power to appoint to office, is a purely executive act; and is in no sense legislative. *Ib.*

23. The action of the mayor upon matters passed by the Common Council, is confined to such resolves, &c., as will take effect as acts or laws of the Corporation; and does not extend to resolves, &c., which operate only as acts of the Common Council. The fact that the two Boards, in exercising powers conferred upon the Common Council, act by resolutions instead of in joint meeting, cannot enlarge his authority. *Ib.*

24. The power to appoint commissioners of deeds being vested in the Common Council, the mayor cannot veto appointments. *Ib.*

25. Street-opening. Passing an ordinance to authorize the opening or alteration of a street, under the act of April, 1818, § 177, is the exercise of a legislative and not of a judicial power. *Chancery, 1841, Wiggin v. Mayor, &c., of N. Y., 9 Paige, 16.*

26. Interest in contract. The charter of New York provided (*Laws of 1830, ch. 122, § 11*) that no member of the Common Council should be directly or indirectly interested in any contract with the city. A member of the Council became interested in a contract for supplying coals to the city, and took a note of the contractor for his share of the profits. By the arrangement with the contractor, the alderman was to aid in purchasing and supplying the coal in fulfilment of the contract, which made him the judge of the quality. *Held*, that the arrangement was void, as being against sound morals, and a breach of official duty, and that a note founded upon it could not be sustained. [6 T. R., 61; 2 B. & P., 371; 3 B. & Ald., 179.] *N. Y. Superior Ct., 1848, Bell v. Quin, 2 Sandf., 146.*

27. Compensation. The provision of the amended charter of 1857, that members of the Common Council shall not receive compensation, applies to members elected before the act. *N. Y. Com. Pl., 1857, Phillips v. Mayor, &c., of N. Y., 1 Hill., 488.*

28. Unlawful appropriation. Where moneys are appropriated by vote of the legislative body of a municipal corporation for two purposes, one of which is lawful, and the other unlawful, the courts will, if it is practicable so to do, distinguish between the two objects, so as to sustain the appropriation, so far as it is for a lawful purpose, and to enjoin only the expenditure for that which is unlawful. But where the appropriation made is of one sum in gross, in such a way that the court cannot determine how much was intended for the lawful object, how much for the other, the entire appropriation will be held void. *Supreme Ct., Sp. T., 1857, Roberts v. Mayor, &c., of N. Y., 5 Abbotts' Pr., 41.*

29. An alderman, may, under the Laws of 1849, commit to the workhouse for vagrancy. *N. Y. Com. Pl., Chambers, 1856, Layden's Case, 3 Abbotts' Pr., 331.*

Officers;—The Attorney and the Counsel.

30. Common Pleas. The mayor and aldermen are *ex officio* judges, or members of the Court of Common Pleas and the Court of General Sessions, New York. *Supreme Ct.*, 1840, *People v. Mayor, &c.*, of N. Y., 25 *Wend.*, 9; affirmed in error by an equally divided court, *Id.*; but see 1 *E. D. Smith*, lxxx.

31. Constitutionality of the act of 1840, excluding aldermen from sitting as judges of the Court of General Sessions. *Purdy v. People*, 4 *Hill*, 384; reversing S. C., 2 *Id.*, 31; and see CONSTITUTIONAL LAW, 266.

32. The appointment of heads of departments was, by the amended charter of 1857, conferred upon the mayor and aldermen who might be in office when a vacancy should occur, whether such mayor, &c., were those elected before or after that act. The power is incident to the offices. *Ct. of Appeals*, 1858, *People v. Conover*, 17 *N. Y.* (3 *Smith*), 64.

33. Oath. Under 1 Rev. Stat., 109, 2 ed., an alderman, or assistant, may be sworn in by the recorder, or other person therein authorized to administer oaths. The provision of Kent's Charter, 105 (*Laws of 1830*, 129, § 24), is merely directory. *Supreme Ct.*, 1842, *Exp. Heath*, 8 *Hill*, 42.

Followed, in the case of a police-clerk, under the act of 1855. *N. Y. Com. Pl.*, 1855, *Canniff v. Mayor, &c.*, of N. Y., 4 *E. D. Smith*, 430.

2. The Attorney and the Counsel.

34. The counsel to the Corporation is entitled to his taxable costs against the city, as his client, in addition to his salary. *N. Y. Superior Ct.*, 1848, *Brady v. Mayor, &c.*, of N. Y., 1 *Sandf.*, 569; 1849, *Leveridge v. Mayor, &c.*, of N. Y., 8 *Id.*, 268.

35. He is not entitled to charge specially for services in drawing special contracts, conveyances, laws, and memorials to the Legislature, connected with the business of the Corporation, nor to counsel-fees for defending suits brought against third persons, and assumed by the city, and referred to him as being the proper business of the Corporation, though the city was not a party to, or under any legal obligation or duty to defend them. But he is entitled to a reasonable recompense for attending at Albany, in behalf of the city, to solicit or oppose the passage of bills brought into the Legislature, affecting the interests of

the city; and he is entitled to counsel-fees on an arbitration in a suit against the city, had after he left the office. *N. Y. Superior Ct.*, 1849, *Leveridge v. Mayor, &c.*, of N. Y., 3 *Sandf.*, 263.

36. It was the intention of the charter of 1849, of the city of New York, and of the ordinances adopted under it, that all the law business of the Corporation or of its departments, including all in which the Corporation should deem that it had any interest, should be placed in the charge of the counsel to the Corporation, and should be conducted by him. He is bound to render all professional services in such business which may be required, and it is not competent for either of the departments of the city government, or for any of their officers, to pass by him and employ other counsel in the law business of the Corporation. No action can be maintained against the Corporation by a counsellor employed by a committee of the Board of Aldermen to conduct law business of the Corporation, to recover fees for his professional services rendered under such employment. *Supreme Ct.*, *Sp. T.*, 1857, *Ramson v. Mayor, &c.*, of N. Y., 24 *Barb.*, 226; S. C., 15 *How. Pr.*, 145; *sub. nom.*, *Rawson v. Mayor, &c.*, of N. Y., 4 *Abbotts' Pr.*, 342. Followed, *Roberts v. Mayor, &c.*, of N. Y., 5 *Id.*, 41.

37. Responsibility to the court. The "counsel to the Corporation" is not the counsel to the two boards of the Common Council merely, so as to be absolutely subject to their orders, in respect to suits in which the city may be a party, but he is an agent or trustee for the whole body of citizens, and is ultimately responsible for his conduct to them; and in so far as he acts as an attorney or counsellor of the court, he is subject to all the rules and regulations of the court, and is responsible to the court, in like manner as any other attorney or counsellor in like case. *Supreme Ct.*, *Sp. T.*, 1857, *Lowber v. Mayor, &c.*, of N. Y., 5 *Abbotts' Pr.*, 325.

38. The attorney of the Corporation is entitled, under the ordinance of 1845, to necessary clerk hire, in addition to his salary; but he should not incur an amount exceeding that theretofore usually allowed, without permission of the Council. He is not entitled to recover, against the city, the taxable costs of suits prosecuted or defended by him, as such attorney, except his disbursements not col-

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lected from the adverse party; nor to retain for his own use the sums received by him, on settlement, without suit, of complaints made to him of breaches of the laws and ordinances of the Corporation, and for other penalties. *N. Y. Superior Ct.*, 1850, *Sniffen v. Mayor, &c.*, of N. Y., 4 *Sandf.*, 198.

8. Other Officers.

39. The public administrator is, in his office, an agent of the Corporation, and the Corporation is therefore primarily liable to an attorney employed by the administrator in suits brought by or against him. *N. Y. Superior Ct.*, 1850, *Nash v. Mayor, &c.*, of N. Y., 4 *Sandf.*, 1.

40. Liability of the city of New York for the acts or omissions of the public administrator. *Matthews v. Mayor, &c.*, of N. Y., 1 *Sandf.*, 182.

41. Powers of the street-commissioner. *Smith v. Mayor, &c.*, of N. Y., 4 *Sandf.*, 231; and see affirmance, 10 *N. Y. (6 Seld.)*, 504; *Altemus v. Mayor, &c.*, of N. Y., 6 *Duer*, 446.

42. A school-commissioner of the city of New York, by removing from the ward for which he was chosen, vacates his office. *Supreme Ct.*, 1845, *People v. Board of Education*, 1 *Den.*, 647.

43. The office of chamberlain is equivalent to that of county treasurer. If the chamberlain is liable at all, in an action at law, for a crier's certified bill, he is so liable only upon proof of refusal with funds applicable to the bill in his hands. The proper remedy is mandamus. *Ct. of Appeals*, 1851, *Huff v. Knapp*, 5 *N. Y. (1 Seld.)*, 65.

44. Copyist. The Laws of 1858, ch. 610, provided that copyists in the register's office should be paid out of the fees paid into the city treasury by the register; but the same act repealed the statute requiring him to pay in such fees. *Held*, That the former clause must be rejected as repugnant, and a copyist could maintain no claim against the city or the county. *Supreme Ct., Sp. T.*, 1857, *People v. Stout*, 15 *How. Pr.*, 159.

45. The city-inspector of the city of New York cannot hold over, after the expiration of his term, until his successor is appointed. *Supreme Ct., Sp. T.*, 1859, *People v. Tiemann*, 8 *Abbotts Pr.*, 359; *S. C.*, 30 *Barb.*, 198.

46. Mode of appointing police-clerks,

under the Laws of 1855, 502, ch. 298. *Canniff v. Mayor, &c.*, of N. Y., 4 *E. D. Smith*, 480.

47. Police-justices and police-clerks deemed county, and not city officers. *People v. Edmonds*, 19 *Barb.*, 468; *Canniff v. Mayor, &c.*, of N. Y., 4 *E. D. Smith*, 480.

48. Policeman's salary. Under the act of 1850, relating to the salary of policemen in the city of New York, a policeman detailed to perform a special duty was only entitled to receive at the rate of \$500 per annum; but under the ordinance of Sept. 15, 1858, he was entitled to be compensated from Jan. 1, 1858, at the rate of \$600 per annum. *N. Y. Superior Ct.*, 1855, *Walling v. Mayor, &c.*, of N. Y., 4 *Duer*, 810.

49. Sickness. Under the Laws of 1853, 440, ch. 228, a policeman has a right to his salary while absent from duty in consequence of disease contracted in the public service. The regulation requiring application for "sick pay" to be accompanied by an affidavit and certificate as to the disease, is void. *N. Y. Com. Pl.*, 1854, *Minto v. Mayor, &c.*, of N. Y., 3 *E. D. Smith*, 384.

As to Harbor-masters, Pilots, Police, and Portwardens, in New York, see those titles.

III. ORDINANCES.

50. Power. The Corporation of the city of New York have power to pass ordinances in matters purely of municipal regulation, and to enforce them by penalties,—*e. g.*, ordinances regulating the wharves and slips. *N. Y. Com. Pl.*, 1854, *Mayor, &c.*, of N. Y. *v. Ryan*, 2 *E. D. Smith*, 868.

51. The ordinance of the Common Council of New York, requiring hoistways, in stores and other buildings, to be inclosed by a railing, is a reasonable police regulation, and within the powers of the Corporation. *Ct. of Appeals*, 1857, *Mayor, &c.*, of N. Y. *v. Williams*, 15 *N. Y. (1 Smith)*, 502.

52. The Corporation cannot interfere in a particular case, and render valid what, under the ordinances, is invalid. Their supervisory power can only be exercised by discontinuing the work altogether, and by refusing an appropriation. *N. Y. Superior Ct., Sp. T.*, 1858, *Russ v. Mayor, &c.*, of N. Y., 12 *N. Y. Leg. Obs.*, 88.

53. Enactment. Although the charter directs the ayes and noes to be called in taking the vote on an ordinance, and directs the pub-

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lication thereof, an ordinance is not void by reason of the omission so to do. *N. Y. Superior Ct.* (1843 ?), *Elmendorf v. Ewen*, 2 *N. Y. Leg. Obs.*, 85. *Supreme Ct.*, 1844, *Striker v. Kelly*, 7 *Hill*, 9. To similar effect, see *Elmendorf v. Mayor, &c.*, of N. Y., 25 *Wend.*, 693.

54. In an ordinance authorizing the commissioners of the sinking fund to sell all real estate belonging to the Corporation, and not in use for, or reserved for public purposes, the exception relates to general public uses. Lands leased at a nominal rent to a religious corporation are not excepted. *Supreme Ct., Sp. T.*, 1856, *Arkenburgh v. Wood*, 28 *Barb.*, 360.

55. The power of the commissioners does not extend to releasing a condition in such a lease requiring the property to be forever used for religious purposes. *Ib.*

56. Repeal. The ordinance of the Corporation organizing a street-commissioner's department, is not repealed by the acts of 1849 and 1853, amending the charter. *N. Y. Superior Ct.*, 1857, *Altamus v. Mayor, &c.*, of N. Y., 6 *Duer*, 446.

57. Revival. The Common Council, in 1851, passed resolutions for opening a street, which they amended in 1853, and under them proceedings were commenced; when, in 1855, they passed a resolution directing all further proceedings to be stayed, and thereupon the counsel to the Corporation entered an order that all further proceedings be discontinued. In 1857, by resolution, they repealed the resolution of 1855. *Held*, that the resolution of 1851, as amended in 1853, was revived, and that it was the duty of the counsel to the Corporation to proceed again under it. *Supreme Ct., Sp. T.*, 1858, *Opening of Albany-street*, 6 *Abbotts' Pr.*, 273.

IV. VARIOUS SUBJECTS OF MUNICIPAL REGULATION.

1. Buildings.

58. Excavations. Under Laws of 1855, 11, ch. 6,—providing that a person excavating a lot in the city of New York to the depth of more than ten feet must preserve and support the contiguous walls, if license is given him to enter on the land,—in order to subject the person excavating to this expense, he must be afforded the necessary license. This must be explicit, and sufficient to protect him, and it should be given by all persons who would be

injuriously affected by such acts. *N. Y. Superior Ct.*, 1857, *Sherwood v. Seaman*, 2 *Boone*, 127.

59. Fire laws. An owner cannot protect himself from the penalties of the Fire laws, by showing that an illegal building was erected with the consent and approval of one of the fire-wardens. *N. Y. Com. Pl.*, 1854, *Fire Department v. Buffum*, 2 *E. D. Smith*, 511.

60. A piazza.—*Held*, a building, within the act regulating the material of buildings within the Fire laws. *Ib.*

2. Ferries.

61. The Corporation has the same power to establish ferries across the East River, as was possessed by the crown, or the Legislature. *Supreme Ct.*, 1841, *Costar v. Brush*, 25 *Wend.*, 628.

62. The Fulton, South, and Hamilton Avenue ferries are, under the charters, the property of the Corporation; and the Legislature has no power to divest the city of its rights in them. It may legislate to secure the safety of passengers, but cannot take away the ferries themselves, nor deprive the city of their legitimate rents and profits; and the act of May, 1845, does not by its terms embrace, but, on the contrary, excepts these ferries, and leaves them undisturbed in the Corporation. *Supreme Ct., Sp. T.*, 1850, *Benson v. Mayor, &c.*, of N. Y., 10 *Barb.*, 228.

3. Fires.

63. The lessee of a store which was destroyed or pulled down by direction of the public authorities of the city of New York, to prevent the extension of a fire, is entitled, under 2 Rev. L., 368, to compensation for the actual damages sustained thereby, as well in the loss and injury of his goods, as from the destruction of the building. The statute is to be liberally construed with reference to the principles of natural equity which entitle the owner to a contribution. *Ct. of Errors*, 1837, *Mayor, &c.*, of N. Y. v. *Lord*, 18 *Wend.*, 126; affirming *S. C.*, 17 *Id.*, 285; 1840, *Mayor, &c.*, of N. Y. v. *Pentz*, 24 *Id.*, 668; and see *Stone v. Mayor, &c.*, of N. Y., 25 *Id.*, 157; affirming *S. C.*, 20 *Id.*, 189; and see *Clark v. Mayor, &c.*, of Syracuse, 18 *Barb.*, 32.

64. The fact that the owner is insured does not affect this right, nor entitle the Corporation to a deduction for the amount recov-

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arable, or received, upon the policy; for the insurers would be entitled to subrogation, or to a reduction for the amount received by the owner from the city. *Ct. of Errors*, 1840, *Mayor, &c.*, of N. Y. v. *Pentz*, 24 *Wend.*, 668; *Stone v. Mayor, &c.*, of N. Y., 25 *Id.*, 157; affirming S. C., 20 *Id.*, 189. Compare *Pentz v. Ætna Fire Ins. Co.*, 9 *Paige*, 568; *City Fire Ins. Co. v. Corlies*, 21 *Wend.*, 867.

65. Owners of goods who have no estate or interest in the building, are not entitled to damages for their destruction. *Ct. of Errors*, 1840, *Stone v. Mayor, &c.*, of N. Y., 25 *Wend.*, 157; affirming S. C., 20 *Id.*, 189.

66. Interest. Where there has been no delay in asserting the claim, interest on the value of the property should be allowed from the time of the destruction. *Ct. of Errors*, 1840, *Mayor, &c.*, of N. Y. v. *Pentz*, 24 *Wend.*, 668; *Stone v. Mayor, &c.*, of N. Y., 25 *Id.*, 157; affirming S. C., 20 *Id.*, 189.

67. Interest does not run intermediate the time of assessment and the confirmation in the Common Pleas, but it runs from that time. *Supreme Ct.*, 1842, *Lord v. Mayor, &c.*, of N. Y., 3 *Hill*, 426.

68. A civil action does not lie against the Corporation to recover compensation for personal property lost by the destruction of a building pursuant to the act. *Ct. of Errors*, 1845, *Russell v. Mayor, &c.*, of N. Y., 2 *Den.*, 461.

69. Property which could not have been saved. The Corporation not liable for property which would have been destroyed by the fire in any event. *Pentz v. Ætna Fire Ins. Co.*, 9 *Paige*, 568.

4. Gunpowder.

70. The statutes regulating the possession and carriage of gunpowder in the city of New York, are mere police regulations, in prevention of a nuisance, and therefore not a regulation of commerce, in contravention of the Constitution of the United States. *Supreme Ct.*, 1843, *Foot v. Fire Department*, 5 *Hill*, 99.

71. Forfeiture. Under the act of 1820,—declaring that if any person shall keep more than 28 pounds of gunpowder in any one place in the city, he shall forfeit it, and also a certain sum, to be recovered with costs, in an action brought within a certain time,—a prosecution within the time is necessary to the

ascertainment of the forfeiture. *Supreme Ct.*, 1833, *Fire Department v. Kip*, 10 *Wend.*, 266.

72. Restitution. Under the provision of section 21,—authorizing the mayor, &c., to order restitution on inquiring into the facts,—an order of restitution is not conclusive, as an estoppel by adjudication, upon the question of forfeiture, in an action brought by the fire department for the penalty. *Supreme Ct.*, 1840, *Talmage v. Fire Department*, 24 *Wend.*, 285.

73. Keeping. The statute (*Laws of 1830*, 852, § 24)—which declares that it shall not be lawful for any person or persons to have or keep any quantity of gunpowder—comprehends every act of possession, whether for the immediate purpose of removal or not, if such possession be in a store, or other building, or place, except when the powder is on its passage in the street secured in the manner provided for by section 29. The act of 1841 (*Laws of 1841*, 187, § 2) is not a repeal, but merely creates a particular exception. *Supreme Ct.*, 1843, *Foot v. Fire Department*, 5 *Hill*, 99.

5. Immigration.

74. Landing. Under 2 Rev. L. of 1813, 440, § 251,—which requires the master of a vessel arriving with an alien passenger to report to the mayor or recorder, and give a bond in a sum not exceeding \$300, and obtain written permission to land the passenger,—it lies with the mayor or recorder to require the bond; but even if it is not required, the master is liable to the penalty if he allows him to land without a previous permission in writing. *Supreme Ct.*, 1826, *Mayor, &c.*, of N. Y. v. *Staples*, 6 *Cow.*, 169.

75. Bond. Since the right to regulate the immigration of foreigners belongs to the States, and not to Congress, a bond taken by the city, under the statute, from the master of a vessel, to indemnify against expense to be incurred for the support of a person imported by him, is valid. *Supreme Ct.*, 1828, *Candler v. Mayor, &c.*, of N. Y., 1 *Wend.*, 493.

76. Order for relief. When such person has been relieved in the almshouse, no previous order for such relief is necessary to a suit. Though the overseers cannot be compelled to give relief without an order, if they give relief in a proper case without it, they may enforce a bond for indemnity. *Id.*

77 The damages are the value of the sup-

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port, deducting the pauper's services. The whole expense of the almshouse, averaged upon its inmates, is not the true measure. *Ib.*

6. Licenses.

78. Excise. According to the just construction of the Excise Law (1 *Rev. L. of* 1818, 176), which is made applicable to cities, it is operative in New York, and a dealer in liquors, though licensed by the mayor under the charter, must also obtain a license from the commissioner under the statute. *Supreme Ct.*, 1821, *Furman v. Knapp*, 19 *Johns.*, 248.

79. Of the construction and effect of the prohibitory liquor law of 1855, in its bearing on the laws relating to the sale of liquors in the city of New York. Mayor, &c., of N. Y. v. Walker, 4 *E. D. Smith*, 258.

80. Coaches. The granting of licenses to owners and drivers of vehicles, is not a matter of right, but rests in the discretion of the mayor. The object is not to raise a tax, but to preserve good order. *Supreme Ct., Sp. T.*, 1851, *People v. Mayor, &c.*, of N. Y., 7 *How. Pr.*, 81.

7. Markets.

81. Power. The Corporation have authority to establish public markets and market-places wherever in their judgment the interests or convenience of the public will be promoted. Owners of property adjacent to a market-place hold in subordination to whatever is necessary for the maintenance of the market, though the Corporation would be held liable to them for an unreasonable obstruction of, or interference with, the use of their property. *N. Y. Superior Ct.*, 1857, *St. John v. Mayor, &c.*, of N. Y., 6 *Duer*, 815.

82. Value. The Common Council may order land to be purchased for a market, notwithstanding the limitation in the charter, as to the yearly value of land which they may hold. *Supreme Ct., Sp. T.*, 1858, *People v. Lowber*, 7 *Abbotts' Pr.*, 158; *S. O.*, less fully, 28 *Barb.*, 65.

8. Piers, Slips, and Wharfrage.

83. Corporation cannot reserve wharfrage. The act of April 8, 1801, for regulating wharves and slips, contains no implied grant of the soil under water to the Corporation; and they are, under the act, only to grant as attorneys for the public, in case piers are sunk.

The power to grant, under restrictions, does not authorize them to reserve the wharfrage to themselves. *Supreme Ct.*, 1804, *Mayor, &c.*, of N. Y. v. Scott, 1 *Cat.*, 548. Compare *Verplanck v. Mayor, &c.*, of N. Y., 2 *Edw.*, 220.

84. Under the act of 1806 (4 *Web. & Skin.*, 514, § 12), the Corporation has power to enlarge slips, and may accomplish this by building piers and extending them into the river; and in order to form a "slip," it is not requisite that the piers on each side should be extended equally or at the same time. Extending one pier is an enlargement of the slip. *Ct. of Appeals*, 1854, *Thompson v. Mayor, &c.*, of N. Y., 11 *N. Y. (1 Kern.)*, 115; affirming *S. O.*, 8 *Sandf.*, 487. To the same effect, *N. Y. Com. Pl.*, 1851, *Marshall v. Vultee*, 1 *E. D. Smith*, 294; and see *Murray v. Sharp*, 1 *Bow.*, 589.

85. The Corporation have no power, under § 280, to make a public slip by sinking piers against a bulkhead or wharf opposite to private property. But where they did so, and the owners acquiesced, and built the pier, and paid two-thirds of the expense in accordance with the corporate order, the Corporation contributing the other third,—*Held*, that the owners were bound by this practical construction of the statute; and that the Corporation was entitled to slippage and wharfrage, as if the work was the enlargement of a public slip. *V. Chan. Ct.*, 1884, *Verplanck v. Mayor, &c.*, of N. Y., 2 *Edw.*, 220. *N. Y. Com. Pl.*, 1851, *Marshall v. Vultee*, 1 *E. D. Smith*, 294. Compare *Thompson v. Mayor, &c.*, of N. Y., 11 *N. Y. (1 Kern.)*, 115; affirming *S. O.*, 8 *Sandf.*, 487.

86. A notice in case of an extension, "to the proprietors of the easterly half of the pier," instead of to those of the lots opposite the place, is insufficient under the statute. It is defective, if, instead of requiring them to commence the work by the time fixed, and contribute to the expenses as they shall accrue, it requires them to signify their intention to join the Corporation in building it, and to contribute their proportions of the expense. Building an extension of ninety feet, upon a resolution and notice contemplating one of seventy feet, is unauthorized. *Supreme Ct.*, 1847, *Marshall v. Guion*, 4 *Den.*, 581. *N. Y. Com. Pl.*, 1851, *Marshall v. Vultee*, 1 *E. D. Smith*, 294.

87. Filling up slip. The provision of 1

Various Subjects of Municipal Regulation:—Piers, Slips, and Wharfrage.

Rev. L. of 1813, 445, § 269,—authorizing the Corporation to assess two-thirds of the expense of filling up a public slip, upon the owners of property who may be benefited,—does not give the owners any interest in land so made, where the charter entitles the Corporation to make land from the river and to build thereon; nor does it make the slip, when filled up, after such proceedings, a public street. *V. Chan. Ct.*, 1837, Schermerhorn v. Mayor, &c., of N. Y., 8 *Edw.*, 119.

88. The city has a general right under the act of 1813, to fill up public slips, and may exercise it and assess the expenses on the property benefited, though the effect of the filling up be to extend a street beyond the bounds of the city as defined by the Montgomery charter. *Supreme Ct.*, 1849, Mayor, &c., of N. Y. v. Whitney, 7 *Barb.*, 485.

89. Grant to one who covenanted to build wharf. The city of New York being owner of the land under water adjoining the city, for 400 feet beyond low-water mark, conveyed a parcel extending 160 feet from that mark, the grantee covenanting, on request, to build and maintain public streets and wharves, and the city covenanting, on its part, that on fulfilment of this covenant he should have the wharfrage in perpetuity. No request was ever made, nor any thing done under these covenants. *Held*, that the grantee had no right to a water front, except at the will of the city, and that the city was still owner of the remaining land. *Ct. of Appeals*, 1858, Furman v. Mayor, &c., of N. Y., 10 *N. Y.* (6 *Seld.*), 567; affirming *S. C.*, 5 *Sandf.*, 16.

90. The proprietors of land intended by the act of 1798,—which empowered the Corporation, upon such plan as it might fix upon, to lay out streets and wharves in front of the city, to be built by and at the expense of the proprietors of land adjoining such streets and wharves,—are only those grantees of the Corporation, whose grants extended to the outer line of the 400 feet. *Ib.*

91. The Corporation granted a water lot, and the grantee covenanted to construct a public street in front of it, and he did so; and the Corporation covenanted that the grantee should enjoy the wharfrage arising from the bulkhead created by the street, which for a time he received. Subsequently the Corporation acquired title to the granted premises pursuant to the act of 1813, §§ 177, 178, for

the purposes of a street; and afterwards directed to be constructed opposite these premises a pier, which thenceforth formed the side of a public slip, which pier was built at the joint expense of the Corporation, and the proprietors of lots adjacent to the granted premises; and the emoluments therefrom were shared between them and the city. Subsequently the Corporation directed this pier to be extended into the river, and invited those proprietors to unite in constructing the extension, the expense and emoluments thereof to be shared in the same proportion as were those of the original pier. This they refused to do, and the Corporation, at the expense of the city, extended the pier. *Held*, that the Corporation had authority to do so; and that the wharfrage arising from this new portion of the pier belonged to the Corporation. The right to wharfrage was a servitude annexed to the estate, and either passed to the Corporation as the grantees, upon the same being taken for a street, or it was extinguished by the union of the dominant and servient estate. [8 *Paige*, 254.] *Ct. of Appeals*, 1854, Marshall v. Guion, 11 *N. Y.* (1 *Kern.*), 461.

92. Pier opposite city lots. Section 224 of 2 Rev. L. of 1813, 433, is not applicable to the construction of a pier, where the Corporation owns the lots opposite the place where it is to be built. In such case the Corporation may construct the pier and take the emoluments. *Ib.*; overruling a previous decision in *S. C.*, 4 *Den.*, 581. Compare *Marshall v. Vulture*, 1 *E. D. Smith*, 294.

93. Grants of use of piers. The Common Council of the city of New York are authorized by law to grant the exclusive use of piers, wharves, and slips, for particular classes or descriptions of vessels. But even if they could give such use to individuals by deed or lease, executed under the authority of the Common Council, by officers of the Corporation, such grants cannot suspend the operation of the general ordinances of the Common Council. *N. Y. Com. Pl.*, 1855, Mayor, &c., of N. Y. v. Rice, 4 *E. D. Smith*, 604.

94. The Corporation may regulate the uses of the basins and slips, and, subject to the rights of the owners to receive and collect their wharfrage, the Corporation may direct the use of a slip or wharf to be appropriated exclusively for any particular craft or class of vessels,—e. g., a floating-dock. *Supreme Ct.*,

Various Subjects of Municipal Regulation:—Streets.

Sp. T., 1857, *Hecker v. N. Y. Balance Dock Co.*, 24 *Barb.*, 215. Contrary, 1856, *Penniman v. N. Y. Balance Co.*, 18 *How. Pr.*, 40; 1857, *Hecker v. N. Y. Balance Dock Co.*, *Id.*, 549.

93. That a lease of two piers and the bulkhead between passes the slip. *Mayor, &c., of N. Y. v. Rice*, 4 *E. D. Smith*, 604.

95 a. Half wharfage of vessel not having dock berth. *Decker v. Jaques*, 1 *E. D. Smith*, 80.

96. The grant of a right to receive wharfage of a bulkhead, the fee remaining in the city, is an incorporeal hereditament [2 *Sandf.*, 552]; and if the grantee refuses to take the lease which he agrees to, and goes into possession by permission, he is liable, under an implied contract, to pay over what he has received. *N. Y. Superior Ct., Sp. T.*, 1856, *Mayor, &c., of N. Y. v. Hill*, 18 *How. Pr.*, 280.

97. Rights of private owners. When the private owners of a pier have an exclusive right to the wharfage, the Corporation cannot legally deprive them of this right, by appropriating the slip adjoining the pier to the purposes of a public ferry, at least without payment of just compensation. *N. Y. Superior Ct.*, 1857, *Murray v. Sharp*, 1 *Bow.*, 539.

98. Payment by city. When, by an ordinance of the Corporation, a pier is directed to be built or extended, the payment by the Corporation of one-third of the expense is, under the statute, a condition precedent to the acquisition by the Corporation of a right to receive half of the wharfage, and the burden of proving the payment rests upon the Corporation. *Id.*

99. Obstructions. Private wharves are not public wharves within the ordinances relative to using and obstructing public wharves and slips. *N. Y. Superior Ct.*, 1848, *Vanderwater v. City of N. Y.*, 2 *Sandf.*, 253.

100. Distress. Under 2 *Rev. L.*, 429, § 212, —allowing wharfingers to distrain for unpaid wharfage,—they can distrain the goods of the vessel at a place other than the wharf where the toll accrued. Wharfage is not technically rent. *Supreme Ct.*, 1835, *Nicoll v. Gardner*, 18 *Wend.*, 288. To similar effect, *N. Y. Com. Pl.*, 1851, *Marshall v. Vultee*, 1 *E. D. Smith*, 294.

101. Mere obstruction. To entitle the owner of a wharf in New York city to distrain for wharfage, the vessel must have been fastened to the wharf, or to another vessel so

fastened. Using an adjoining pier so as to obstruct the enjoyment of the plaintiff's wharf does not confer this right. *N. Y. Superior Ct.*, 1851, *Camden & Amboy R. R. Co. v. Finch*, 5 *Sandf.*, 48.

102. Mode of apportioning wharfage, in New York city, among owners in common of a pier extended from a bulkhead owned by them in severalty, stated. *Roosevelt v. Post*, 1 *Edw.*, 579, 580, n.

9. Streets.

103. The fee of the streets in the city of New York is in the Corporation, in trust for public use; and the fee of ground taken for opening a new street, is not changed from the former owner, to the Corporation, until the report of estimate and assessment is confirmed. (*Sess. 80, ch. 115, § 9, 2 Rev. L.*, 414.) *Supreme Ct.*, 1828, *Matter of Seventeenth-street*, 1 *Wend.*, 262.

104. The Corporation have a general power over the streets, which cannot be surrendered without authority of law. And in exercising authority conferred by law to grant permission to a railroad company to use the street, the court may in the grant impose such restrictions as it may deem proper. Granting the use of a street does not prevent them from subsequently regulating its use, and forbidding, by ordinance, resort to steam-power upon it. *N. Y. Com. Pl., Sp. T.*, 1858, *N. Y. & Harlem R. R. Co. v. Mayor, &c., of N. Y.*, 1 *Hill.*, 562.

105. Railroad. That the Corporation of the city of New York has the power and right to authorize the use of its streets for a railway. *Supreme Ct.*, 1849, *Drake v. Hudson River R. R. Co.*, 7 *Barb.*, 198; 1853, *Milbau v. Sharp*, 15 *Id.*, 528. Compare *Williams v. N. Y. Central R. R. Co.*, 18 *Id.*, 222; reversed, 16 *N. Y. (2 Smith)*, 97.

106. The grant of a right to build a railroad in Broadway,—*Held*, void, because, 1. It granted a franchise, which the Common Council had no authority to grant. 2. By the legal import of its terms, it might be perpetual. 3. Such grant is, in judgment of law, a contract between the Corporation and the grantees, and would import to restrict the Corporation in the future exercise of its legislative powers. 4. It conferred upon the grantees and their associates exclusive privileges to a partial use of Broadway, which

Contracts for Work.

might be of perpetual duration. 5. It absolved them from an obligation imposed on them by a statute of the State. [2 Rev. Stat., 424, § 198.] 6. It conferred rights, and exempted the associates from consequences, in the event of the death of one of their number, repugnant to law. 7. It authorized the associates to become incorporated at any time, under the general Railroad Act, although the road might have been previously constructed, and whatever might be their number at the time, while the act itself does not allow an incorporation after a road shall have been built, nor of a less number than twenty-five. 8. It made a contract, which the Common Council had been prohibited from making, by the amended charter of 1849. *N. Y. Superior Ct.*, 1854, *Attorney-general v. Mayor, &c.*, of N. Y., 8 *Duer*, 119.

107. The act of April 4, 1854, which confirms railroads already constructed in whole or in part, under city grants, confirms only such as are constructed under legal, valid grants. *Supreme Ct.*, 1856, *Wetmore v. Story*, 22 *Barb.*, 414; S. O., 8 *Abbotts' Pr.*, 262; and see *Laws of 1860*, 16, ch. 10.

108. **Gas-pipes.** That the Corporation have power to grant permission to lay down gas-pipes for furnishing the citizens. The right to lay them down is not property which can only be sold by auction. *Supreme Ct.*, *Sp. T.*, 1855, *Smith v. Metropolitan Gas-light Co.*, 12 *How. Pr.*, 187.

109. **Obstructions.** Under the ordinances of 1849, the power to order a removal of an obstruction in the streets is vested in the superintendent of streets, not in the commissioner of streets and lamps. *N. Y. Superior Ct.*, 1855, *Naylor v. Glasier*, 5 *Duer*, 161.

V. CONTRACTS FOR WORK.

110. **Sealed proposals.** The charter of the city of New York, as amended April 12, 1853, requires that all work involving the expenditure of more than \$250 shall be done by contract, on sealed bids, and that all such contracts, when given, shall be given to the lowest bidder. A contract entered into by the officers of the Corporation in violation of this provision, is illegal and void; and imposes no obligation on the city. *N. Y. Superior Ct.*, 1857, *Brady v. Mayor, &c.*, of N. Y., 2 *Bow.*, 178; S. O., 7 *Abbotts' Pr.*, 234; 16 *How. Pr.*, 432; affirmed, *Ct. of Appeals*, 1859, 20 *N. Y.*

(6 *Smith*), 812. *Supreme Ct.*, *Sp. T.*, 1858, *Appleby v. Mayor, &c.*, of N. Y., 15 *How. Pr.*, 428.

111. Even if bids are advertised for and received, yet, if they are tested by a comparison which brings into view only a part of the work contracted for, and by such means the contract is awarded to one who was not in fact the lowest bidder, the contract is invalid. Thus, where the Corporation called for bids for flagging a sidewalk, and laying a curb and gutter, and the making of excavation of earth and rock, if any, and stating that the lowness of the bid would be tested only by the price at which the bidders offered to lay the flagging, curb, and gutter;—*Held*, that a contract awarded upon such a test, when it was impossible to determine by such test who was the lowest bidder, was void in respect to the excavation. *N. Y. Superior Ct.*, 1857, *Brady v. Mayor, &c.*, of N. Y., 2 *Bow.*, 178; S. O., 7 *Abbotts' Pr.*, 234; 16 *How. Pr.*, 432; affirmed, *Ct. of Appeals*, 1859, 20 *N. Y.* (6 *Smith*), 812.

112. The officers of the Corporation cannot, therefore, in such a case, bind the Corporation by accepting the work, or confirming an assessment to pay the expenses thereof. *Id.*

113. **The audit and allowance** of a charge which is not a legal charge against the county,—*e. g.*, of a bill for work done, &c., for the Corporation of the city of New York under private contract, and exceeding \$250 in amount,—is a nullity. *Supreme Ct.*, *Sp. T.*, 1856, *People v. Stout*, 28 *Barb.*, 349; S. O., 4 *Abbotts' Pr.*, 22; 18 *How. Pr.*, 314.

114. **Appropriation.** No contract for a sum exceeding \$500 can be made by the street-commissioner for the performance of work in his department, although such contract may have been previously awarded by him to the lowest bidder, until a specific appropriation of a definite sum for the performance of the work shall have been made by the Common Council. Whether such appropriation shall or shall not be made, rests entirely in the discretion of the Common Council; and until it is made, there is no contract which a court, either of law or equity, can enforce. *N. Y. Superior Ct.*, 1857, *Altemus v. Mayor, &c.*, of N. Y., 6 *Duer*, 446.

115. **Advertisement by one board.** By the charter and ordinances (*Laws of 1849*, 283, § 23; *Ord. of 1849*, §§ 492-5), the Com-

Liabilities of the Corporation.

mon Council has no power to make a contract for work to be done except through the head of the appropriate department, and after advertisement for proposals; and an advertisement for proposals ordered by one board only of the Common Council, is invalid. *Supreme Ct.*, 1852, *Christopher v. Mayor, &c.*, of N. Y., 18 *Barb.*, 567. Followed, 1853, *De Baun v. Mayor, &c.*, of N. Y., 16 *Id.*, 392.

116. That a notice inviting proposals does not bind the Corporation to accept the lowest bid, even though in all respects formal. *So held*, where the Corporation ordinances provided that contracts should not be executed till laid before the Common Council, and an appropriation made. *Ct. of Appeals*, 1858, *Smith v. Mayor, &c.*, of N. Y., 10 *N. Y.* (6 *Seld.*), 504; affirming *S. C.*, 4 *Sandf.*, 221.

117. Defective advertisement. Where the commissioner's advertisement did not, as the ordinances required, state the amount of security to be given,—*Held*, that the bid was informal. The commissioner cannot waive a provision of the ordinance so as to bind the Corporation. *Id.*

118. Defective proposals. Under the Ordinances of 1849, proposals defective in substance ought to be rejected; and the award of the contract made to the next lowest bidder whose proposal is perfect; and amendment should be permitted only in matters of form. *N. Y. Superior Ct.*, *Sp. T.*, 1858, *Russ v. Mayor, &c.*, of N. Y., 12 *N. Y. Leg. Obs.*, 38.

119. A proposal signed by C. & Co., or a proposal accompanied with the consent of a single surety, is substantially defective, and incapable of amendment. *Id.*

120. Oath of "party." Section 498 of the Ordinance of 1849,—which provides that an estimate for a Corporation contract shall be verified by the oath of the party making the same,—is only satisfied in case of an estimate made by a partnership, by giving the oath of each partner. *Supreme Ct.*, 1857, *People v. Croton Aqueduct Board*, 6 *Abbotts' Pr.*, 42; *S. C.*, 26 *Barb.*, 240; affirming *S. C.*, 5 *Abbotts' Pr.*, 816.

121. The distinction between errors of form and errors of substance in estimates for contracts. *Id.*

122. Printing 1500 copies of the charter, with Kent's notes, is not within the ordinary printing of the Corporation, which may be done without advertising for bids. *N. Y. Su-*

perior Ct., *Sp. T.*, 1857, *McSpedon v. Mayor, &c.*, of N. Y., 15 *How. Pr.*, 462.

123. Professional services. The provision of the charter requiring that the various departments shall advertise for sealed proposals for contracts for all "work" involving an expenditure exceeding \$250, does not apply to professional services;—*e. g.*, those of a surveyor in preparing a map. Where professional services are to be employed, the Common Council have a power of selection, with reference to securing the requisite skill, and no advertisement is required. *Supreme Ct.*, *Sp. T.*, 1857, *People v. Flagg*,* 5 *Abbotts' Pr.*, 282.

124. The lowest bidder for a contract to do work for the Corporation of the city of New York, under the charters of 1849, 1853, and 1857, and under the ordinance of 1849, does not acquire any legal right to the contract, to enforce which a mandamus will issue, until the contract has been made with him, and approved by the Common Council. *Supreme Ct.*, 1857, *People v. Croton Aqueduct Board*, 6 *Abbotts' Pr.*, 42; *S. C.*, 26 *Barb.*, 240; affirming *S. C.*, 5 *Abbotts' Pr.*, 816.

125. Extra allowance. Under section 10 of the amended charter of 1853,—providing that "no additional allowance beyond the legal claim for any service shall ever be allowed,"—the Council have no power of making an allowance for services which exceed that fixed for such services by their own ordinances. *Ct. of Appeals*, 1858, *People v. Flagg*, 17 *N. Y.* (3 *Smith*), 584; *S. C.*, 16 *How. Pr.*, 36.

126. That provision is not applicable to officers whose salaries or rates of compensation are fixed by a general ordinance, and not by a special contract with each individual,—*e. g.*, police officers. *N. Y. Superior Ct.*, 1855, *Walling v. Mayor, &c.*, of N. Y., 4 *Duer*, 810.

VI. LIABILITIES OF THE CORPORATION.

127. Expenses under the Registry Law are a county charge, to be audited by the supervisors, and are not recoverable from the city. *N. Y. Com. Pl.*, 1848, *White v. Mayor, &c.*, of N. Y., 2 *N. Y. Leg. Obs.*, 26.

* The decision was affirmed at general term, but was reversed on another point by the Court of Appeals, 17 *N. Y.* (3 *Smith*), 584; *S. C.*, 16 *How. Pr.*, 36.

Local Improvements;—How undertaken. Lands acquired.

128. A mandamus does not lie to compel the comptroller of the city of New York to pay a claim against the Corporation, before such claim has been audited by the auditor of accounts in the department of finance. The charter requires such audit. [Charter of 1849, § 11; Charter of 1858, § 12.] The Common Council have not power to determine the sum due for services and disbursements at their employment, or to require the comptroller to draw his warrant for payment. The adjustment belongs to the auditing bureau. *Ct. of Appeals*, 1858, *People v. Flagg*, 17 *N. Y.* (3 *Smith*), 584; *S. C.*, 16 *How. Pr.*, 86. To the contrary (*Supreme Ct.*, 1858) was *People v. Flagg*, 16 *Barb.*, 508; *S. C.*, 12 *N. Y. Leg. Obs.*, 42.

129. A mandamus to compel the comptroller to draw his warrant for the payment of a bill against the Corporation of the city of New York, should not be granted where it has not been examined and allowed by the auditor, and approved by the comptroller; for by the Laws of 1857, ch. 590, an audit and allowance by the board of supervisors is not sufficient to authorize any payment from the city treasury. *Supreme Ct.*, 1858, *People v. Flagg*, 15 *How. Pr.*, 558.

130. An action lies against the Corporation of the city of New York, when they receive money from any source of revenue which they are bound to apply to a special purpose, to compel them to pay it to the purpose contemplated; and they are also liable to an action, when, being authorized to raise money by tax for a special purpose, they neglect to provide for such claim. *N. Y. Com. Pl., Sp. T.*, 1857, *Green v. Mayor, &c.*, of *N. Y.*, 5 *Abbotts' Pr.*, 503.

131. But the Corporation are not liable to an action for an increase of salary given to an officer—*e. g.*, a justice of one of the district courts of the city—by act of the Legislature, where the Legislature have neglected to give the Corporation authority to raise money for its payment. *Id.*; but see *Green v. Mayor, &c.*, of *N. Y.*, 8 *Id.*, 25.

132. An action lies against the Corporation of the city of New York to compel them to pay an expense incurred pursuant to statute, —*e. g.*, the salary of a district-court justice,—although they have no fund appropriated by law to that purpose, if they have funds, or means of raising funds, appropriated generally

to "such expenses as they may be put to by law." *N. Y. Com. Pl.*, 1858, *Green v. Mayor, &c.*, of *N. Y.*, 8 *Abbotts' Pr.*, 25. To the contrary effect was *The same v. The same (Sp. T.*, 1857), 5 *Id.*, 508.

133. A police-clerk, though not a city officer, may, under Laws of 1851, ch. 514, § 6, maintain an action against the city for his compensation. [25 *Wend.*, 680.] *N. Y. Com. Pl.*, 1855, *Canniff v. Mayor, &c.*, of *N. Y.*, 4 *E. D. Smith*, 480.

134. Negligence. The Corporation is liable for injuries occasioned by the negligence, unskilfulness, or malfeasance of its agents and contractors engaged in the construction of its public works. *N. Y. Superior Ct.*, 1848, *Delmonico v. Mayor, &c.*, of *N. Y.*, 1 *Sandf.*, 222.

135. The Corporation owns its streets, and has power to raise funds to repair them, and its sewers, &c.; and hence, if it permits them to be out of repair, is liable for an injury thereby sustained by an individual, without any negligence of his own. *Ct. of Appeals*, 1858, *Hutson v. Mayor, &c.*, of *N. Y.*, 9 *N. Y.* (5 *Seld.*), 168; affirming *S. C.*, 5 *Sandf.*, 289; *Griffin v. Mayor, &c.*, of *N. Y.*, 9 *N. Y.* (5 *Seld.*), 456. To the same effect, 1851, *Lloyd v. Mayor, &c.*, of *N. Y.*, 5 *N. Y.* (1 *Seld.*), 869. *Supreme Ct.*, 1842, *Mayor, &c.*, of *N. Y. v. Furze*,* 3 *Hill*, 612.

VII. LOCAL IMPROVEMENTS.

1. How undertaken. Lands acquired.

136. The power given to the Corporation of New York, to lay out new streets and open old ones, in that part of the city not embraced in the permanent plan of improvements, given to it by the act of April, 1813, is not affected by the act of 1880, changing the organization of the Common Council. Although, by the act of 1880, the mayor and recorder are excluded from the Common Council, the mayor, aldermen, and commonalty are to be deemed convened in Common Council within the meaning of a previous statute, when the aldermen and council convene and pass a resolution subject to the qualified veto of the mayor. *Chancery*, 1841, *Wiggin v. Mayor, &c.*, of *N. Y.*, 9 *Paige*, 16.

137. The Corporation are the sole judges of the expediency of pitching and paving the

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

Local Improvements:—Commissioners and Assessors.

streets, and no notice by the street-commissioners to those liable to be assessed is required. *Supreme Ct., Sp. T.*, 1851, *Morewood v. Corporation of N. Y.*, 6 *Hov. Pr.*, 386.

138. Work done before assessment. The estimate and assessment for a local improvement in the city of New York should properly be made before the execution of the work; but the statute is directory in this respect, and doing the work first does not affect the validity of the subsequent assessment. *Supreme Ct.*, 1846, *Doughty v. Hope*, 3 *Den.*, 249.

139. Under the statutes relating to New York (2 *Rev. L.* of 1813, 342, 407, § 270; *Laws* of 1824, ch. 49), the Corporation of the city, after adopting an ordinance for the construction of a street or sewer, has power to make and collect an assessment, and then proceed to the construction of the work; or to construct the work in the first instance at the cost of the city, and then reimburse itself by an assessment. *N. Y. Superior Ct.*, 1849, *Wetmore v. Campbell*, 2 *Sandf.*, 841. Approved and followed, *Ct. of Appeals*, 1858, *Manice v. Mayor, &c.*, of N. Y., 8 *N. Y.* (4 *Seld.*), 120. *N. Y. Superior Ct.*, 1850, *Laimbeer v. Mayor, &c.*, of N. Y., 4 *Sandf.*, 109. *Supreme Ct.*, 1850, *Waddell v. Mayor, &c.*, of N. Y., 8 *Barb.*, 95.

140. Under the provision that they may construct the work at their own expense and afterwards assess those benefited, they have power to make such assessment, although the contract under which the work was done provided that the contractor should not be paid until the money should be collected on the assessment. *N. Y. Superior Ct.*, 1849, *Wetmore v. Campbell*, 2 *Sandf.*, 841. *Ct. of Appeals*, 1853, *Manice v. Mayor, &c.*, of N. Y., 8 *N. Y.* (4 *Seld.*), 120.

141. Contract before assessment. Though a contract for making a sewer in the city of New York, if entered into before an assessment of the expense, is invalid, it does not prevent the Council making a subsequent assessment. *Supreme Ct.*, 1848, *People v. Mayor, &c.*, of N. Y., 5 *Barb.*, 43.

142. Limits of assessment. Where the Corporation directs the improvement to be made before assessing the expense, they need not determine, preliminarily, what property will be benefited, nor fix the limits of the property to be assessed. If the assessment fixes the limits, the approval of the assess-

ment by the Common Council is a sufficient designation thereof. *Ct. of Appeals*, 1853, *Manice v. Mayor, &c.*, of N. Y., 8 *N. Y.* (4 *Seld.*), 120.

143. For regulating several streets the Corporation may make one assessment, or may make an assessment for each. *Id.*

144. Abandoned street. Where a street, the fee of which does not belong to the Corporation, is altered or discontinued, the abandoned strip reverts in full and unqualified dominion to the adjacent owners, who are *prima facie*, and of common right, owners to the centre of the street. The Corporation cannot take it; for it is not for public use. Even if it were so deemed, it is not necessary to the purpose to take the fee. *Supreme Ct.*, 1839, *Matter of John & Cherry streets*, 19 *Wend.*, 659. Compare *Embury v. Conner*, 3 *N. Y.* (8 *Comst.*), 511; reversing S. C., 2 *Sandf.*, 98.

145. Lot partly required. The provision of 2 *Rev. L.*, 416, § 179,—authorizing commissioners of estimate and assessment to include a whole lot in their assessment, when only a part is required for the use of a street,—is not unconstitutional in its application to cases in which the owner consents; and where such consent has been obtained, and proceedings confirmed and damages paid, the title vests in the Corporation. *Ct. of Appeals*, 1850, *Embury v. Conner*, 3 *N. Y.* (8 *Comst.*), 511; reversing S. C., 2 *Sandf.*, 98.

146. Land which the Corporation acquired for public use, pursuant to the provisions of the act of March 29, 1816, they hold in fee, and when the necessity for which it was taken ceases, there is no reversion to the original owner, but the fee remains in the Corporation. It is competent for the Legislature to authorize the fee to be taken, and to determine upon the necessity. *Ct. of Appeals*, 1852, *Heyward v. Mayor, &c.*, of N. Y., 7 *N. Y.* (8 *Seld.*), 314; affirming S. C., 3 *Barb.*, 436.

2. Commissioners and Assessors.

147. Indifferent person. A freeholder of the city of New York cannot act as an "indifferent person," within the statute provisions for the appointment of appraisers of the damage done to the streets by laying the Manhattan pipes. *Supreme Ct.*, 1804, *Mayor, &c.*, of N. Y. v. *Manhattan Co.*, 1 *Cai.*, 507.

148. It is no objection to an assessment,

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that while the property of the Corporation is assessed, with other property, a member of the Common Council was one of the commissioners. His interest is merely nominal. *Supreme Ct.*, 1884, Matter of Twenty-sixth-street, 12 *Wend.*, 208.

149. On an application for the appointment of commissioners, affidavits showing that they are qualified must be produced. *Supreme Ct.*, 1845, Matter of Houston-street, 7 *Hill*, 175.

150. On the application for the appointment of commissioners, the court is confined to ascertaining, 1st, that the commissioners are proper and suitable persons; and 2d, the regularity of the proceedings. *Supreme Ct.*, *Sp. T.*, 1858, Opening of Albany-street, 6 *Abbott's Pr.*, 278.

151. It is a sufficient objection to naming a person as commissioner, that he has expressed opinions on a question arising in the case, that, if carried out, would defeat the application. *Id.*

152. It is not necessary that the notice of application for the appointment of commissioners should state the exact dimensions of the ground to be taken. Where it stated the proposed improvement to be, the opening of Albany-street from Broadway to Greenwich-street,—*Held*, a sufficient statement of the nature and extent of the improvement. *Id.*

153. Changing. Under the provision (2 *Rev. L.* of 1813, 413, § 178)—authorizing the court, on refusing to confirm the report, to refer the matter to the same commissioners, or to new ones to be appointed—they may refer it to a part of the old commissioners, with a part new ones. *Supreme Ct.*, 1827, Matter of Henry-street, 7 *Cow.*, 400.

154. The Council may remove the assessors appointed by it, and appoint others. *N. Y. Superior Ct.*, 1850, Laimbeer v. Mayor, &c., of N. Y., 4 *Sandf.*, 109.

3. Discontinuance.

155. Before commissioners have been appointed, and equally after appointment, if they have refused to act, the court will grant the application of the Corporation for leave to discontinue. *Supreme Ct.*, 1821, Corporation of N. Y. v. Dover-street, 18 *Johns.*, 506; and see Corporation of N. Y. v. Mapes, 6 *Johns. Oh.*, 46.

156. If the court have the power to discontinue, they should not exercise it to the preju-

dice of property owners. *Supreme Ct.*, 1822, Matter of Beekman-street, 20 *Johns.*, 269.

157. Before confirmation. The court may grant leave to discontinue, at any time before rights have become vested in the public or in individuals by the proceedings;—i. e., at any time before confirmation of the commissioners' report. *Supreme Ct.*, 1834, Matter of Canal-street, 11 *Wend.*, 154. To the same effect, 1828, People v. President of Brooklyn, 1 *Id.*, 318. Compare *Hawkins v. Trustees of Rochester, Id.*, 58. To the contrary was Matter of Beekman-street, 20 *Johns.*, 269.

4. The Assessment.

158. That an assessment is a lien which overreaches a prior mortgage. (2 *Rev. L.* of 1813, 420, § 186; 442, § 259.) *Ct. of Errors*, 1828, Dale v. McEvers, 2 *Cow.*, 118.

159. A sum assessed upon the owner of a lot for the purpose of widening a street in the city of New York, by virtue of 2 *Rev. L.*, 842, and the amendments thereof, is a lien upon the lot in respect to which the assessment is made, in the nature of a mortgage. Such lien is not discharged by an irregular and defective sale, under the statute, of the premises for its payment, although the purchaser completed his purchase by paying the money and taking a deed from the Corporation, if the money was refunded on the defect being discovered. The owner is still liable to an action for such assessment. *Ct. of Appeals*, 1854, Mayor, &c., of N. Y. v. Colgate, 12 *N. Y.* (2 *Kern.*), 140.

160. Several lots of one owner, and lying in one body, may be included in one valuation and description. *Supreme Ct.*, 1839, Matter of William & Anthony streets, 19 *Wend.*, 678.

161. The expenses of the commission are properly included in the assessment. One-third of the value of any building which it may be necessary to remove may be charged on the Corporation. *Id.*

162. Description. That if there were in fact no street-numbers, the assessment is not invalid for not describing the lots by street-numbers. *N. Y. Superior Ct.*, 1850, Laimbeer v. Mayor, &c., of N. Y., 4 *Sandf.*, 109.

163. Owner. Under section 175 of the act of 1813, as modified by the act of 1840, the assessment-list for fencing a vacant lot, and the advertisement of sale, must state the name of the owner. The person last assessed as owner, or who paid taxes as owner, is to be

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regarded as owner for the purposes of the assessment; and if the assessors inquire of the collector of taxes of the ward, and of the person who collected the taxes of the ward for the previous year, and, in consequence of information derived from those officers, insert the name of one who is not the real owner, the assessment is valid. If, however, a wrong name is inserted, such inquiry will not be presumed. *N. Y. Superior Ct.*, 1850, *Paillet v. Youngs*, 4 *Sandf.*, 50.

164. An assessment for altering a slip must be under section 269 of the statute; and property of the Corporation, if benefited, must be assessed in addition to the one-third of the expense of the improvement charged specifically upon the Corporation. *Supreme Ct.*, 1829, *Ross v. Mayor, &c.*, of N. Y., 3 *Wend.*, 388.

165. Benefit and damage. Where one will suffer damage and receive benefit from the improvement, the commissioners are not to state them separately, but only the excess of one over the other. (2 *Rev. L.*, 412, 416.) *Supreme Ct.*, 1881, *Livingston v. Mayor, &c.*, of N. Y., 8 *Wend.*, 85; 1889, *Matter of William & Anthony streets*, 19 *Id.*, 678.

166. Landlord and tenant. In making the assessment, a tenant is considered owner of the term, and his landlord owner of the reversion; and the benefit and damage in respect to each interest in the premises, are to be regarded by the commissioners in making their assessment, and should not be regarded in apportioning the rent. *Supreme Ct.*, 1886, *Gillespie v. Thomas*, 15 *Wend.*, 464. *N. Y. Superior Ct.* (1842?) *Post v. Logan*, 1 *N. Y. Leg. Obs.*, 59.

167. In estimating the damages to a lessee (2 *Rev. L.*, 416, §§ 178, 181), the commissioners must take into account all the beneficial covenants and conditions of the lease, including covenants for renewal on the one hand, and all the covenants and obligations of the lessee under it upon the other. *Supreme Ct.*, 1839, *Matter of William & Anthony streets*, 19 *Wend.*, 678.

168. Occupant. Under the statute relative to opening streets, the commissioners may assess an occupant of land deemed to be benefited. Where the assessment, after describing the premises, and stating that it was owned by A. and occupied by B. and C., assessed upon it \$120,—*Held*, a sufficient assessment

of them as owners and occupants. *N. Y. Superior Ct.*, 1849, *Gilbert v. Havemeyer*, 2 *Sandf.*, 506.

169. Award for fee of highway. Where one owning land opened a street and sold lots on each side bounding thereon, and the Corporation subsequently took the street and opened it as a public highway,—*Held*, that the commissioners should award him nominal damages for the fee, subject to the purchasers' right of way, and not award damages for the fee to the purchasers. *Supreme Ct.*, 1828, *Matter of Seventeenth-street*, 1 *Wend.*, 262. Followed, 1829, *Matter of Lewis-street*, 2 *Id.*, 472; explaining *Matter of Mercer-street*, 4 *Cow.*, 542.

170. Benefit. In assessing the benefits to be derived from opening a street, the commissioners should assume that the established plan of streets, &c., is to be carried out. *Supreme Ct.*, 1884, *Matter of Twenty-sixth-street*, 12 *Wend.*, 208.

171. It is not the duty of the commissioners to pass upon conflicting claims of title, depending either upon strongly controverted facts, or difficult questions of law. In such cases they may report an assessment for benefit, without specifying the names, or the estates, or interests of the owner. [§ 178.] *Supreme Ct.*, 1839, *Matter of William & Anthony streets*, 19 *Wend.*, 678; and see *Matter of John & Cherry streets*, *Id.*, 659. Compare *Paillet v. Youngs*, 4 *Sandf.*, 50.

172. If there is no question of difficulty, the owner's name, if ascertainable, must be specified. An award of the widow's dower should not be made to the estate of her husband. *Supreme Ct.*, 1839, *Matter of William & Anthony streets*, 19 *Wend.*, 678.

173. Apportionment of rent. Where part of a leased lot is taken, the commissioners must, under the statute, apportion the rent in the common-law method, reducing it in the ratio that the value of the part taken bears to the value of the whole, and not according to the area. *Supreme Ct.*, 1886, *Gillespie v. Thomas*, 15 *Wend.*, 464. Approved, *Ct. of Errors*, 1840, in *Gillespie v. Mayor, &c.*, of N. Y., 28 *Id.*, 648; and see *Wiggin v. Mayor, &c.*, of N. Y., 9 *Paige*, 16.

174. The common-law rule of apportioning rent should not be followed when its application would be unjust. In such cases the value of the term should be estimated at a supposed

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rent for the part taken and for the part remaining, and the apportionment made in proportion. *N. Y. Superior Ct.* (1842?), Post v. Logan, 1 *N. Y. Leg. Obs.*, 59.

175. The apportionment should be made with reference to, and takes effect from, the final confirmation of the report. *Supreme Ct.*, 1836, *Gillespie v. Thomas*, 15 *Wend.*, 464. *N. Y. Superior Ct.* (1842?), Post v. Logan, 1 *N. Y. Leg. Obs.*, 59.

176. Award between landlord and tenant. Where the commissioners assess the damages of the owner of the fee, and also the damages of his lessee, and the report is confirmed, it is conclusive, and the lessee cannot recover from the owner a part of the award to the latter, on proof that a part was intended by the commissioners for his benefit. *Supreme Ct.*, 1838, *Turner v. Williams*, 10 *Wend.*, 139.

177. But where the commissioners awarded the entire damages to the lessor, in ignorance of the lessee's ownership of the buildings, and it appeared that a certain sum was included for the buildings,—*Held*, that the lessee might recover that sum. *A. V. Chan. Ct.*, 1845, *Contant v. Catlin*, 2 *Sandf. Ch.*, 485.

178. Evidence. The commissioners have, at common law, power to administer oaths to witnesses; and in the city of New York they have it by statute. They have no right to receive unsworn estimates of the appraisers; and if they govern themselves by such estimates, the report will be sent back. *Supreme Ct.*, 1839, Matter of John & Cherry streets, 19 *Wend.*, 659.

179. They may add to their stock of knowledge by proper inquiries addressed to persons not on oath; but, coming to the particular damage of cutting away buildings on a street, &c., if they do not personally perform the duty of inspection and appraisal, they should take the oaths of witnesses. [4 *Rawle*, 192.] *Id.*

180. Oaths. It is enough if the assessors make oath to their assessment at any time before they report it to the Council. *N. Y. Superior Ct.*, 1850, *Laimbeer v. Mayor, &c.*, of N. Y., 4 *Sandf.*, 109.

181. Vacating. The act of 1858 (*Laws of 1858*, 574, ch. 388)—authorizing an application by an aggrieved party to a justice of the Supreme Court to vacate any assessment for fraud or irregularity—applies to assessments made before, as well as those made after its

passage. The act only affects the remedy. *Supreme Ct., Sp. T.*, 1859, Matter of Beams, 17 *How. Pr.*, 459.

15. The Report. Reviewing, Confirming, &c.

182. After reviewing their report and making alterations, the commissioners are not bound to file a copy of the amended report and give a new notice. *Chancery*, 1828, *Patterson v. Mayor, &c.*, of N. Y., 1 *Paige*, 114. Followed, *Supreme Ct.*, 1839, Matter of William & Anthony streets, 19 *Wend.*, 678; and see *Bouton v. President of Brooklyn*, 2 *Id.*, 395.

183. Notice. Under 2 Rev. L. of 1818, 417, § 182, requiring notice, by mail and publication, of the time of presenting the report for confirmation, and that, if objections are made, the commissioners must review their assessment, one notice is enough. A new notice as often as the commissioners review the assessment is not necessary. *Chancery*, 1828, *McLaren v. Pennington*, 1 *Paige*, 102.

184. Practice. Of the requisite notice calling for objections to the report, and of filing the report. Matters of Reed and Duane streets, 6 *Abbotts' Pr.*, 273, note.

185. Report partly void. If the report must be referred back upon the ground that the appropriation of a part of the lands is void, it cannot stand for the residue, for the failure of part may make material alterations necessary. *Supreme Ct.*, 1839, Matter of John & Cherry streets, 19 *Wend.*, 659.

186. Costs. The act of April, 1839, § 12, relative to the city of New York, only requires that the costs and charges of the commissioners, attorney, counsel, &c., should be regularly taxed before they are paid; not that they shall be taxed before the assessment is made and confirmed, which from the nature of the proceedings cannot be done. *Chancery*, 1841, *Wiggin v. Mayor, &c.*, of N. Y., 2 *Paige*, 16.

187. Rates of taxation of costs in street-opening cases, before 1855, in the city of New York, under Laws of 1854, 281, ch. 122. Matter of the Bowery, 19 *Barb.*, 588.

188. Recommitting. The Supreme Court has power, on its own motion, as well as on the application of the commissioners, or of any party interested, to recommit the report after it has been completed and presented to the court for action, and before confirmation. Where, after filing, but before confirmation, the commissioners certified to the court that

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they had erred in omitting to exercise their power to assess a portion of the expense of the improvement upon the city at large, it was thus referred back to them for correction. *Supreme Ct.*, 1850, Matter of Canal-street, 8 *Barb.*, 505. Compare Woodruff v. Fisher, 17 *Id.*, 224.

189. New affidavits. As the commissioners are bound to review their report if objections are made (2 *Rev. L. of* 1818, 842, 408), affidavits not served upon the commissioners with the objections of the party, so as to enable them to decide whether they are ground for altering their report, cannot be read in opposition to the motion to confirm it. *Supreme Ct.*, 1819, Matter of Harman-street, 16 *Johns.*, 281; and see Matter of William & Anthony streets, 19 *Wend.*, 678.

So held, also, under the act of 1847, "To provide for the opening of Washington Park in the city of Brooklyn." *N. Y. Superior Ct.*, 1848, Matter of Washington Park, 1 *Sandf.*, 288.

190. But in a case of surprise, the court may, upon such affidavits, refer the report back for reconsideration under § 178. *Supreme Ct.*, 1823, Matter of Dover-street, 1 *Cow.*, 74.

191. Objections made on the motion to confirm the report are in the nature of an appeal from the commissioners, and can properly be decided only upon the affidavits and evidence they had before them; but new affidavits may be received in support of, but not to oppose, the report. *Supreme Ct.*, 1839, Matter of William & Anthony streets, 19 *Wend.*, 678. Followed, Matter of John & Cherry streets, *Id.*, 659.

192. Affidavits of parties in interest are not admissible in opposition to the report. *Supreme Ct.*, 1839, Matter of John & Cherry streets, 19 *Wend.*, 659; 1841, Matter of Twenty-ninth street, 1 *Hill*, 189.

193. The question upon confirming. As a general rule, reviews of the report can extend to matter of principle only, and not to mere questions of value. *Supreme Ct.*, 1836, Matter of Furman-street, 17 *Wend.*, 649; 1839, Matter of John & Cherry streets, 19 *Id.*, 659.

194. That a departure from principle in this respect must be clearly made out. *Supreme Ct.*, 1839, Matter of John & Cherry streets, 19 *Wend.*, 659.

195. In respect to values, the report is in

the nature of a verdict of a jury upon a question of fact; and the court will not set it aside unless there is a plain and decided preponderance of evidence against it. *Supreme Ct.*, 1839, Matter of Pearl-street, 19 *Wend.*, 651. To the same effect [citing, also, 17 *Wend.*, 668; 5 *Mass.*, 435; 9 *Id.*, 888; 2 *Id.*, 489; 1 *Pick.*, 418], Matter of John & Cherry streets, *Id.*, 659; Matter of William & Anthony streets, *Id.*, 678.

196. Effect of confirmation. Under the statutes relating to New York, nothing is submitted to the court but the fitness of the commissioners, the regularity of the proceedings of the Corporation and the commissioners, and the justness of the estimates and assessment. An order of confirmation is not an adjudication upon the effect of the proceedings, such as to conclude owners from subsequently raising a question as to their legal effect. *Ct. of Appeals*, 1850, Embury v. Conner, 8 *N. Y. (3 Comst.)*, 511; reversing S. C., 2 *Sandf.*, 98.

197. Power of court. In proceedings on the reports of commissioners, in street cases, the court derives its powers wholly from statute, and act as commissioners, rather than as a court; and their confirmation is conclusive, and it cannot be reviewed by them, either on the merits or for irregularity, unless it be voluntarily waived by all parties concerned. *Supreme Ct.*, 1823, Matter of Beekman-street, 20 *Johns.*, 269; 1827, Matter of Third-street, 6 *Cow.*, 571; 1841, Matter of Mount Morris Square, 2 *Hill*, 14; S. P., 1828, People v. President of Brooklyn, 1 *Wend.*, 816; 1811, Stafford v. Mayor, &c., of Albany, 7 *Johns.*, 541. Compare Woodruff v. Fisher, 17 *Barb.*, 224; and see Striker v. Kelly, 2 *Den.*, 323.

198. That in other respects the court act as a court. *Supreme Ct.*, 1834, Matter of Canal-street, 11 *Wend.*, 154.

199. The Supreme Court, under 2 Rev. L. of 1818, 409, § 178, acts as a court in reviewing the report; not as commissioners nor as a tribunal of limited jurisdiction.* *Ct. of Appeals*, 1855, Matter of Canal & Walker streets, 12 *N. Y. (2 Kern.)*, 406. Compare Bowery Extension Case, 2 *Abbotts' Pr.*, 368; S. C., 12 *How. Pr.*, 97.

* See, also, Embury v. Conner, 8 *N. Y. (3 Comst.)*, 511, in which it is said that since Striker v. Kelly (7 *Hill*, 9, and 2 *Den.*, 323), it is settled that the court acts as a court, not as commissioners; and to the same effect is Doughty v. Hope, 3 *Den.*, 249.

Applying for Payment of Award;—Collection of Assessments. Sales. Purchaser's Title.

200. Chancery has not power to interfere with, or set aside, an assessment on the proprietors and occupants of lots, made by commissioners of estimate and assessment under authority of a statute, for the purpose of a local improvement, on the ground merely of a mistake in judgment of the commissioners, and of the Common Council in ratifying it, where there is no allegation of partiality or unfairness. [8 Atk., 689; 4 Bro., 165; 1 Johns. Ch., 18.] The remedy, if any, is at law. *Chancery*, 1820, *Le Roy v. Mayor, &c.*, of N. Y., 4 *Johns. Ch.*, 852; 8 P., 1822, *Moore v. Smedley*, 6 *Id.*, 28. Followed, 1828, *Patterson v. Mayor, &c.*, of N. Y., 1 *Paige*, 114; 1829, *Whitney v. Mayor, &c.*, of N. Y., *Id.*, 548. Compare *Woodruff v. Fisher*, 17 *Barb.*, 224.

201. Irregularities in the proceedings to confirm the assessment, which do not render the proceedings void, but only voidable, will not authorize a court of equity to interfere by injunction. *Chancery*, 1828, *Patterson v. Mayor, &c.*, of N. Y., 1 *Paige*, 114.

202. If all the assessors certify the assessment and the council ratify it, it cannot be impeached by alleging that all did not act in making it. *Supreme Ct., Sp. T.*, 1851, *Morewood v. Corporation of N. Y.*, 6 *Hov. Pr.*, 886.

6. Applying for Payment of Award.

203. Notice. Applicants for damages awarded to unknown owners, and paid into court, must publish six weeks' previous notice of their application, in a daily newspaper of the city, describing the property, and give notice to the Corporation. *Supreme Ct.*, 1828, *Matter of Dewint*, 1 *Cow.*, 595.

204. Security. If the applicant makes out a clear case, he will not be required to give security to refund if called on. *Supreme Ct.*, 1824, *Matter of De Wint*, 2 *Cow.*, 498; but see *Matter of Art-street*, 20 *Wend.*, 685.

205. A map must accompany the petition. *Supreme Ct.*, 1828, *Matter of Bogart*, 1 *Wend.*, 41.

206. Decedent's estate. Neither notice in the newspapers, nor security to refund, is required in case of moneys awarded to the estate of a deceased person. *Supreme Ct.*, 1840, *Matter of Art-street*, 20 *Wend.*, 685.

7. Collection of Assessments. Sales. Purchaser's Title.

207. Although a demand of an assessment must be made before levy, yet it need not be made before issuing the warrant; nor need it be made by the collector, but is as good if made by his deputy: and hence an omission in the answer to deny an allegation in the complaint "that no demand was made by the said A.," the collector, is not an admission that it was not made by the deputy. *Ct. of Appeals*, 1853, *Manice v. Mayor, &c.*, of N. Y., 8 *N. Y.* (4 *Seld.*), 120.

208. A warrant to collect an assessment which is regular as against the owner, is not avoided by the fact that it directs the officer to levy on his goods, &c., or of "those who may occupy the premises." Even if void as against an occupant, it is still good as against the owner. *Supreme Ct.*, 1846, *Doughty v. Hope*, 8 *Den.*, 249. Compare *Gilbert v. Havemeyer*, 2 *Sandf.*, 506.

209. An assessment upon an occupant must name him; and a warrant to collect the assessment from the person named, "or any one who may occupy the premises," is void as against an occupant not named, and the officer is a trespasser, if he levy upon his goods. *N. Y. Superior Ct.*, 1849, *Wetmore v. Campbell*, 2 *Sandf.*, 341.

210. The warrant may issue to a collector. *Id.* See, also, *Gilbert v. Havemeyer*, 2 *Sandf.*, 506.

211. The warrant ought, by schedule or in itself, to state when the assessment was confirmed by the Supreme Court, the names of the persons assessed, both owners and occupants, a brief description of the premises assessed, and the amount of the assessment. If it omits to set forth the name of the occupant, it is void as to him. *N. Y. Superior Ct.*, 1849, *Gilbert v. Havemeyer*, 2 *Sandf.*, 506.

212. The conditions of sale on assessment, made by the street-commissioner, are binding upon the Corporation; and if the sale is irregular and illegal, the purchaser may recover his money. *N. Y. Superior Ct.*, 1848, *Bennett v. Mayor, &c.*, of N. Y., 1 *Sandf.*, 485.

213. Where a party sets up a title to land under a sale for non-payment of an assessment for opening a street in the city of New York, under the statute (*sess. L. of 1816*, 115, § 2), he must show the authority to sell,

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and must therefore prove that the collector has made affidavit that the tax had been demanded, &c., as provided by the act. The lease given to the purchaser, though it is made conclusive evidence of the regularity of the sale, does not prove the authority to sell. *Ct. of Errors*, 1845, *Striker v. Kelly*, 2 *Den.*, 328.

214. To make an assessment-sale valid, the affidavit of the collector must state that two demands of payment have been made of the owner of the lot, and an omission or refusal to pay the assessment. *N. Y. Superior Ct.*, 1848, *Bennett v. Mayor, &c.*, of N. Y., 1 *Sandf.*, 485.

215. The notice to redeem required by § 8 of the act of 1841, cannot be given until after the delivery of the conveyance or lease from the Corporation. *N. Y. Superior Ct.*, 1850, *Paillet v. Youngs*, 4 *Sandf.*, 50.

216. Publication of the notice to redeem must be completed before the commencement of the last six months of the two years succeeding the sale, and an omission in this respect will invalidate the purchaser's title. *Ct. of Appeals*, 1847, *Doughty v. Hope*, 1 *N. Y.* (1 *Comst.*), 79; *S. C.*, 3 *Den.*, 594. Followed, *N. Y. Superior Ct.*, 1848, *Bennett v. Mayor, &c.*, of N. Y., 1 *Sandf.*, 485.

217. The lease is no evidence of the due publication of the notice to redeem. *Supreme Ct.*, 1844, *Striker v. Kelly*, 7 *Hill*, 9. *Ct. of Appeals*, 1847, *Doughty v. Hope*, 1 *N. Y.* (1 *Comst.*), 79; *S. C.*, 3 *Den.*, 594.

218. The certificate of the street-commissioner, required by section 7 of the same act, does not confirm the title. *Ct. of Appeals*, 1847, *Doughty v. Hope*, 1 *N. Y.* (1 *Comst.*), 79; *S. C.*, 3 *Den.*, 594.

219. That the ratification, by the Common Council, of a void assessment, does not aid it. *Id.*

8. Particular Works.

220. The charter of the Manhattan Company authorizes them temporarily to occupy a street for the purpose of opening fountains, or laying subterranean aqueducts; but not to take the fee of the land discharged of the street. *Supreme Ct.*, 1840, *Exp. Manhattan Co.*, 22 *Wend.*, 658.

221. Objection to confirming report. Since the judge who has granted, cannot, under the statute, revoke an order for the appointment of appraisers, a party who has not

sufficient notice of the application may object to the report at the time application is made to confirm it. *Supreme Ct.*, 1804, *Mayor, &c.*, of N. Y. v. *Manhattan Co.*, 1 *Cai.*, 507.

222. Croton water-works. The water-commissioners may take the fee of the land, even where their principal object is to procure materials for the work; and they may take any land they deem proper for the purposes of the work, in conformity with the plan adopted for supplying the city with water. They may take separate and adjoining parcels from the same owner at different times. *V. Chan. Ct.*, 1842, *Matter of Water-commissioners*, 3 *Edw.*, 552.

223. Section 18 of the act of 1834, for supplying water to the city of New York,—which provides for an appraisal of damages in certain cases,—does not apply to damages springing from the failure of a dam defectively constructed by the commissioners, upon land appropriated by the city under the act. *Ct. of Errors*, 1845, *Mayor, &c.*, of N. Y. v. *Bailey*, 2 *Den.*, 438; affirming *S. C.*, 3 *Hill*, 581.

224. Disagreement of the water-commissioners with the owners is a jurisdictional fact, which must precede an application to the vice-chancellor for the appointment of appraisers; but if the record shows such a disagreement, and the owner appeared, he cannot afterwards collaterally impeach its existence. *Ct. of Appeals*, 1851, *Dyckman v. Mayor, &c.*, of N. Y., 5 *N. Y.* (1 *Seld.*), 434; affirming *S. C.*, 7 *Barb.*, 498.

225. A tender, within the statute time, of the amount appraised, made to a party who acted in the proceedings for his co-tenants, by their authority, is sufficient. *Supreme Ct.*, 1849, *Dyckman v. Mayor, &c.*, of N. Y., 7 *Barb.*, 498; affirmed, *Ct. of Appeals*, 1851, 5 *N. Y.* (1 *Seld.*), 434.

226. Central Park. Under the act of 1853, relating to lands taken for the Central Park, though an award of damages is payable immediately, an action will not lie upon it until after application to the Common Council for payment. *Supreme Ct.*, *Sp. T.*, 1856, *Shepherd v. Mayor, &c.*, of N. Y., 13 *How. Pr.*, 286.

VIII. TAXES.

227. Judges' salaries. The act of 1852, authorizing the supervisors of New York to raise by the county tax additional annual com-

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pensation to the judge of the Supreme Court of the first district, is not unconstitutional; and, the board having allowed such compensation, the county-treasurer is bound to pay it, upon a copy of their resolution auditing a claim for it. *Supreme Ct., Sp. T., 1853, People v. Edmonds, 15 Barb., 529.*

228. The powers and duties of the supervisors of the city and county of New York in reference to taxation—considered. *Shepard v. Wood, 18 How. Pr., 47.*

229. The supervisors in the city and county of New York have greater powers than in other counties, and may, on application within six months after the assessment-rolls are returned (*Laws of 1844, ch. 250, § 2*), or upon application within six months from the delivery of the books to the receiver, for collection, remit or reduce a tax. (*Laws of 1850, ch. 121, § 27.*) Although the books may have passed out of the hands of the supervisors, they have still the power to correct them. *Supreme Ct., Sp. T., 1854, Adriance v. Supervisors of N. Y., 12 How. Pr., 224.*

230. After the taxes are assessed in the city of New York, and warrants are issued and delivered to the receiver, the board of supervisors have no further control over the assessment-rolls, and cannot thereafter strike a name from them. *Supreme Ct., Sp. T., 1856, Colonial Life Assurance Co. v. Supervisors of N. Y., 24 Barb., 166; S. C., 4 Abbott's Pr., 84; 18 How. Pr., 805.*

231. The power of the supervisors of New York, upon application made to them within six months after the tax-rolls are delivered to the receiver, to remit or reduce a tax, is discretionary with them; and they are the judges of the cause shown. *Id.*

232. Reducing tax. The affidavit alone of the owner, to reduce the valuation of his property below that imposed by the assessors, without examination, reduced to writing, before the assessors or the tax-commissioners, is not enough to entitle him to a reduction of the tax. *Supreme Ct., Sp. T., 1854, Adriance v. Supervisors of N. Y., 12 How. Pr., 224.*

233. Increasing. The tax-commissioners of the city and county of New York have no power to increase the assessors' valuation of property; their power, under the act of 1851, which authorizes them to add and assess, according to law, property liable to taxation, which may have been omitted by the assessors,

—is not an appellate power to increase the assessors' valuation; it is limited in its terms to cases in which the property has not been assessed, or in which, by accident or otherwise, they have not exercised their judgment. Hence, where the tax-commissioners increase the valuation made by the assessors, the board of supervisors may be compelled by mandamus to correct the assessment by conforming it to the original. *Id.*

234. The Fire Department of the city of New York is the representative of a public charity, for benefit of which a tax or license-fee may be laid. *N. Y. Com. Pleas, 1854, Fire Department v. Noble, 8 E. D. Smith, 440.*

As to **Taxation**, consult also **TAXES**.

NEXT FRIEND.

1. When necessary. No next friend, or security for costs, is required by 2 Rev. Stat., 446, § 2,—which relates to suits commenced in the name of an infant plaintiff,—unless the infant is sole plaintiff. *So held*, where a husband sued with his infant wife. *Supreme Ct., Sp. T., 1849, Hulburt v. Newell, 4 How. Pr., 93; S. C., 2 Code R., 54.*

2. In an action for an absolute divorce against a wife, there can be no proceeding against the wife after service of the summons, until her next friend has been appointed. [Code, § 114.] If she neglects to procure the appointment, it will be made by the court on the application of the plaintiff. *N. Y. Superior Ct., 1852, Meldora v. Meldora, 4 Sandf., 721; but see PARTIES, III.*

3. If a married woman plaintiff is not an infant or lunatic, &c., no order for leave to sue by next friend, or for the appointment of next friend, is necessary. [1 Hoffm. Pr., 66.] *Supreme Ct., Sp. T., 1853, Towner v. Towner, 7 How. Pr., 887.*

4. A prochain ami is not a party, but rather an attorney, and hence may be surety in replevin. *Supreme Ct., 1842, Anonymous, 2 Hill, 417.*

5. Want of. An objection that one of the complainants, being a feme covert, did not appear by a next friend, being a matter of form rather than substance, may be disregarded, when taken *ore tenus* at the hearing. *V. Chan. Ct., 1838, Schenck v. Ellingwood, 3 Edw., 175.*

Nonsuit;—At the Trial.

6. Responsibility. Rule 168—requiring a next friend in a divorce suit to be “a responsible person”—means that he should be worth at least \$250 above all debts. *Chancery*, 1832, *Robertson v. Robertson*, 8 *Paige*, 887.

Consult, also, *GUARDIAN AD LITEM*.

NEXT OF KIN.

DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; LEGATEES.

NON-INTERCOURSE ACT.

1. Seizure. The Non-intercourse Act of Congress (§ 8) authorized officers of customs to seize prohibited goods without a warrant, at least where they could without entering a dwelling. *Supreme Ct.*, 1814, *Sailly v. Smith*, 11 *Johns.*, 500.

2. The act was virtually repealed by the declaration of war with Great Britain. *Supreme Ct.*, 1818, *Amory v. McGregor*, 15 *Johns.*, 24.

NON-RESIDENTS.

As to *Proceedings against*, see *ATTACHMENT*, and *SERVICE*.

As to *Who are*, see *DOMICIL*.

NONSUIT.

I. AT THE TRIAL.

II. JUDGMENT AS IN CASE OF NONSUIT.

1. In what cases allowed. *Excuses for failing to try.*

2. The motion; how made and how determined.

I. AT THE TRIAL.

1. Voluntary nonsuit. Whether the jury leave their bench or not, the plaintiff, by not answering when called, may preclude them from giving a verdict. *Supreme Ct.*, at *N. P.*, 1808, *Cunningham v. Duncan*, *Anth. N. P.*, 61.

2. Plaintiff held entitled to submit to a nonsuit, notwithstanding jury were ready with a verdict on a claim of set-off. *Supreme Ct.*, 1829, *Wooster v. Burr*, 2 *Wend.*, 295.

3. A verdict is irregular, if the plaintiff is

not called by the clerk on the coming in of the jury, before taking the verdict, and his appearance or default entered. *Supreme Ct.*, *Sp. T.*, 1845, *Gale v. Hoysradt*, 1 *How. Pr.*, 72. Compare *S. C.*, *Id.*, 19.

4. The plaintiff in replevin may suffer a nonsuit on the trial, as in ordinary actions. [Tidd's *Pr.*, *Phil. ed.* of 1840, 869; *Ryan & M.*, 355; 2 *C. & P.*, 358; 2 *Rev. Stat.*, 531, § 53, 56.] *Supreme Ct.*, *Sp. T.*, 1845, *Gale v. Hoysradt*, 1 *How. Pr.*, 72.

5. Under section 1 of the act for more easy pleading, &c. (1 *Greenl.*, 343),—providing that in certain suits against officers, if the plaintiff does not prove the cause of action committed within the county wherein the suit is laid, the defendant shall be found not guilty,—an officer sued in the wrong county is entitled to a verdict in his favor. The plaintiff cannot elect to become nonsuited. *Supreme Ct.*, 1830, *Hull v. Southworth*, 5 *Wend.*, 265.

6. It shall not be necessary to call the plaintiff when the jury return to the bar to deliver their verdict; and the plaintiff shall have no right to submit to a nonsuit, after the jury have gone from the bar to consider of their verdict. *Supreme Ct.*, *Rule 46 of 1847*; 31 of 1858.

7. Compulsory nonsuit. If the evidence offered by the plaintiff does not support his action, and there is no question of fact for the jury to decide, the court may nonsuit him, although against his consent. This power results, necessarily, from the courts being judges of the law of the case, when there are no facts in dispute. *Supreme Ct.*, 1816, *Pratt v. Hull*, 13 *Johns.*, 334. *S. P.*, *Ct. of Appeals*, 1851, *Labar v. Koplin*, 4 *N. Y. (4 Comst.)*, 547.

8. And this power is possessed by Courts of Common Pleas, as well as by justices of the peace. [12 *Johns.*, 299.] *Supreme Ct.*, 1816, *Pratt v. Hull*, 13 *Johns.*, 334; 1831, *Foot v. Sabin*, 19 *Id.*, 154.

9. If the evidence adduced by plaintiff will not authorize the jury to find a verdict for the plaintiff, or if the court would set aside a verdict in his favor as contrary to evidence, it is the duty of the court to nonsuit him. *Supreme Ct.*, 1828, *Stuart v. Simpson*, 1 *Wend.*, 376; 1831, *Demeyer v. Souzer*, 6 *Id.*, 436; 1835, *Wilson v. Williams*, 14 *Id.*, 146; 1837, *Doane v. Eddy*, 16 *Id.*, 523; 1848, *McMartin v. Taylor*, 2 *Barb.*, 356; 1851, *Carpenter v. Smith*, 10 *Id.*, 663.

At the Trial.

10. That a nonsuit may be sustained on grounds other than that on which it was granted. *Supreme Ct.*, 1844, *Bakewell v. Ellsworth*, 6 *Hill*, 484; affirming *S. O.*, 1 *N. Y. Leg. Obs.*, 346.

11. — in malicious prosecution. In an action for malicious prosecution, where it appears that the prosecution complained of terminated in a compromise instead of an acquittal, the defendant is entitled to a nonsuit. *Supreme Ct.*, 1827, *McCormick v. Sisson*, 7 *Cow.*, 715.

12. So, if upon the whole testimony the judge sees there is no evidence of probable cause. *Supreme Ct.*, 1829, *Masten v. Deyo*, 2 *Wend.*, 424.

13. — in action for negligence. In an action for damages through negligence,—*e. g.*, for negligently running defendants' cars against plaintiff's wagon,—if it does not appear from the plaintiff's evidence that he himself was free from negligence, it is the duty of the court to nonsuit him. *Supreme Ct.*, 1849, *Spencer v. Utica & Schenectady R. R. Co.*, 5 *Barb.*, 387; 1858, *Mackey v. N. Y. Central R. R. Co.*, 27 *Id.*, 528.

14. The question of negligence should be submitted to the jury, if there is conflicting evidence, or if the proofs leave the matter in doubt. But when, upon the plaintiff's own showing, he has no cause of action, by reason of negligence, or has defeated his claim by his own misconduct, there can be no propriety in requiring the jury to pass upon the evidence, but a nonsuit should be ordered. *Supreme Ct.*, 1852, *Haring v. N. Y. & Erie R. R. Co.*, 18 *Barb.*, 9.

15. — in premature suit. Where it appears on the trial that the suit was prematurely brought,—*e. g.*, where a suit on a note was commenced before the expiration of the three days of grace,—the defendant is entitled to a nonsuit. The plaintiff is bound, under non-assumpsit, to show a good cause of action existing at the time of commencing the suit. *Supreme Ct.*, 1829, *Osborn v. Moncure*, 8 *Wend.*, 170; overruling *Crygier v. Long*, 1 *Johns. Cas.*, 898; and *Lawrence v. Bowne*, 2 *Id.*, 225.

16. — in an action for use and occupation. If the plaintiff prove an agreement in writing, not under seal, he cannot be nonsuited, but may use it as evidence of the quantum of damages. [1 Rev. L. of 1813, 444,

§ 31; 1 Rev. Stat., 748, § 26.] *Supreme Ct.*, 1881, *Williams v. Sherman*, 7 *Wend.*, 109.

17. — in action wrongly laid. Where the action is local and the venue is wrongly laid, but the objection does not appear on the record, so as to entitle defendant to demurrer, he may demand a nonsuit at the trial. *Supreme Ct.*, 1834, *Rightmyer v. Raymond*, 12 *Wend.*, 51.

18. But where, in a local action laid in the wrong county, a motion to nonsuit was erroneously denied, but before the hearing of a motion for new trial a statute was passed rendering the action transitory, so that the new trial, if granted, might be had in the same county,—it was *Held*, useless to grant a new trial. *Id.*

19. A plaintiff declared against a witness, in one count for the damages, and in another for the penalty, but laid a different venue from that of the first action: the judge nonsuited him at the trial. *Held*, regular; though the plaintiff was entitled upon the evidence to a verdict on the count for the damages, and might have had it by abandoning the other. The count for the penalty was local. The plaintiff was bound to abandon it, to entitle himself to go on upon the other. *Supreme Ct.*, 1834, *Cogswell v. Meech*, 12 *Wend.*, 147.

20. — in joint action. In actions arising *ex contractu*, where the legal interest is joint,—*e. g.*, an action by partners,—those in whom such interest is vested must, if living, join in an action for the breach of such contract; and the objection may be made upon the trial, as a ground of nonsuit, upon the general issue, if it appears that there is another person living, not made a party, who has a joint interest in the contract. *Supreme Ct.*, 1819, *Dob v. Halsey*, 16 *Johns.*, 84.

21. When there is any evidence on the part of a plaintiff of the fact put in issue by the pleadings, a refusal to nonsuit is not good cause for an exception. *Supreme Ct.*, 1848, *Kelly v. Kelly*, 8 *Barb.*, 419.

22. A motion for nonsuit, properly denied, if plaintiff is entitled to recover something, although it be but nominal damages. *Ct. of Appeals*, 1849, *Van Rensselaer v. Jewett*, 2 *N. Y. (2 Comst.)*, 185.

23. The court cannot nonsuit the plaintiff against his will, where he has adduced any evidence competent to go to the jury, tending

At the Trial.

to make out a case. *Ct. of Appeals*, 1851, *Labar v. Koplin*, 4 *N. Y. (4 Comst.)*, 547.

24. Thus where, on the trial of an action for an assault and battery, the plaintiff called two witnesses, one of whom testified to the assault without stating any matter to justify it, and the other also proved the same assault, but stated circumstances of justification;—*Held*, that the court could not be required to nonsuit the plaintiff. *Id.*

25. Evidence on both sides. A nonsuit may be granted after evidence has been given on both sides. *Ct. of Errors*, 1844, *Rudd v. Davis*, 7 *Hill*, 529. *Supreme Ct.*, 1839, *Fort v. Collins*, 21 *Wend.*, 109; *Jansen v. Acker*, 23 *Id.*, 480.

26. To warrant a nonsuit on the defendant's evidence, after the plaintiff has made out a *prima-facie* case, it is not necessary that the evidence should be conclusive in its character. It is enough that a verdict for the plaintiff would be against the clear weight and effect of the defensive evidence, whatever may be its character. *Ct. of Errors*, 1844, *Rudd v. Davis*, 7 *Hill*, 529.

27. Credibility of witness. Whether, under the circumstances, a witness produced by plaintiff is a credible witness or not, is solely a question for the consideration of the jury. A nonsuit cannot be granted on the assumption, by the judge, that the plaintiff's witness is not to be believed. *Supreme Ct.*, 1848, *Merritt v. Lyon*, 3 *Barb.*, 110.

28. Absence of witness. On a trial, the plaintiff's counsel having examined a witness, before dismissing the witness from the stand, publicly inquired of the defendants' counsel whether any of the facts testified to by him would be controverted on the trial; to which the defendant's counsel replied—"no." The right to cross-examine the witness was not reserved by the defendants' counsel. At the close of the trial, the defendant's counsel called the said witness for further examination. The witness did not appear, and the defendant's counsel called upon the plaintiffs to produce him, which they declined to do, saying he had gone home without their leave, and that they had received no intimation, until after the witness had left, that his further examination was desired. This was one ground upon which, after the evidence on both sides was in, the defendants moved for a nonsuit.

Held, that under these circumstances the

plaintiffs were under no obligation to detain the witness for the purpose of further examination by the defendant's counsel. Counsel should avail themselves of the opportunity to cross-examine before the witness leaves the stand; unless the court, for some good reason, should allow them the privilege, at a subsequent stage of the trial. In this case, the plaintiff's counsel had good reason to suppose the witness would not be wanted further by the defendants. *Supreme Ct.*, 1856, *Sheffield v. Rochester & Syracuse R. R. Co.*, 21 *Barb.*, 889.

29. Allowing plaintiff to resume proof. Where the plaintiff rests on an incomplete case, the judge may, in his discretion, deny a nonsuit and permit him to resume his evidence. *Ct. of Appeals*, 1852, *Hunt v. Maybee*, 7 *N. Y. (3 Seld.)*, 266.

30. It is a matter entirely in the discretion of the justice, whether he will allow a plaintiff to give additional evidence after a motion for a nonsuit. And his refusal to allow evidence to be given, forms no ground for reversing his judgment on appeal. *N. Y. Com. Pl.*, 1851, *Reed v. Barber*, 3 *Code R.*, 160.

31. Assessing contingent damages. Where there is a demurrer to one count of the declaration, and a plea to another, and plaintiff is nonsuited upon the latter, he cannot go on to assess contingent damages upon the count demurred to. *Supreme Ct.*, 1827, *Packard v. Hill*, 7 *Cow.*, 484; affirmed, on other grounds, *sub nom.* *Hill v. Packard*, 5 *Wend.*, 375.

32. Evidence afterwards supplied. A new trial will not be granted on the ground that a nonsuit was refused when the plaintiff rested on evidence not sufficient to entitle him to recover, if the defendant afterwards on the trial supplied the necessary proof. *Supreme Ct.*, 1831, *Jackson v. Leggett*, 7 *Wend.*, 377; 1842, *Colvin v. Burnet*, 2 *Hill*, 620. *N. Y. Com. Pl.*, 1852, *Bean v. Canning*, 10 *N. Y. Leg. Obs.*, 248; *S. C.*, less fully reported, 2 *E. D. Smith*, 419, note; 1855, *Mayor, &c., of N. Y. v. Mason*, 4 *Id.*, 142; *S. C.*, more fully reported, 1 *Abbotts' Pr.*, 344. *N. Y. Superior Ct.*, 1857, *Colgrove v. Harlem and New Haven R. R. Cos.*, 6 *Duer*, 382, 412.

33. Although a nonsuit applied for on account of a defect in proof might properly have been granted, yet if either party in the course of trial supplies the proof which was before wanting, the objection is obviated. *Ct. of*

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Appeals, 1854, Schenectady & Saratoga Plank-road Co. v. Thatcher, 11 *N. Y.* (1 *Kern.*), 102. *Supreme Ct.*, 1829, Lansing v. Van Alstyne, 2 *Wend.*, 561; 1855, Barrick v. Austin, 21 *Barb.*, 241. *N. Y. Com. Pl.*, 1852, Breidert v. Vincent, 1 *E. D. Smith*, 542; 1855, Mayor, &c., of *N. Y.* v. Mason, 1 *Abbotts' Pr.*, 844.

34. After the plaintiff rested, the defendant offered to demur to the evidence, which was overruled, and he excepted. He then, instead of relying upon the exception, gave evidence upon his part, and submitted the cause upon the whole evidence. *Held*, that his exception to the refusal of his demurrer was waived, and although the refusal was erroneous, yet if the jury found against him upon the whole evidence, and properly so, he was not entitled to a new trial. *N. Y. Superior Ct.*, 1857, Colgrove v. Harlem and New Haven R. R. Co., 6 *Duer*, 382, 412.

35. **Questions of pleading.** If the plaintiff proves all that is laid in his declaration, he ought not to be nonsuited. If the declaration is bad, the defendant's remedy is by demurrer, or motion in arrest. The only ground for nonsuit at the trial must be that the proof is not sufficient to support the declaration. *Ct. of Errors*, 1828, Safford v. Stevens, 2 *Wend.*, 158.

36. The necessity or sufficiency of a particular averment in the declaration, cannot be drawn in question upon a motion to set aside a nonsuit. The question must be raised by motion in arrest. *Supreme Ct.*, 1809, Van Vechten v. Graves, 4 *Johns.*, 403.

37. The insufficiency of the declaration is not proper ground of nonsuit. If the declaration is defective, its sufficiency ought to have been tested by a demurrer, and not on a motion for a nonsuit. *Supreme Ct.*, 1848, Kelly v. Kelly, 8 *Barb.*, 419.

38. Defendant cannot object, at the trial, to a variance between the copy of the declaration as served, and the *nisi-prius* record. The judge must be governed by the record alone, and if there is any material variance, the party must apply to set aside the verdict. *Supreme Ct.*, 1816, Wood v. Bulkley, 18 *Johns.*, 486.

39. The rule that a plaintiff who proves all the allegations in his declaration ought not to be nonsuited, even though he fail to make out a cause of action, applies only where a motion in arrest will present the same question as the one presented at the trial. *Supreme Ct.*, 1842, Gregory v. Mack, 3 *Hill*, 380.

40. Accordingly, in assumpsit, where the declaration concluded with the usual allegation of a promise to pay when requested, and the case presented at the trial was such as to render an express promise essential to the plaintiff's rights of action, but no promise was proved;—*Held*, that the circuit judge did right in ordering a nonsuit; for, after verdict in favor of the plaintiff, the promise alleged would be presumed to have been an express one. *Id.*

41. Where issue was taken upon a declaration alleging matters sufficient to make out a right of action, along with others wholly insufficient, and at the trial the plaintiff failed in sustaining that part of his declaration which was good,—*Held*, though he proved all the rest, he should be nonsuited. *Supreme Ct.*, 1848, Boyd v. Townsend, 4 *Hill*, 188.

42. The defendant may move at the trial for a dismissal of the complaint, upon the ground that a defence is admitted on the pleadings, and is not confined to his motion under section 154 of the Code of Procedure. *N. Y. Superior Ct.*, 1851, Bridge v. Payson, 5 *Sandf.*, 210.

II. JUDGMENT AS IN CASE OF NONSUIT.

1. In what Cases allowed. Excuses for Failing to Try.

43. **Where plaintiff could not be nonsuited at the trial,** judgment as in case of nonsuit cannot be granted. Thus in a joint action of trespass or assumpsit, if one of two or more defendants suffer judgment by default, the others cannot have such judgment. [1 *Burr.*, 858; *Cowp.*, 488.] *Supreme Ct.*, 1811, Yates v. Lansing, 8 *Johns.*, 289; 1838 [citing 8 *T. R.*, 662; 4 *Wend.*, 422], McGregor v. Cleveland, 10 *Wend.*, 596.

44. **On a feigned issue,** directed by the court, to ascertain the facts for its own information, both parties are actors, and there can be no nonsuit for not proceeding to trial. *Supreme Ct.*, 1820, Rogers v. Tift, 17 *Johns.*, 287.

45. **In replevin,** since defendant is an actor, he can move for judgment as of nonsuit, only when neither party has noticed the cause for trial. [2 *Rev. Stat.*, 580, § 46.] For neglecting to try pursuant to notice, he can move only for costs. *Supreme Ct.*, 1835, Potter v. Lewis, 18 *Wend.*, 519; 1838, Poltz v. Curtis, *Id.*, note; *S. C.*, briefly, *Id.*, 497. Followed,

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under the Code, *N. Y. Com. Pl.*, 1858, Schroeder v. Kohlenback, 6 *Abbotts' Pr.*, 66. Compare Roy v. Thompson, 1 *Duer*, 686.

Before the Revised Statutes the motion could not be granted in replevin. 1800, Barrett v. Forrester, 1 *Johns. Cas.*, 247; S. O., *Col. & C. Cas.*, 95.

46. Against the People, judgment as of nonsuit cannot be rendered. *Supreme Ct.*, 1824, People v. Thurman, 8 *Cow.*, 16.

The contrary is provided by 2 *Rev. Stat.*, 552, § 18.

47. Trial by proviso granted in lieu. 1827, People v. Bank of Washington, 7 *Cow.*, 519.

48. One of several defendants cannot sustain the motion. *Supreme Ct.*, 1828, Jackson v. Wakeman, 1 *Cow.*, 177.

49. Where all join, and one has no right to move, the motion must be denied. *Supreme Ct.*, 1824, Bancroft v. Wilson, 2 *Cow.*, 495.

50. Where two defendants sever, though one cannot have judgment as of nonsuit, if plaintiff neglects to try he may be compelled to pay the costs of his defence. *Supreme Ct.*, 1832, Clark v. Wood, 9 *Wend.*, 435; 1834, McGregor v. Cleveland, 12 *Id.*, 201.

51. Where the maker and indorser of a note are joined under the act of 1832, either may move for judgment as of nonsuit. [Laws of 1832, 249, § 4.] *Supreme Ct.*, 1836, Livingston County Bank v. Ellis, 18 *Wend.*, 562.

52. Under rule 84, defendants in assumpsit appearing in good faith by different attorneys, are each entitled to move for judgment as of nonsuit. *Supreme Ct.*, 1845, Platt v. Littell, 1 *How. Pr.*, 71.

53. In an action against two defendants, in which only one answers, such defendant may move for judgment as of nonsuit. *N. Y. Superior Ct.*, 1849, Hoyt v. Loomis, 1 *Code R.*, 128.

54. Under rules 7-9 of 1796, a rule to declare must be entered and notice given, before a judgment of nonsuit can be entered. *Supreme Ct.*, 1801, Gilbert v. Field, 2 *Johns. Cas.*, 292.

55. Though defendant entered a *ne recipiatur* at the circuit, he may move for judgment as of nonsuit. *Supreme Ct.*, 1828, Sage v. Robbins, 8 *Cow.*, 110.

56. Where defendant obtains a *ne recipiatur*, if he refuses to vacate it on reasonable excuse, his motion for judgment as of nonsuit should be denied. *Supreme Ct.*, 1828, Thomp-

son *ads.* Jackson, 1 *Wend.*, 76. Followed, 1841, Ogdensburgh Bank v. Tift, 1 *Hill*, 222.

57. Neglect to notice. Defendant has a right to move for judgment of nonsuit, whenever there is, after issue, time to notice for the next circuit, and it is not noticed. *Supreme Ct.*, 1805, Brooks v. Hunt, 8 *Cai.*, 94; S. O., *Col. & C. Cas.*, 444.

58. In the city of New York, a defendant is not entitled to judgment as of nonsuit, if it appear that the cause could not have been tried in its order if it had been noticed. *Supreme Ct.*, 1806, Currie v. Moore, 1 *Johns.*, 492.

This rule does not apply to country circuits. 1808, Ross v. Vaughan, 8 *Id.*, 442; but see, to the contrary, Griffith v. Miller, 7 *Wend.*, 514.

59. The affidavit (in the city of New York) must show that the cause might have been tried, or that younger issues were tried. *Supreme Ct.*, 1816, Russell v. Barnes, 18 *Johns.*, 156.

60. Neglect to bring to trial at an adjourned circuit in the city of New York (2 *Rev. Stat.*, 202, § 11), is ground for the motion. *Supreme Ct.*, 1834, Parkins v. Stephenson, 10 *Wend.*, 621.

61. Circuit judge. Notwithstanding the act of 1841, giving leave to move for judgment as of nonsuit before the circuit judge of the first circuit, where the parties and attorneys all reside in the city of New York, such motions may still be made at special term. *Supreme Ct.*, 1845, Bell v. Robinson, 1 *How. Pr.*, 118.

62. Upon the first default, plaintiff must be nonsuited, or stipulate to try at the next circuit, unless he shows excuses for the default, but defendant must move at the next term after the circuit. *Supreme Ct.*, 1799, Wild v. Gillet, 1 *Johns. Cas.*, 30; S. O., *Col. & C. Cas.*, 69; 1803, Ryers v. Hillyer, 1 *Cai.*, 112; S. O., *Col. & C. Cas.*, 185; and see Mumford v. Columbian Ins. Co., 2 *Cai.*, 251; S. O., *Col. & C. Cas.*, 400.

63. Want of diligence in obtaining return of commission, is a ground to compel plaintiff to stipulate, or be nonsuited. *Supreme Ct.*, 1804, Coles v. Thompson, *Col. & C. Cas.*, 330.

64. Where the plaintiff's proceedings had been stayed until payment of costs in a former suit, the court refused to nonsuit for not proceeding, except on condition that the costs were not paid in thirty days. *Supreme Ct.*, 1823, Jackson v. Edwards, 1 *Cow.*, 596.

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65. Plaintiff must be ready when the cause is formally called on the first day. *Supreme Ct.*, 1824, Jackson v. Sutphen, 2 *Cow.*, 457.

66. The trial of a younger issue is not conclusive that the cause might have been brought on. *Supreme Ct.*, 1808, Weed v. Ellis, 1 *Cai.*, 115.

67. The certificate of the clerk of the circuit,—*Held*, sufficient evidence that the cause was not tried at the circuit. *Supreme Ct.*, 1810, Wright v. Murray, 6 *Johns.*, 286.

68. Moving for costs. If plaintiff does not bring the cause to trial when called, defendant should not move for his costs, but for judgment as of nonsuit. *Supreme Ct.*, 1846, Petit v. Hewlett, 2 *How. Pr.*, 157.

69. — after breach of stipulation. If plaintiff, having stipulated to try and pay costs, does not pay costs on demand, defendant may move for judgment as of nonsuit. [Rule 42.] *Supreme Ct.*, 1831, Chadderton v. Backus, 6 *Wend.*, 521; 1841, Howard v. McKnight, 25 *Id.*, 688.

But a demand should be made before moving. 1841, Howard v. McKnight, 25 *Wend.*, 688.

70. If, under an order requiring plaintiff to file security for costs or show cause, with a stay meanwhile, plaintiff elects to show cause, defendant cannot have judgment as of nonsuit, because plaintiff did not notice the cause for trial in the interim. *Supreme Ct.*, 1845, Mills v. Chapman, 1 *How. Pr.*, 102.

71. When a cause has been referred, judgment, as of nonsuit, cannot be had; but defendant should apply for leave to bring on the cause on plaintiff's default to notice it within twenty days. *Supreme Ct.*, 1884, Sheldon v. Erie C. P., 12 *Wend.*, 268; and see Bissell v. Lee, 16 *Johns.*, 45.

72. Consent to pass. Where defendant was ready, but twice consented that the cause be passed, for the accommodation of the plaintiff; and it was not afterwards reached;—*Held*, that defendant might move, and plaintiff should be required to stipulate. *Supreme Ct.*, 1842, Root v. —, 4 *Hill*, 88.

73. Settlement. Motion for judgment as of nonsuit should not be granted after the debt has been settled, and there is nothing at stake but costs. *Supreme Ct.*, 1886, Livingston County Bank v. Ellis, 18 *Wend.*, 562.

74. Noticing a cause for hearing within

40 days, is not "bringing it to a hearing" within that time. *Supreme Ct.*, 1846, Pease v. Blossom, 2 *How. Pr.*, 81.

75. Where there are issues both of law and of fact, defendant cannot, while the issue of law is undetermined, move for judgment as of nonsuit. *Supreme Ct.*, 1818, Overseers of Pittstown v. Overseers of Plattsburgh, 15 *Johns.*, 398.

76. After a new trial ordered, plaintiff may be nonsuited for not going to trial a second time. *Supreme Ct.*, 1805, Patrick v. Hallett, 2 *Cai.*, 878; 1808, Jackson v. Meyers, 3 *Johns.*, 541; 1845, Baldwin v. Tillson, 1 *How. Pr.*, 178.

77. Rule for new trial must be served before defendant can move. *Supreme Ct.*, 1812, Jackson v. Wilson, 9 *Johns.*, 265.

78. What is a sufficient excuse for not going to trial. *Campbell v. Munger*, 1 *Cai.*, 129; *S. C., Col. & C. Cas.*, 200; *Jackson v. Marsh, Id.*, 210; *Deas v. Smith*, 1 *Cai.*, 172; *S. C., Col. & C. Cas.*, 221; *Phelps v. Eddy*, 1 *Cai.*, 252; *S. C., Col. & C. Cas.*, 232; 1804, *Cotes v. Thompson*, 2 *Cai.*, 47; *S. C., Col. & C. Cas.*, 344; *Jackson v. Haight*, 2 *Cai.*, 98; *S. C., Col. & C. Cas.*, 357; *Palmer v. Mulligan*, 2 *Cai.*, 95; *S. C., Col. & C. Cas.*, 360; *Mumford v. Columbian Ins. Co.*, 2 *Cai.*, 251; *S. C., Col. & C. Cas.*, 400; *Brooks v. Hunt*, 3 *Cai.*, 94; *S. C., Col. & C. Cas.*, 444.

79. Arbitration. Motion for judgment of nonsuit after the parties had submitted the cause to arbitration, denied, with costs of opposing. *Bradt v. Way*, 2 *Cai.*, 96; and see *Brooks v. Hunt*, 3 *Id.*, 94; *S. C., Col. & C. Cas.*, 444.

80. Several similar causes. Where plaintiff was nonsuited in one of several causes involving the same questions and evidence, and awaited the issue of a case made to set the nonsuit aside,—*Held*, that he should not be required to stipulate in the others. *Supreme Ct.*, 1808, *Campbell v. Munger*, 1 *Cai.*, 129; *S. C., Col. & C. Cas.*, 200.

But he must pay the costs. 1804, *Palmer v. Mulligan*, 2 *Cai.*, 95; *S. C., Col. & C. Cas.*, 360. Compare *Jackson v. Weed*, 2 *Cai.*, 94.

81. The proper course for plaintiff to avoid judgment as in case of nonsuit in the causes not tried, is to apply to the court for a rule that one be tried, and that the others abide the event. *Supreme Ct.*, 1829, *Brant v. Fowler*, 2 *Wend.*, 284.

82. If plaintiff has been nonsuited at the

Judgment as in case of Nonsuit;—In what Cases allowed. Excuses for failing to try.

circuit, and taken exceptions in one of the causes, judgment as in case of nonsuit should be granted in the others, unless he pays costs, and stipulates that they abide event. *Supreme Ct.*, 1880, *Jackson v. Leggett*, 5 *Wend.*, 88.

83. Bankrupt defendant. If, on application for judgment as in case of nonsuit, it appears that defendant is sentenced to the state-prison or insolvent, plaintiff may have leave to discontinue, without costs. *Supreme Ct.*, 1808, *Lackey v. McDonald*, 1 *Cai.*, 116; *S. C.*, *Col. & C. Cas.*, 190; 1806, *Hart v. Storey*, 1 *Johns.*, 143.

84. Plaintiff not required to stipulate, where defendant was in prison, and notoriously bankrupt. *Steinbach v. Hallett*, 1 *Johns.*, 141.

85. A mistake of a rule of practice, by the plaintiff's attorney, may prevent judgment as in case of nonsuit, but will not excuse him from stipulating and paying costs. *Supreme Ct.*, 1808, *Sheffield v. Watson*, 1 *Cai.*, 22; *S. C.*, *Col. & C. Cas.*, 157. Compare *Patrick v. Hallett*, 2 *Cai.*, 878.

86. Sickness of counsel and attorney occurring when too late to employ others, is an excuse sufficient to prevent judgment as of nonsuit; but the plaintiff must pay the costs of not proceeding to trial. *Supreme Ct.*, 1808, *Jackson v. Brown*, 1 *Cai.*, 152.

87. Where no cause of as young an issue was tried at the circuit, the motion was denied. *Supreme Ct.*, 1838, *Hawk v. Taylor*, 10 *Wend.*, 592.

88. Where plaintiff resists the application, on the ground that the cause could not have been heard, he must show that the other issues tried were older than his. *Supreme Ct.*, 1808, *Jackson v. Chamberlin*, 1 *Cai.*, 171.

89. Delay by agreement. Where the cause was not brought on to trial in consequence of an agreement between the parties, the motion was denied, with costs. *Phelps v. Eddy*, 1 *Cai.*, 252; *S. C.*, *Col. & C. Cas.*, 282.

90. Unavoidable occurrences may excuse the plaintiff for not proceeding to trial, but they will not excuse him from payment of costs. *Supreme Ct.*, 1803, *Russell v. Ball*, 1 *Cai.*, 252; *S. C.*, *Col. & C. Cas.*, 283.

91. The fact that a public officer—e. g., the attorney-general—is concerned in a cause, is not an excuse for not going to trial pursuant to notice, nor a reason of refusing a judgment of nonsuit. *Supreme Ct.*, 1804, Anonymous,

2 *Cai.*, 246. To the contrary, as to such officers in the city of New York, was *McVickar v. Alden* (1803), 1 *Cai.*, 58.

92. Defect of proof. The plaintiff cannot excuse himself by the want of a witness, unless diligence to subpoena him is shown. *Supreme Ct.*, 1808, *Deas v. Smith*, 1 *Cai.*, 172; *S. C.*, *Col. & C. Cas.*, 221.

93. That the cause was called on, and passed for the accommodation of defendant, is a fact which ought to be sworn to by counsel. The plaintiff's oath alone is insufficient. *Id.*

94. Agency of the real, or the nominal defendant, in keeping back plaintiff's evidence, a reason for denying the motion. *Smith ad. Grover*, 1 *Wend.*, 77; *Cole v. Wright*, 1 *How. Pr.*, 132; *Sabin v. Ames*, *Id.*, 228.

95. If plaintiff was prevented from trying by an unexpected defect of proof, he need not stipulate, but must pay costs. *Supreme Ct.*, 1804, *Jackson v. Haight*, 2 *Cai.*, 98; *S. C.*, *Col. & C. Cas.*, 357; *S. P.*, 1807, *Marseles v. Olopper*, 2 *Johns.*, 480. Followed, 1826, *Case v. Belknap*, 5 *Cow.*, 422.

96. That the cause was not on the day-docket is merely matter of excuse. *Supreme Ct.*, 1805, *Manhattan Co. v. Brower*, 2 *Cai.*, 381; *S. C.*, *Col. & C. Cas.*, 424.

97. Refusal to proceed for good cause. Defendant is not entitled to judgment, as in case of nonsuit, where plaintiff refused to proceed to trial because the judge improperly overruled a challenge. *Supreme Ct.*, 1812, *Gardner v. Turner*, 9 *Johns.*, 260; and see *Pringle v. Huse*, 1 *Cow.*, 432.

98. Where it appears probable that the plaintiff cannot have a trial by an impartial jury, he may refuse going to trial, and will not for that cause be nonsuited,—e. g., where the ballots of names of jurymen were not folded as the statute directed, and were kept in the box so as to be visible to the clerk, and justify a suspicion of his fairness. *Supreme Ct.*, 1823, *Pringle v. Huse*, 1 *Cow.*, 432.

99. After disagreement and discharge of one jury, the judge put the cause on the calendar again. *Held*, that plaintiff was not in default for refusing to try, and defendant was not entitled to judgment as in case of nonsuit. *Supreme Ct.*, 1820, *Fisher v. Dale*, 17 *Johns.*, 342.

100. Where the judge declined trying the cause,—*Held*, that the plaintiff was excused. *Supreme Ct.*, 1824, *Hart v. Hildreth*, 2 *Cow.*, 511.

Judgment as in case of Nonsuit;—The Motion; how made and determined.

101. Where the cause goes off on plaintiff having leave to withdraw a juror, defendant is not entitled to judgment as in case of nonsuit; but plaintiff is not excused from costs. *Supreme Ct.*, 1825, *Chandler v. Bicknell*, 5 *Cow.*, 30.

102. Poverty of defendant is no excuse for not trying, unless he has been discharged in insolvency. *Supreme Ct.*, 1828, *McGlade ads. Wheaton*, 1 *Wend.*, 84.

103. Plaintiff's inability from illness is an excuse sufficient for stipulation. *Supreme Ct.*, 1844, *Slocum v. Watkins*, 1 *How. Pr.*, 40.

104. Passing the cause. Where the circuit judge permits a cause to be passed for the day without prejudice to the plaintiff, where he is ready when the cause is called, and the defendant not, the defendant is not entitled to judgment as in case of nonsuit, when no opportunity is afterwards afforded to try. *Supreme Ct.*, 1844, *Pier v. Page*, 1 *How. Pr.*, 87.

105. A parol settlement of the suit.—*Held*, good against a motion for judgment as of nonsuit. *Merritt v. Seacord*, 1 *How. Pr.*, 95.

106. Where defendant, by injunction, restrains plaintiff from proceeding in the suit, except to proceed to judgment, it is at plaintiff's election to proceed to judgment or not, and his neglect to do so is not ground for judgment as of nonsuit. *Supreme Ct.*, 1846, *McDonald v. Brace*, 2 *How. Pr.*, 119.

107. Prevalence of epidemic an excuse for not going to trial pursuant to stipulation. *Supreme Ct.*, 1800, *Torrey v. Morehouse*, 1 *Johns. Cas.*, 242.

108. Absence of counsel on professional business is not. *Supreme Ct.*, 1824, *Jackson v. Wakeman*, 2 *Cow.*, 578.

109. Unexpected departure of a material witness.—*Held*, an excuse for not proceeding to trial according to stipulation. *Supreme Ct.*, 1801, *Nixen v. Hallett*, 2 *Johns. Cas.*, 218; and see *Gifford v. Babbott*, 1 *How. Pr.*, 38.

110. Upon a stipulation to try the cause peremptorily in expectation of a return of a witness, it is a sufficient excuse that the witness still absent is a seafaring man. *Supreme Ct.*, 1808, *Livingston v. Delafield*, 1 *Cai.* 6; *S. C.*, *Col. & C. Cas.*, 147.

2. The Motion; how made and how determined.

111. Application must be made at the term next after default. *Supreme Ct.*, 1799,

Wild v. Gillet, 1 *Johns. Cas.*, 80; *S. C.*, *Col. & C. Cas.*, 69; 1803, *Ryers v. Hillyer*, 1 *Cai.*, 112; *S. C.*, *Col. & C. Cas.*, 185; *Brandt v. Buckhout*, 1 *Cai.*, 118; *S. C.*, *Col. & C. Cas.*, 186; and see *Mumford v. Columbian Ins. Co.*, 2 *Cai.*, 251; *S. C.*, *Col. & C. Cas.*, 400.

112. If defendant had not time to give notice for the first day of the term next after the circuit, he is not bound to give it for that term, but may for the next. *Supreme Ct.*, 1829, *Hicks v. Knickerbacker*, 2 *Wend.*, 288.

113. Motion for judgment as of nonsuit, is in season if made at any time before the next general term after the circuit. *Supreme Ct.*, 1833, *Anonymous*, 9 *Wend.*, 461.

114. If no special term intervenes, he may move at the first one after the general term. *Supreme Ct.*, 1833, *Lyon v. Hoffman*, 10 *Wend.*, 576. Followed, *Sp. T.*, 1853, *Hawley v. Seymour*, 8 *How. Pr.*, 96.

115. Where he suffered four non-enumerated terms to pass, his motion was denied. *Chapman v. Van Alstyne*, 6 *Wend.*, 517.

116. Circuit passed. The motion cannot be made till the circuit is passed. *Supreme Ct.*, 1826, *Jackson v. Vroman*, 6 *Cow.*, 392.

117. Notice given ten or twelve days after the close of the circuit, is in season. *Supreme Ct.*, 1832, *Harrison v. Stevens*, 7 *Wend.*, 519.

118. After the circuit has commenced, and younger issues have been tried, notice of the motion may be given, *Supreme Ct.*, 1828, *Latham ads. Winchell*, 1 *Wend.*, 281.

119. The notice may be given as soon as the circuit has commenced, unless the venue be in the county of New York. [6 *Cow.*, 388; distinguishing *Id.*, 392.] *Supreme Ct.*, 1832, *Griffith v. Miller*, 7 *Wend.*, 514.

120. The fact that the notice of motion was for judgment of non-pros. instead of nonsuit, may be disregarded where the papers showed that the latter must be the true object of motion. *Supreme Ct.*, 1846, *Jones v. Aldrich*, 2 *How. Pr.*, 159.

121. The notice is not waived by giving notice of motion for commission. *Supreme Ct.*, 1805, *Brandt v. Burrows*, 3 *Cai.*, 140; and see *Seamans v. Tillson*, 1 *How. Pr.*, 18.

122. Who may make affidavit. An affidavit to move for judgment as of nonsuit, should be made by the attorney; and, if made by his clerk, an excuse must be shown. *Supreme Ct.*, 1829, *Chase v. Edwards*, 2 *Wend.*,

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288. To the same effect, 1805, *Jackson v. Woodworth*; 8 *Cai.*, 186; S. C., *Col. & C. Cas.*, 480.

123. The defendant may make the affidavit.* *Supreme Ct.*, 1833, *Ames v. Merriman*, 9 *Wend.*, 498.

124. Where the cause is not noticed for trial, the affidavit must be by the attorney, or a reason assigned. Where it has been placed on the calendar, counsel may make it. *Supreme Ct.*, 1842, *Bird v. Moore*, 8 *Hill*, 447.

125. An affidavit for the purpose of moving for judgment as in case of nonsuit, should state where the venue is laid, that the cause was noticed for trial, and was not tried; or that it was not noticed, and that a circuit was held at which it might have been tried. *Supreme Ct.*, 1845, *Johnston v. Davis*, 1 *How. Pr.*, 289; 1805, *Brooks v. Hunt*, 8 *Cai.*, 128; S. C., *Col. & C. Cas.*, 462; 1808, *Walsh v. Hill*, 8 *Johns.*, 446; 1826, *Anonymous*, 6 *Cow.*, 388; 1844, *Borst v. Bovee*, 1 *How. Pr.*, 62; *Mather v. Wardwell*, *Id.*, 60.

126. Stating that issue was joined without saying issue of fact—is enough. *Supreme Ct.*, 1842, *Saratoga Mutual Ins. Co. v. Duram*, 3 *Hill*, 451.

127. What the cause of action is need not be stated. *Supreme Ct.*, 1846, *Griffing v. Thurman*, 2 *How. Pr.*, 275.

128. Stipulating. Plaintiff, when allowed to pay costs and stipulate. *Rule 26 of 1858*.

129. What costs to be paid on an offer to stipulate. *Anonymous*, *Col. & C. Cas.*, 345.

130. The terms of stipulation on a motion for judgment as of nonsuit, are in the discretion of the court, in ordinary cases. *Supreme Ct.*, 1800, *Peck v. Phillips*, *Col. & C. Cas.*, 118.

131. Executor not held liable for costs of a nonsuit which arose from a clerical error. *Fleming v. Tyler*, 1 *Johns. Cas.*, 102; S. C., *Col. & C. Cas.*, 71.

132. Irregular demand. On stipulating, the costs should be demanded, and where the demand is not regularly made, plaintiff may notice and bring on the cause; and even if he has been irregular, an appearance by the defendant at the trial waives the irregularity. *Supreme Ct.*, 1803, *Gilliland v. Morrell*, 1 *Cai.*, 154; S. C., *Col. & C. Cas.*, 212.

133. Judge's intention not to try. Where the judge towards the close of the circuit, intimated that he would not take up the cause,—*Held*, that on motion for judgment as of nonsuit, plaintiff must pay for the attendance of defendant's witnesses on the first day of the circuit. *Supreme Ct.*, 1804, *Jackson v. Weed*, 2 *Cai.*, 94. Compare *Jackson v. Valentine*, 3 *Id.*, 128.

134. Countermend. Where plaintiff is prevented from going to trial by inevitable accident, and has no time to countermend after discovery of the impossibility, he must pay the costs of the circuit. *Supreme Ct.*, 1803, *Jackson v. Brown*, 1 *Cai.*, 484.

135. If plaintiff offered to pay defendant's costs of the circuit and to stipulate, and the defendant moves without presenting his bill, defendant must pay costs of the motion, though it be granted. *Supreme Ct.*, 1824, *Jackson v. Hooker*, 8 *Cow.*, 15. See *Anonymous*, 2 *Cai.*, 56.

The offer must be made to defendant's attorney, not to his counsel. 1825, *Shattuck v. Chamberlin*, 4 *Cow.*, 14.

136. Denial of motion for judgment as of nonsuit, on condition that plaintiff stipulates, will be with costs of motion. *N. Y. Superior Ct.*, 1848, *Anderson v. Johnson*, 1 *Sandf.*, 736.

137. Second stipulation. Where the plaintiff has brought the cause to trial pursuant to stipulation, and the verdict is set aside, he may stipulate again. *Rule 42* does not apply. *Supreme Ct.*, 1845, *Baldwin v. Tillson*, 1 *Den.*, 621.

138. If after plaintiff's default on a stipulation to try, defendant suffers two terms to pass without moving for judgment, it is a waiver of the default; and if he moves subsequently, plaintiff may stipulate anew. *Supreme Ct.*, 1801, *Haskins v. Sebor*, 2 *Johns. Cas.*, 217.

139. How defendant must proceed to enter judgment as of nonsuit after stipulation by plaintiff. *Gilliland v. Morrell*, 1 *Cai.*, 154; S. C., *Col. & C. Cas.*, 212; *Witmore v. Russel*, 3 *Cai.*, 135; S. C., *Col. & C. Cas.*, 479.

As to the Effect of such a termination of the suit, see FORMER ADJUDICATION.

As to the Present practice, see DISMISSAL OF COMPLAINT.

* Limited to cases where the cause was noticed, and the defendant attended the court without the attorney. *Bird v. Moore*, 8 *Hill*, 447.

Notice;—When Necessary.

NOTARIES PUBLIC.

1. **Number.** So many in each county as the governor and senate may appoint.* 1 *Rev. Stat.*, 96.

2. **Oath** to be deposited in county clerk's office. 1 *Rev. Stat.*, 120, § 24, subd. 5.

3. **Must reside** within the city or county for which appointed, but may act anywhere in the State. 1 *Rev. Stat.*, 102, § 14.

4. **Powers, enumerated.** 2 *Rev. Stat.*, 283, § 44.

5. **Power given** to administer oaths and affirmations, and to take the proof and acknowledgments of any instrument for use or record in this State, in all the cases where the same might be taken by commissioners of deeds, and under the same rules as commissioners of deeds; and such notary's acts may be performed without official seal. *Laws of 1859*, 869, ch. 360.

As to what is the effect of Notarial certificates as evidence, see EVIDENCE.

6. **A notary cannot delegate** his official authority. [Chitt. on B., 8 ed., 498; Mood. & M., 87.] In order to protest a bill he must present it personally, and his certificate that he caused it to be presented is insufficient. *Supreme Ct.*, 1842, Onondaga County Bank v. Bates, 3 *Hill*, 58; and see Sheldon v. Benham, 4 *Id.*, 129.

7. **Fees regulated.** 2 *Rev. Stat.*, 647, § 41.

8. **Notaries' fees**, when a note is protested and but one notice given, limited to seventy-five cents. [2 *Rev. Stat.*, 647, § 41.] *Supreme Ct.*, 1838, Campbell v. Cook, 9 *Wend.*, 492.

9. **Fees for service of notice of non-payment of tax or assessment**, under act of 1840,—authorizing mortgagees to redeem land sold for taxes,—limited to seventy-five cents for each mortgage. *Laws of 1860*, 419, ch. 170.

10. **Liability for misconduct.** 2 *Rev. Stat.*, 284, § 48.

11. **Defective notice.** Although a notary who gives defective notice is not liable to the holder, where the latter sustained no loss, or need not sustain any with ordinary attention to his case against the indorser, if the holder comes to trial in his action against the indorser without any intimation that the notice will be questioned, he may be deemed entitled to rest on the notice; and if defeated on that ground, his recovery against the notary may

* The number in the city of New York is limited by special statutes (*Laws of 1859*, 1115, ch. 435); and the act of 1858 (ch. 57) fixes the number in the city of Troy. In other cities the number is biennially fixed by the Common Council. *Laws of 1848*, ch. 161.

be sustained. *Supreme Ct.*, 1839, Franklin v. Smith, 21 *Wend.*, 624.

12. **Special promise.** It is no part of the official duty of a notary to give notice of protest to the indorsers; and his special undertaking to a second indorser that he will give such notice, will not inure to the benefit of a prior indorser. *Supreme Ct.*, 1807, Morgan v. Van Ingen, 2 *Johns.*, 204.

NOTES.

BILLS, NOTES, AND CHECKS.

NOTICE.

I. NOTICE.

1. *When necessary.*

2. *What amounts to notice, and its effect.*

II. WRITTEN NOTICES.

III. NOTICE OF SUIT PENDING.

I. NOTICE.

1. *When Necessary.*

1. **Of a public act**, of which both parties are presumed to be cognizant,—e. g., an award of the Onondaga commissioners,—one is bound to take notice, without information from the other. [Oro. Jac., 890, 432.] *Supreme Ct.*, 1807, Folliard v. Wallace, 2 *Johns.*, 395.

2. **Wherever magistrates proceed judicially**, both parties to the proceeding are entitled to be heard; and notice to both is indispensable, notwithstanding the statute by which the tribunal is constituted does not require notice. *Supreme Ct.*, 1818, Commissioners of Kinderhook v. Claw, 15 *Johns.*, 587. *Washington County Ct.* (1858?), Doubleday v. Newton, 9 *How. Pr.*, 71. S. P., *Supreme Ct.*, 1822, Adams v. Oaks, 20 *Johns.*, 282; 1826, Peters v. Newkirk, 6 *Cow.*, 103. Compare Row v. Row, 4 *How. Pr.*, 138; Elmendorf v. Harris, 28 *Wend.*, 628; and see McDermott v. Metropolitan Police Board, 5 *Abbotts' Pr.*, 422.

3. **Corporate power.** A party dealing directly with a corporation,—e. g., an insurance company, for a purchase of real estate to be conveyed by it,—must be assumed to know the extent of its corporate powers as to such estate. *A. V. Chan. Ct.*, 1839, Merritt v. Lam-

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bert, *Hoffm.*, 166. Compare *Edwards v. Farmers' Fire Ins. & Loan Co.*, 21 *Wend.*, 467.

4. **General laws.** All persons dealing with or deriving title from a foreign corporation are bound to take notice of every limitation upon its powers contained in its charter; but other general laws of such foreign State, although tending to abridge or modify those powers, fall within the well-settled rule, that where knowledge of a foreign law is material upon a question of good faith, such knowledge must be shown. *Ct. of Appeals*, 1859, *Hoyt v. Thompson*, 19 *N. Y.* (5 *Smith*), 207.

5. **Though taking property for public use** must be upon notice to the owner, it is competent for the Legislature to say what notice shall be sufficient. *Supreme Ct.*, 1886, *Owners of Ground, &c., v. Mayor, &c., of Albany*, 15 *Wend.*, 374; and see *CONSTITUTIONAL LAW*, 185; *MUNICIPAL CORPORATION*, 102.

As to the cases in which **Personal notice** is necessary, see, also, *SERVICE*.

2. *What amounts to Notice, and its Effect.*

6. **That notice to one tenant in common**, not traced to his co-tenants, but denied by them, can affect his own share only. *A. V. Chan. Ct.*, 1839, *Wiswall v. McGowan*,* *Hoffm.*, 125.

7. **The general rule is that notice to the agent is notice to the principal**, if the agent comes to the knowledge of the fact while he is acting for the principal in the course of the very transaction which becomes the subject of the suit; for upon general principles of policy, it must be taken for granted that the principal knows whatever the agent knows. There is no difference between personal and constructive notice, except in respect to the guilt; for if there were, it would produce great inconvenience, as notice might be avoided in every case by employing an agent. [18 *Ves.*, 120; *Pal. on Ag.*, 262; *Com. Dig.*, tit. *Chan.*, 4, c. 5, 6; 8 *Atk.*, 294; 1 *Pet.*, 309; *Stor. on Ag.*, 181, 182.] *Supreme Ct.*, 1842, *Bank of U. S. v. Davis*, 2 *Hill*, 451.

8. **The principle that notice to an agent is notice to the principal**, is only applicable to cases in which the agent is acting in the course of his employment. [17 *Mass.*, 478; 18 *M. & W.*, 884; 8 *Adolp. & E.*, 512; 9 *Wend.*, 268;

2 *N. Y.*, 479.] *Ct. of Appeals*, 1854, *Weisser v. Denison*, 10 *N. Y.* (6 *Seld.*), 68.

9. **Notice to the directors of a corporation**, when assembled as a board, is notice to their successors, and to the corporation. Although notice to an individual director who has no duty to perform in relation to the subject of the notice, is not a good constructive notice to the corporation; the rule that notice to an agent whose duty it is, as such, to act upon the notice, or to communicate the information to his principal, in the proper discharge of his trust as such agent, is legal notice to the principal, applies to the agents of corporations as well as others. *Chancery*, 1833, *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 *Paige*, 127.

10. **The directors of a bank**, in order to continue themselves in office, purchased stock sufficient to insure them the control, and transferred it in trust for the bank, paying the premium with proceeds of their individual notes discounted by the bank. *Held*, that the guilty knowledge of the directors was not notice to the bank of the illegal withdrawal of the capital stock, so as to preclude the bank from recovering on the notes. *N. Y. Superior Ct.*, 1828, *City Bank of N. Y. v. Barnard*, 1 *Hall*, 70.

11. — **to one director.** The publication of notice of a copartnership dissolution in a newspaper, though it reaches a director of the bank, is not in itself actual notice to the bank. It should be shown that he was agent of the bank in respect to the transaction, or that the notice was given to him as director that he might communicate it. *Supreme Ct.*, 1841, *National Bank v. Norton*, 1 *Hill*, 572.

The rule should be the same even though he had actual notice. 1842, *Bank of U. S. v. Davis*, 2 *Id.*, 451.

12. **Information given to A. in dealing with him as a member of his firm of A. & B.**, is not notice to a corporation of which he is president. [*Ang. & A. on Corp.*, §§ 305-308; 1 *Hill*, 578; 4 *Paige*, 186.] *Supreme Ct.*, 1857, *Miller v. Illinois Central R. R. Co.*, 24 *Barb.*, 312.

13. **But notice to one of the directors**, while engaged in its business, is notice to the bank. Thus, where one of the directors, a note being sent to him as such, for the benefit of a third person, procured its discount by the board, as his own, and appropriated the proceeds;—

* Reversed on other points, 2 *Barb.*, 270; and 10 *N. Y.* (6 *Seld.*), 465.

Notice;—What amounts to Notice, and its Effect.

Held, that the bank had notice of the fraud, and could not recover. *Supreme Ct.*, 1842, *Bank of U. S. v. Davis*, 2 *Hill*, 451; and see *North River Bank v. Aymar*, 8 *Id.*, 262; *Fulton Bank v. Benedict*, 1 *Hall*, 480.

14. Comptroller of city. Notice of an assignment of a demand against the city of New York served on the comptroller, while in his office, engaged in the duties thereof, is notice to the city. [Ang. & A. on Corp., 247.] *Ct. of Appeals*, 1852, *Field v. Mayor, &c.*, of N. Y., 6 *N. Y. (2d Sd.)*, 179.

15. Dissolution of partnership. Notice in the newspapers, of the dissolution of a partnership, is sufficient notice to all persons who have had no previous dealings with the firm. [Peake's N. P., 42, 154; 1 *Esp. Cas.*, 871; 8 *Esp.*, 108, 248.] Without the protection of such a rule, one partner never could retire with safety from the concerns of the partnership. *Supreme Ct.*, 1807, *Lansing v. Gaine*, 2 *Johns.*, 800. Compare *Ketcham v. Clark*, 6 *Id.*, 144.

16. To all persons having previously dealt with the copartnership, it is requisite for the discharge of a retiring party from new liability, that actual notice should be brought home, or at least, that notice should be *bona-fide* given, under such circumstances, as to show that all which custom, prudence, and good faith require has been done to bring the knowledge home. *Ct. of Errors*, 1839, *Vernon v. Manhattan Co.*,* 22 *Wend.*, 188; affirming S. C., 17 *Id.*, 524. To similar effect [citing 1 *Esp. Cas.*, 871; 8 *Id.*, 248; Peake, 42, 154; 15 *Vin.*, 244, pl. 12], *Supreme Ct.*, 1810, *Ketcham v. Clark*, 6 *Johns.*, 144; 1827, *Graves v. Merry*, 6 *Cow.*, 701.

17. A bank who have dealt with a firm are not necessarily chargeable with notice of its dissolution by the mere fact that such notice was published in a newspaper which was taken at the bank. *Ct. of Errors*, 1839, *Vernon v. Manhattan Bank*, 22 *Wend.*, 188; affirming S. C., 17 *Id.*, 524.

18. One partner, without authority, gave the firm note for B.'s accommodation, and the note was discounted for B. by a bank, and renewed from time to time, and the last renewal was made after dissolution of the firm. *Held*, in an action upon it, by the bank, against

the firm, that the bank was a dealer with the firm and entitled to actual notice. *Id.*

19. Infancy. Since inspection is a sufficient legal criterion to decide the question of infancy, it ought also to be considered as sufficient to put a party who may be affected by it, upon inquiry. *Supreme Ct.*, 1799, *Conroe v. Birdsall*, 1 *Johns. Cas.*, 127.

20. Deed. Where the rights of third parties appear on the face of a deed, those who claim under it are chargeable with notice, though the instruments creating such rights are not recorded. *Chancery*, 1848, *Childs v. Clark*, 8 *Barb. Ch.*, 52.

21. Existence of deed. The doctrine that notice of the existence of a deed is constructive notice of its contents, applied between the purchaser and third persons having prior equities, is not always applicable to controversies between a vendor and purchaser, in relation to their rights as against each other. *Ct. of Errors*, 1837, *Champlin v. Laytin*, 18 *Wend.*, 407; affirming S. C., 6 *Paige*, 189.

22. Recitals. Under a patent conveying to several without expressing any tenancy in common, a subsequent conveyance by surviving patentees reciting that it was the intent that the patentees should hold in common, is notice to a later grantee, of the trusts implied. *Ct. of Errors*, 1805, *Cuyler v. Bradt*, 2 *Cal. Cas.*, 326.

23. That deposit of a deed, reciting a letter of attorney by virtue of which the deed was made (*Act of 1794, Sess. 7, ch. 44*), is notice of the power, by means of the recital, to a subsequent purchaser, equally as if the power itself had been deposited. *Supreme Ct.*, 1813, *Jackson v. Neely*,* 10 *Johns.*, 874.

24. Where a trust-deed executed by a moneyed corporation, transferring assets to secure their bonds, recited that the provisions of the statute relative to such transfers had been fully complied with; and the purchasers of the bonds, to whom a counterpart of it had been furnished, were assured that the recital was true;—*Held*, that there was no actual notice of non-compliance, and that the mere omission to inquire whether the statute had not been violated, did not make them chargeable with notice; but that an officer of the corporation, whose duty as such it was to

* See this case in table of CASES CRITICIZED, Vol. I., *Anie.*

* Doubted in *Wendell v. Wadsworth*, 20 *Johns.*, 659; *Jackson v. Bowen*, 6 *Cow.*, 141.

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have known the facts, was chargeable with notice. *N. Y. Superior Ct.*, 1849, *Palmer v. Yates*, 8 *Sandf.*, 187, 184.

25. Trust. Where an administrator bought land at his sale under a surrogate's order, and the deed to him was executed by himself and his co-administrator as administrators,—*Held*, that the deed was notice of the trust to his grantees. *A. V. Chan. Ct.*, 1846, *Ward v. Smith*, 8 *Sandf. Ch.*, 592.

26. The general rule that the possession of land is notice to others of the possessor's title, is not universal. The notice is merely an inference; it may not arise in some cases; it may be repelled in others; and in others it may be restricted to some particular title or claim. The rule, like all rules of circumstantial evidence, must be governed by the particular circumstances of each case, and have a reasonable operation. [8 *Pick.*, 156; 14 *Serg. & R.*, 383; 8 *Greenl.*, 94; 7 *Watts*, 382; 2 *Sumn.*, 487.] *Supreme Ct.*, 1856, *Cook v. Travis*, 22 *Barb.*, 388.

27. Knowledge of the existence of an excavation,—*Held*, equivalent to notice. *N. Y. Com. Pl.* (1847?), *Rogers v. Rhodeback*, 5 *N. Y. Leg. Obs.*, 384.

28. Purchasers put on inquiry. Knowledge sufficient to put upon inquiry, is, in equity, equivalent to a notice to a purchaser, &c. *Chancery*, 1829, *Pitney v. Leonard*, 1 *Paige*, 461; 1830, *Pendleton v. Fay*, 2 *Id.*, 202. To the same effect [citing 1 *Atk.*, 489], 1819, *Green v. Slayter*, 4 *Johns. Ch.*, 38; and see *Durell v. Haley*, 1 *Paige*, 492.

29. That if there are circumstances sufficient to put on inquiry, one acts at his peril if he makes no inquiry, so that it is no answer to say, that had he inquired he might have failed to be informed. *N. Y. Com. Pl.*, 1851, *Holbrook v. Mix*, 1 *E. D. Smith*, 154; but compare *Williamson v. Brown*, 15 *N. Y. (1 Smith)*, 354.

30. When a purchaser has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that which he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona-fide* purchaser. By the later authorities, the same rules are applied in regard to notice, to cases arising under the registry

acts, as to all other cases. [1 *You. & Coll. Ex.*, 303.] If the information possessed by the party would, if it had been followed up by proper examination, have led to a discovery of such mortgage or conveyance, the information possessed by the party amounts to implied notice of such instrument. [8 *Myl. & K.*, 699; 2 *Sugd. on Vend.*, 552; 4 *Kent's Com.*, 172; 4 *Sandf.*, 577; 8 *N. Y.*, 274; 1 *Stor. Eq. Jur.*, §§ 398-400, a; 10 *Johns.*, 461; 15 *Id.*, 568; 8 *Id.*, 137; 8 *Ves.*, 478; 2 *Paige*, 205; 4 *Sandf.*, 578.] *Ct. of Appeals*, 1857, *Williamson v. Brown*, 15 *N. Y. (1 Smith)*, 354. Compare *Fort v. Burch*, 6 *Barb.*, 60.

31. The presumption of notice which arises from proof of that degree of knowledge which will put a party upon inquiry, is not a presumption of law, but of fact, and may therefore be controverted by evidence. *Ct. of Appeals*, 1857, *Williamson v. Brown*, 15 *N. Y. (1 Smith)*, 354.

32. That notice to an attorney employed in investigating a title is notice to his client. *Chancery*, 1841, *Griffith v. Griffith*, 9 *Paige*, 315; S. C. below, *Hoffm.*, 153.

33. Protection before notice. One who has contracted for the purchase of land subject to a prior equity, is protected to the extent of his payments made in good faith before notice of it, but no further. [3 *Atk.*, 304, 1814; 2 *Id.*, 680; 3 *P. Wms.*, 307; 2 *Eq. Ca. Ab.*, 635; 7 *Johns. Ch.*, 65; 1 *Paige*, 280; 5 *Little*, 62; 1 *Mumf.*, 38; 3 *Leigh*, 365; 7 *Monr.*, 599; 1 *Johns. Ch.*, 398.] *A. V. Chan. Ct.*, 1839, *Merritt v. Lambert*, *Hoffm.*, 166.

34. Although, to complete the character of a *bona-fide* purchaser in equity, the party should pay the whole consideration before he has notice of the prior right, yet it is not necessary that the whole or any part of it should be paid at the time of delivering or recording the conveyance, provided it be paid before the conscience of the purchaser is affected by notice. *A. V. Chan. Ct.*, 1844, *Warner v. Wine-low*, 1 *Sandf. Ch.*, 430.

35. A purchaser with notice of an equity, from a purchaser without notice of it, will be protected. *Chancery*, 1841, *Griffith v. Griffith*, 9 *Paige*, 315; S. C. below, *Hoffm.*, 153.

II. WRITTEN NOTICES.

36. Legal proceeding. Where "notice" is required in a legal proceeding, it should be in

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writing. *So held* of notice of appointment and meeting of commissioners to appraise road damages. *Supreme Ct.*, 1802, *Gilbert v. Columbia Turnpike Co.*, 3 *Johns. Cas.*, 107.

So held of notice of application to the surrogate for the appointment of commissioners to assign dower. 1818, *Matter of Cooper*, 15 *Johns.*, 583.

So held of a denial of encroachment on the highway after written notice to remove it. 1855, *Lane v. Cary*, 19 *Barb.*, 537. Compare *Miner v. Clark*, 15 *Wend.*, 425, the dissenting opinion in which is cited in *Lane v. Cary*, 19 *Barb.*, 537.

37. Notices under the Code to be in writing. *Code of Pro.*, § 408; *People v. Eldridge*, 7 *How. Pr.*, 108.

38. Contract. Where a notice is prescribed as a condition to the validity of a contract, and it is not in terms, or by necessary implication, required to be in writing, it may be given verbally, unless the notice be a legal proceeding. [5 *Barn. & Ald.*, 539; 3 *Johns. Cas.*, 107; 15 *Johns.*, 533; 15 *Wend.*, 425, 428.] *Supreme Ct.*, 1843, *McEwen v. Montgomery County Mutual Ins. Co.*, 5 *Hill*, 101.

39. Under a municipal ordinance, which provides that no bid or estimate for a corporation contract shall be rejected for any error of form, provided the party making it shall correct it within twenty-four hours after notice of any such defect,—the notice of the defect need not be in writing. The law implies that all notices should be in writing which form part of a judicial proceeding, but not those relating to the formation of contracts. Nor need the notice invite a correction of such defect. *Supreme Ct.*, 1857, *People v. Croton Aqueduct Board*, 6 *Abbotts' Pr.*, 42; S. C., less fully reported, 26 *Barb.*, 240; affirming S. C., 5 *Abbotts' Pr.*, 316.

40. Verbal information given to one of two partners in the absence of the other, who alone could correct the error complained of,—*Held*, sufficient. *Ib.*

41. Definiteness. A notice given as the foundation of a special statutory proceeding.—*e. g.*, notice of an application to appoint appraisers of land taken for public use,—must state the time and place of the application. The rule of practice that a defective notice is enough to put a party on inquiry, does not apply to such a proceeding, and the party is not bound to apply to the court immediately on

receiving such a notice which is defective in this respect. *Supreme Ct.*, 1804, *Mayor, &c.*, of N. Y. v. *Manhattan Co.*, 1 *Cai.*, 507.

42. If in a remedial statute requiring notice to be given, the form or contents of the notice are not prescribed, a notice which though general apprises the party of what he is required to do may be held sufficient. *N. Y. Com. Pl.*, 1854, *Fire Department v. Buffum*, 2 *E. D. Smith*, 511.

43. Proposing. A letter from the attorneys stating that "we now propose to retax the plaintiff's costs in, &c., at, &c.," is not sufficient notice. *Supreme Ct.*, 1846, *Brown v. Ferguson*, 2 *How. Pr.*, 128.

44. Signature, &c. Under Rule 10—which requires the attorney, on every process or paper to be served, not only to subscribe his name, but to add thereto his place of business—a paper purporting to be a notice, but without either the signature of the attorney, or the addition of his place of business, is not a notice, and insufficient to limit the adverse party. *So held* of a notice of judgment, intended to limit the time to appeal. *Supreme Ct.*, 1859, *Yorks v. Peck*, 17 *How. Pr.*, 192.

45. Notice of bail implies notice of retainer. *Supreme Ct.*, 1805, *Bogert v. Bancroft*, 3 *Cai.*, 127; S. C., *Col. & O. Cas.*, 466.

46. Short notice. Where a statute gave a right to appeal from an assessment of damages within ten days after notice,—*Held*, that a party who, on receiving nine days' notice, appealed and was heard, could not afterwards object to the short notice. *Supreme Ct.*, 1829, *Bouton v. President, &c.*, of Brooklyn, 2 *Wend.*, 395.

47. Time. That notice to remove things "on or before" a specified day, gives the whole of that day. *N. Y. Superior Ct.*, 1852, *Codding v. White*, 2 *Duer*, 390.

48. A notice served on Saturday for Monday, is not a notice of two days. *Supreme Ct.*, *Sp. T.*, 1849, *Whipple v. Williams*, 4 *How. Pr.*, 28.

49. A notice of thirty days, given during a calendar month which contains but thirty days, is a "month's notice." *Supreme Ct.*, 1855, *People v. Ulrich*, 2 *Abbotts' Pr.*, 28.

50. One who gave notice, bound. The superintendent of streets in the city of New York was authorized by law to remove any thing obstructing the streets, after he had given twenty-fours' notice to the owner to remove

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it. *Held*, that having given such notice, he was bound to await the lapse of that time before removing the thing, and could not justify an interference before that time on the ground that the obstruction was a public nuisance, which, as a private citizen, he had a right to remove. *N. Y. Superior Ct.*, 1858, Coddington v. White, 2 *Duer*, 390.

51. Weekly publication. In all cases where a three months' advertisement is required, a weekly notice is sufficient. *Supreme Ct.*, 1805, Anonymous, *Col. & C. Cas.*, 428. To somewhat similar effect, *Betts v. City of Williamsburgh*, 15 *Barb.*, 255.

52. Publication of ordinance. Where a statute requires that notice of a village ordinance shall be published, publishing the ordinance itself, without any notice that it is an ordinance passed by the trustees, is insufficient. *Supreme Ct.*, 1854, Rathbun v. Acker, 18 *Barb.*, 393. Compare Canniff v. Mayor, &c., of N. Y., 4 *E. D. Smith*, 430.

53. Posting. A statute requiring an affidavit to show that a notice was posted in a conspicuous place, does not require the affidavit to specify the place. It is enough to state that the notice was put up, and that the place was conspicuous. *Supreme Ct.*, *Sp. T.*, 1858, Opening of Albany-street, 6 *Abbotts' Pr.*, 278.

Newspaper notices without signature, and equivocal in import, disregarded. *Saxton v. Read*, *Hill & D. Supp.*, 828.

III. NOTICE OF SUIT PENDING.

54. The commencement of a suit in chancery, which is duly prosecuted in good faith and followed by a decree, is constructive notice, to every person who acquires an interest from the defendant in the subject-matter of the suit *pendente lite*, of the legal and equitable rights of the complainant as charged in the bill and established by the decree. [1 *Johns. Ch.*, 556; 2 *Id.*, 444.] But this rule is not an arbitrary one. Its reason is, that it is necessary to prevent evasion of justice, and hardship to the suitor; and where the reason fails, the rule may be relaxed. *Ct. of Errors*, 1838, *Parks v. Jackson*, 11 *Wend.*, 442.

Consult, also, **PARTIES**.

55. A *lis pendens* is constructive notice to a purchaser from the defendant; and he, and his interest, will be bound by the decree entered in the suit. *Supreme Ct.*, 1856, *Harring-*

ton v. Slade, 22 *Barb.*, 161; *S. P.*, *Chancery*, 1829, *Sears v. Hyer*, 1 *Paige*, 483.

56. As against whom. The commencement of a suit in chancery is only constructive notice of the pendency of such suit as against persons who acquire an interest under a defendant *pendente lite*. *Chancery*, 1847, *Stuyvesant v. Hall*, 2 *Barb. Ch.*, 151; affirming *S. C.*, 1 *Sandf. Ch.*, 419.

So of a notice filed. *Ib.*

57. The doctrine that one who acquires an interest pending a suit is bound by the proceedings, applies only to voluntary transfers of interest, but does not apply to one whose interest subsisted before the suit was commenced, and who might have been made an original party. Thus, where one assigned a mortgage, with a condition upon the happening of which it was to revert to him;—*Held*, that he continued to have an interest, and the reversion of the title by performance of the condition pending a suit, was not a transfer during litigation within the rule. *Ct. of Errors*, 1825, *Hopkins v. McLaren*, 4 *Cow.*, 667. To similar effect, 1838, *Parks v. Jackson*, 11 *Wend.*, 442.

58. Bill not specific. The mere pendency of a suit, the bill in which does not lay claim to any specific land, nor to all the land of defendant in a particular county or place, but asks merely for a discovery of any lands in which he has invested money, is not constructive notice of an equity in any particular parcel of land held by the defendant. But further proceedings in the suit, such as an order for the appointment of a receiver of specific property, of which proceedings notice is had, is effectual to put the purchaser upon inquiry. *Chancery*, 1841, *Griffith v. Griffith*, 9 *Paige*, 315; reversing *S. C.*, *Hoffm.*, 153.

59. What description of lands in a bill is sufficient to put a purchaser of a part on inquiry. *Green v. Slayter*, 4 *Johns. Ch.*, 38. Compare *Parks v. Jackson*, 11 *Wend.*, 442.

60. When commenced. A *lis pendens* duly prosecuted, is notice to a purchaser, so as to affect and bind his interest by the decree; and the pendency of the suit is deemed to commence from the service of the subpoena, after the bill is filed. *Chancery*, 1815, *Murray v. Ballou*, 1 *Johns. Ch.*, 566. *V. Chan. Ct.*, 1840, *Skeel v. Spraker*, 8 *Paige*, 182; affirmed, *Id.*, 193. See, also, *Heatley v. Finster*, 2 *Johns. Ch.*, 158; *Green v. Slayter*, 4

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Id., 38; and *Scudder v. Van Amburgh*, 4 *Edw.*, 29.

61. A bill was filed to set aside a conveyance, but a third person obtained judgment against the grantee in such conveyance; there being no proof of service of the subpoena, or of actual notice to the plaintiffs in the judgment, prior to the judgment. *Held*, that notice of the *lis pendens* might be inferred, as to the defendant, but not as to the plaintiffs in the judgment; and that a sale to one of the plaintiffs, under their execution, was valid, though the conveyance to his debtor had been set aside; and that his deed to one who had full notice of the *lis pendens*, passed the title. *Supreme Ct.*, 1828, *Roberts ad. Jackson*, 1 *Wend.*, 478.

62. Mere issuing of the subpoena is not sufficient to create a *lis pendens*, as against a purchaser without actual notice. Service is necessary, though it need not always be personal. *Chancery*, 1842, *Hayden v. Bucklin*, 9 *Paige*, 512.

63. Filing a bill and attempting to serve the subpoena, are a sufficient *lis pendens* as against the defendant, and any one who, with notice, purchases the defendant's choses in action. *A. V. Chan. Ct.*, 1846, *Weed v. Smull*, 3 *Sandf. Ch.*, 273; and see *Hayden v. Bucklin*, 9 *Paige*, 512.

64. Notice of a suit pending against a trustee for an account, &c., and for an injunction against assigning securities and a receiver, will not prevent the payment by a debtor of a bond to the trustee, or his assignee, being the legal owner of the bond, before a receiver is appointed. *Chancery*, 1819, *Green v. Slayter*, 4 *Johns. Ch.*, 38.

65. Denying notice of the pendency of suit will not avail, if defendant, at the time, knew that the person of whom he purchased was a trustee, and had no power to sell. *Chancery*, 1816, *Heatley v. Finster*, 2 *Johns. Ch.*, 158.

66. That a purchaser who claims to have acted in good faith, and without notice of the suit pending, must set up the facts by plea or answer. [*Hopk.*, 48; 8 *Cow.*, 361.] *V. Chan. Ct.*, 1839, *Scudder v. Van Amburgh*, 4 *Edw.*, 29.

67. Filing notice. Where, after delivery of a deed, but before it was recorded, a bill was filed against the grantor, and the notice of *lis pendens* was filed after the recording,—*Held*, that the grantee had not constructive

notice. Actual notice should be shown, such as to imply fraud. *A. V. Chan. Ct.*, 1839, *Wisswall v. McGowan*,* *Hoffm.*, 125.

68. If, after filing notice of suit pending, new defendants are added by amendment, an amended notice of suit pending should be filed. *V. Chan. Ct.*, 1841, *Clark v. Havens*, *Clarke*, 560.

This is not necessary except as to such new parties, so that where they are subsequently struck out again, no new notice is necessary. *Supreme Ct., Sp. T.*, 1858, *Waring v. Waring*, 7 *Abbotts' Pr.*, 472.

69. Where, in a foreclosure-suit, after notice of *lis pendens* filed, parties are stricken out, the safer course is to file a new notice. Where new parties are added by amendment, a new notice is absolutely necessary to bar the judgment-creditors of the new parties, and subsequent purchasers from them. *Chancery*, 1843, *Curtis v. Hitchcock*, 10 *Paige*, 399.

70. Where a foreclosure-suit was commenced, making the judgment-creditors of the mortgagor parties, and the proper notice of *lis pendens* was filed, and after the act of 1840,—dispensing with the necessity of making such judgment-creditors parties,—the complainant dismissed his bill as to them, without filing a new notice of *lis pendens* under that act;—*Held*, that such judgment-creditors were not foreclosed by the decree and sale. *Id.*

71. Purchaser. That one who takes an assignment as indemnity against a precedent liability, is not a purchaser, within the meaning of the statute requiring notice of the pendency of the suit to be filed. [2 *Rev. Stat.*, 174, § 48.] *A. V. Chan. Ct.*, 1843, *Leavitt v. Tylee*, 1 *Sandf. Ch.*, 207.

72. Defective notice. Where all having any interest or claim are made parties, there can be no objection to a defective *lis pendens*, because no one can be prejudiced by it. *V. Chan. Ct.*, 1842, *Totten v. Stuyvesant*, 3 *Edw.*, 500.

73. In an action to foreclose a mortgage, under the Foreclosure Act of 1840, a notice of *lis pendens*, omitting to state in what county the mortgage is recorded, may be regarded as a sufficient compliance; and although it might be good ground to open the judgment for ir-

* Reversed, *sub nom.* *Price v. McGown* (*Supreme Ct.*, 1848), 2 *Barb.*, 270; and latter case affirmed, *Ct. of Appeals*, 1858, 10 *N. Y.* (6 *Seld.*), 465.

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regularity, upon proper motion, it does not render the proceedings invalid. The decree cannot be objected to in a collateral action. [10 Paige, 399.] *Ct. of Appeals*, 1854, *Potter v. Rowland*, 8 *N. Y. (4 Sedg.)*, 448.

74. In a suit brought to compel defendant to give a lease, a notice of *lis pendens* was filed, but in the title of the cause in the notice, and in the entry of the notice in the index, an initial, as if of a middle name, was wrongly inserted in the defendant's name. *Held*, nevertheless, sufficient to put a purchaser of the land, pending the suit, upon inquiry, and to charge him with all the knowledge to which that inquiry, if entered upon, would have led. *Supreme Ct., Sp. T.*, 1854, *Weber v. Fowler*, 11 *How. Pr.*, 458.

75. The Code of 1848 does not dispense with the necessity of filing a notice of *lis pendens* in mortgage cases. *Supreme Ct., Sp. T.*, 1848, *Brandon v. McCann*, 1 *Code R.*, 88.

76. A notice of the pendency of an action affecting the title to real property, or an action in which an attachment affecting real property has been issued,* may be filed. Its requisites. From the time of filing only, is the pendency of the action, constructive notice to purchasers or incumbrancers. *Code of Pro.*, § 182, as amended.

77. **Who bound.** The provision of the amendment of 1858, § 182,—that every person whose conveyance or incumbrance is subsequently executed or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer, and bound by subsequent proceedings, as if a party to the action,—does not authorize the filing of a notice against prior purchasers or incumbrancers who are not parties to the action. *Supreme Ct., Chambers*, 1858, *People v. Connolly*, 8 *Abbotts' Pr.*, 128.

78. **Time of filing.** Filing the notice is not effectual before service of summons; and as between the plaintiff and one who purchased the premises after filing the notice, but before the time when the service of summons is alleged, in the affidavit inserted in the judgment-roll, to have been made, that affidavit is conclusive. *Supreme Ct., Sp. T.*, 1856, *Burroughs v. Reiger*, 12 *How. Pr.*, 171; *S. C.*, 3 *Abbotts' Pr.*, 393, *note*.

* Before this provision was expressly extended to actions in which attachments are issued, it was *Held*, that such actions were not within the section, and that filing notice of pendency did not affect the right of a *bona-fide* purchaser. *Supreme Ct., Sp. T.*, 1852, *Burkhardt v. Sanford*, 7 *How. Pr.*, 329.

79. A notice of pendency of action, filed in a foreclosure-suit before service of process, though ineffectual as against a purchaser in good faith for value, who takes before such service; is effectual where no change in the title takes place, and no new incumbrances attach in the interval between the filing and the service. *Supreme Ct., Sp. T.*, 1856, *Tate v. Jordan*, 3 *Abbotts' Pr.*, 392; *Burrows v. Reiger*, *Id.*, 393, *note*; *S. C.*, 12 *How. Pr.*, 171. Compare *Waring v. Waring*, 7 *Abbotts' Pr.*, 472.

80. The filing of the complaint subsequent to the notice makes the notice valid from that time. *Supreme Ct., Sp. T.*, 1858, *Benson v. Sayre*, 7 *Abbotts' Pr.*, 472, *note*.

81. If the complaint is filed at the same time with the notice, the fact that entering a minute of it in the appropriate record was inadvertently omitted, or that it was subsequently removed from the file to be used in court, does not affect the validity of the notice. *Supreme Ct., Sp. T.*, 1858, *Waring v. Waring*, 7 *Abbotts' Pr.*, 472.

82. A notice of action pending does not become operative against a defendant until actual service of summons upon him, and it has no sooner effect against a grantee from the defendant. *Supreme Ct., Sp. T.*, 1859, *Farmers' Loan & Trust Co. v. Dickson*, 17 *How. Pr.*, 477; *S. C.*, 9 *Abbotts' Pr.*, 61.

83. The action is to be deemed pending for the purpose of the notice from the time it is filed, if followed by commencing publication of summons or by personal service within sixty days. *Code of Pro.*, § 182; as amended, 1862.

84. **Cancelling.** On a motion, in an action in which a notice of *lis pendens* had been filed, to take the notice from the files of the clerk's office,—*Held*, that the court cannot prevent a plaintiff from giving notice of the pendency of the suit in the way the statute has provided. It cannot rightfully interfere to take from the files of the clerk of the county, a paper, in proper form, and regularly filed under the authority of a statute, which is notice in law to all who may purchase. *N. Y. Superior Ct., Sp. T.*, *Pratt v. Hoag*, 12 *How. Pr.*, 215.

85. **After abatement** the court may direct the notice to be removed. *Code of Pro.*, § 182; as amended, 1862.

What is.

NUISANCE.

I. WHAT IS.

II. THE REMEDIES.

I. WHAT IS.

1. That what was at common law a nuisance, is not made otherwise by a statute prohibiting it and giving a new remedy. *Supreme Ct.*, 1835, *Wetmore v. Tracy*, 14 *Wend.*, 250; and see *People v. Sands*, 1 *Johns.*, 78; *Renwick v. Morris*, 7 *Hill*, 575.

2. Authority of law. That which is maintained under express authority given by the Legislature, cannot be deemed a nuisance. *Supreme Ct.*, 1850, *Harris v. Thompson*, 9 *Barb.*, 350; *S. P.*, *Plant v. Long Island R. R. Co.*, 10 *Id.*, 26.

3. Whatever is permitted by a statute which the Legislature is constitutionally competent to pass, is not, in judgment of law, a nuisance. *N. Y. Superior Ct.*, *Sp. T.*, 1853, *Leigh v. Westervelt*, 2 *Duer*, 618. *Supreme Ct.*, 1854, *Williams v. N. Y. Central R. R. Co.*, 18 *Barb.*, 222.

4. Any excess or irregularity in the exercise of a power, conferred by statute, to maintain a dam in a navigable river, is a public nuisance, *pro tanto*; and any person may so far abate the dam as to restore the navigation as saved by the act. *Ct. of Errors*, 1844, *Renwick v. Morris*, 7 *Hill*, 575; affirming *S. C.*, 8 *Id.*, 621; and see *Adams v. Beach*, 6 *Id.*, 271.

5. The Legislature declared a stream to be a public highway, but afterwards enacted a law authorizing the riparian owners to erect a dam across it. *Held*, that the latter act merely restored the common-law right of the owners to obstruct the navigation [5 *Cow.*, 165; 3 *Hill*, 621], and did not legalize the dam if otherwise a nuisance. *Supreme Ct.*, 1852, *Clark v. Mayor, &c., of Syracuse*, 18 *Barb.*, 32.

6. The exercise of banking privileges without authority, is not a nuisance. *Chancery*, 1825, *Attorney-general v. Bank of Niagara*, *Hopk.*, 354.

7. An immigrant depot is not a known nuisance in the law. It must be shown to be such by the circumstances of the case. *N. Y. Superior Ct.*, *Sp. T.*, 1855, *Phoenix v. Commissioners of Emigration*, 1 *Abbotts' Pr.*, 466.

8. Dangers. Keeping gunpowder near dwelling-houses, and near a public street, or transporting it through a public street, is not

a nuisance, unless made such by particular circumstances, such as negligent keeping. The time, place, and manner, are essential in determining whether a powder-house is a nuisance. The fears of mankind will not alone create a nuisance without real danger. [8 *Atk.*, 750.] *Supreme Ct.*, 1806, *People v. Sands*, 1 *Johns.*, 78.

9. Carelessly depositing and keeping gunpowder in an exposed place,—*e. g.*, in a wooden building in a city,—is a public nuisance; and any individual sustaining a special injury from the act, is entitled to private damages. *Supreme Ct.*, 1844, *Myers v. Malcolm*, 6 *Hill*, 292.

10. It is an indictable nuisance, to divide a house in a town for poor people to inhabit, by reason whereof it will become more dangerous in time of sickness and infection [2 *Roll. Abr.*, 139]; and such nuisances may lawfully be abated by any man, by tearing them down. *Supreme Ct.*, 1836, *Meeker v. Van Rensselaer*, 15 *Wend.*, 397. Compare *Van Wormer v. Mayor, &c., of Albany*, 18 *Id.*, 169, affirming *S. C.*, 15 *Id.*, 262.

11. A person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding-house, is not a nuisance. *Supreme Ct.*, 1843, *Boom v. City of Utica*, 2 *Barb.*, 104.

12. A ferocious dog, that attacks persons, is a nuisance, and, if permitted to run at large, any one may kill him. *Supreme Ct.*, 1816, *Putnam v. Payne*, 13 *Johns.*, 812. Followed, 1825, *Hinckley v. Emerson*, 4 *Cow.*, 351.

So of a dog which has been bitten by a mad dog. 1816, *Putnam v. Payne*, 13 *Johns.*, 812.

13. A bowling or ninepin alley, kept for hire or emolument, is a nuisance; and under a charter of a village allowing the Corporation to make by-laws relative to nuisances, may be prohibited. Erections adapted to sports or amusements, having no useful end, and notoriously fitted up and continued with the view to make a profit for the owner, are nuisances; because such establishments are usually perverted into nurseries of vice and crime. *Supreme Ct.*, 1843, *Tanner v. Trustees of Albion*, 5 *Hill*, 121. Followed, *N. Y. Com. Pl.*, 1855, *Udike v. Campbell*, 4 *E. D. Smith*, 570. Compare *People v. Sergeant*, 8 *Cow.*, 139.

14. That a ditch or other obstruction in a highway, is a nuisance. *Supreme Ct.*, 1826, *Harlow v. Humiston*, 6 *Cow.*, 189; 1828, *Lansing v. Smith*, 8 *Id.*, 146; 1840, *Dygart v.*

What is.

Schenck, 28 *Wend.*, 446; and see *People v. Lambier*, 5 *Den.*, 9; *Rogers v. Rogers*, 14 *Wend.*, 181; *Davis v. Mayor, &c.*, of N. Y., 14 *N. Y.* (4 *Kern.*), 506; The same *v. The same*, 1 *Duer*, 451. Compare *Peckham v. Henderson*, 27 *Barb.*, 207.

15. Bridge. If one dig a ditch across a highway, though it be on his own land, it is a nuisance; and if he builds a bridge over it, he is answerable for the private damages of any one who is injured in crossing it, if the injury happens without gross negligence of the sufferer. The utmost care of the wrongdoer to prevent mischief will not protect him. *Supreme Ct.*, 1840, *Dygart v. Schenck*, 23 *Wend.*, 446.

16. Logs near the highway. Though placing logs in the highway is a nuisance, and one injured specially thereby may have an action,—it is otherwise if they are placed by defendant on his own land adjoining the highway. *Supreme Ct.*, 1826, *Harlow v. Humiston*, 6 *Cow.*, 189.

17. Private way. A fence built across a private road is not a public nuisance, and only the one entitled to the right of way can lawfully abate it. *Supreme Ct.*, 1842, *Drake v. Rogers*, 3 *Hill*, 604.

18. Using street for business of ostenters. Where distillers delivered their slops daily in the street to purchasers, and the street was obstructed by carts and teams resorting thither for it, and waiting to load,—*Held*, that the business so conducted was a nuisance, and that the distillers were indictable therefor for the unreasonable delays in the street of the carts, &c., which the business invited thither. *Supreme Ct.*, 1845, *People v. Cunningham*, 1 *Den.*, 524.

19. In such a case, evidence showing frequent collisions in the street among the drivers of the carts is proper, as tending to prove an obstruction of the highway. *Id.*

20. An unnecessary encroachment by a railroad corporation upon a turnpike, by placing its track thereon, and not restoring the turnpike to its original width and "former state, so as not to impair its usefulness," as required by its own charter, is a public nuisance, for which any person who thereby sustains a particular injury may maintain an action. [4 *Wend.*, 9; 19 *Pick.*, 147; 10 *Id.*, 888; 1 *Root*, 262; 8 *Verm.*, 529.] *Supreme Ct.*, 1850, *Moshier v. Utica & Schenectady R. R. Co.*, 8 *Barb.*, 427.

21. The public has a right to insist that a turnpike should be kept of the width prescribed by its charter, as well as that it should be kept safe and passable; and a violation of either duty is indictable as a nuisance. *Supreme Ct.*, 1850, *Waterford & Whitehall Turnpike Co. v. People*, 9 *Barb.*, 161.

22. A canal-boat permanently stationed in a basin,—*Held*, a nuisance. *Hart v. Mayor, &c.*, of Albany, 9 *Wend.*, 571; affirming *S. C.*, 3 *Paige*, 218.

23. A floating-dock in a slip at the wharves of the city of New York,—*Held*, a nuisance. *Supreme Ct.*, *Sp. T.*, 1857, *Hecker v. N. Y. Balance Dock Co.*, 13 *How. Pr.*, 549. To the contrary, *The same v. The same*, 24 *Barb.*, 215.

24. To make a noxious trade a nuisance, it is not necessary that it should endanger the health of a neighborhood. It is sufficient, if it produces that which is offensive to the senses, and impairs the enjoyment of life and property. [2 *Carr. & P.*, 485; 1 *Burr.*, 337.] *Chancery*, 1842, *Oatlin v. Valentine*, 9 *Paige*, 575. *Supreme Ct.*, *Sp. T.*, 1848, *Brady v. Weeks*, 3 *Barb.*, 157. To similar effect, *Gen. Sess.*, 1817, *Prescott's Case*, 2 *City H. Rec.*, 161; 1821, *Lynch's Case*, 6 *Id.*, 61.

25. A fat-boiling establishment, if it infect injurious to the health, is a private nuisance, the air with noisome smells, or with gases for which an action for damages lies. *N. Y. Com. Pl.*, 1856, *Cropsey v. Murphy*, 1 *Hill.*, 126.

26. To constitute an indictable public nuisance by conducting in a populous city a lawful business, it is not necessary that it be prejudicial to health, but it is not sufficient that its exercise be merely disagreeable; but it must be an annoyance, calculated to interrupt the public in the reasonable enjoyment of life or property. *Gen. Sess.*, 1819, *Prout's Case*, 4 *City H. Rec.*, 87.

27. Priority. Though a person has a right to erect a mill where he pleases on his own ground, yet he must so exercise that right as not to interfere with the existing rights of others. If A. erects a new mill in such a place, or so near the mill of B., that an artificial dam, before erected by B., causes the water to flow back on A.'s mill, and obstructs its movement, A. has no right to complain of the dam of B. as a nuisance. *Chancery*, 1818, *Van Bergen v. Van Bergen*, 3 *Johns. Ch.*, 282.

The Remedies.

28. It is no defence to an indictment for nuisance, that the establishment complained of was erected prior to adjacent buildings. *Gen. Sess.*, 1821, Lynch's Case, 6 *City H. Rec.*, 61.

29. **Interference with business.** Stationing before the door of an auction-room a man with a placard, inscribed, "Beware of Mock Auctions,"—*Held*, a private nuisance. *V. Chan. Ct.*, 1846, Gilbert v. Mickle, 4 *Sandf. Ch.*, 357.

30. **A dog** in the habit of coming on plaintiff's premises and barking and howling about his dwelling, by day and night, to the great annoyance of his family, is a nuisance, and plaintiff may kill it after reasonable notice to its owner. *Supreme Ct.*, 1840, Brill v. Flagler, 23 *Wend.*, 354.

31. **No length of time** will legalize a public nuisance, for the very reason, that while it continues a mere trifle, no one thinks of taking measures to have it removed, and thus the public would be sure to suffer. [7 East, 199; 8 Doug., 840, 843.] *Nullum tempus occurrit reipublica*, applies peculiarly against a public nuisance. *Supreme Ct.*, 1840, Dygert v. Schenck, 23 *Wend.*, 446.

So held, in an action for damages. 1882, Mills v. Hall, 9 *Wend.*, 315.

So held, on indictment for a public nuisance. [Citing, also, *Rosc. Crim. Ev.*, 789.] 1845, People v. Cunningham, 1 *Den.*, 524.

32. And the remedy of abatement is concurrent with that by indictment. *Ct. of Errors*, 1844, Renwick v. Morris, 7 *Hill*, 575; affirming 8 *O.*, 8 *Id.*, 621.

33. **Mere encroachments.** The rule that no lapse of time will legalize a public nuisance, does not apply to the case of a simple encroachment upon a highway, not amounting to an obstruction, or a real and substantial annoyance to the public. *Supreme Ct.*, 1858, Peckham v. Henderson, 27 *Barb.*, 207.

34. What is a nuisance in respect to encroachments on a highway considered. *Id.*

II. THE REMEDIES.

35. **Of the common-law remedies** for nuisance. Brown v. Woodworth, 5 *Barb.*, 550; Waggoner v. Jermaine, 3 *Den.*, 806.

36. **The remedy by writ** of nuisance not favored. [1 *Den.*, 436; 1 *Barb.*, 65; Smith's Com., 692, § 547.] *Supreme Ct.*, 1849, Brown v. Woodworth, 5 *Barb.*, 550; 1848, Clark v.

Storrs, 4 *Id.*, 562. To the same effect, under the Code of Pro., *Sp. T.*, 1852, Ellsworth v. Putnam, 16 *Id.*, 565.

37. **Chancery** has jurisdiction in the case of a private nuisance; but it will not give an order to abate a nuisance, until the opposite party has been heard. [1 *Ves.*, 548.] *Chancery*, 1816, Van Bergen v. Van Bergen, 2 *Johns. Ch.*, 272.

38. Chancery has jurisdiction to restrain nuisances which are injurious to the property of individuals. *Chancery*, 1846, Peck v. Elder, 3 *Sandf.*, 129, *note*; 8 *O.*, 6 *Ch. Sent.*, 88. *N. Y. Superior Ct.*, 1849, Howard v. Lee, 8 *Sandf.*, 281.

39. **Second suit.** After a verdict and judgment, in a suit at law for a nuisance, it is competent for either party to prove in another suit, on which, of several grounds of nuisance stated in the declaration, the judgment was given. *V. Chan. Ct.*, 1846, Blunt v. Hay, 4 *Sandf. Ch.*, 862.

40. **Health officers.** Under the act of 1850 (ch. 824),—authorizing health boards to make regulations, &c.,—their power is legislative rather than judicial; and even if they have power to adjudicate against an individual, their order must be published pursuant to the act. *Supreme Ct.*, 1854, Reed v. People, 1 *Park. Cr.*, 481.

41. On the trial of an indictment for such misdemeanor, it is a defence to prove that at the time of the making and service of the order, the defendant resided out of the bounds of the village corporation in which such board of health was organized. *Id.*

42. **A writ to prostrate** a nuisance cannot be granted till a record of the conviction is regularly made and returned. *Supreme Ct.*, 1800, People v. Valentine, 1 *Johns. Cas.*, 336.

43. **Suspending sentence.** After a conviction for a nuisance, in conducting a lawful business, it is the practice to suspend the sentence a reasonable time, to give the defendant an opportunity to remove the nuisance. *Gen. Sess.*, 1819, Prout's Case, 4 *City H. Rec.*, 87.

44. **Private action.** Any, the least injury to an individual, by a public nuisance,—*e. g.*, an expense of time, or money, or labor, &c.,—entitles him to an action. It is a special damage, as contradistinguished from the injury to the public in general, which is theoretical, or resting in presumption of law only. [T. Jones,

The Rule.

156; 1 Bin., 469; 4 M. & S., 101.] *Supreme Ct.*, 1827, *Pierce v. Dart*, 7 Cow., 609.

45. Where a highway is obstructed, the fact that it is more contiguous and therefore more beneficial to the plaintiff than to others, does not give him a right of action. There must be a specific damage to sustain the action. *Id.*; S. P., 1828, *Lansing v. Smith*, 8 Cow., 146.

46. It is a general rule, that a party who sustains a special and particular injury by an act which is unlawful on the ground of public injury, may maintain an action for his own special injury. [8 Barn. & Cr., 556; 4 M. & S., 101; 5 Bing., 91; 8 Barn. & Ad., 77; 1 Bing. N. C., 222; 7 Cow., 609; 8 Id., 146; S. C., 4 Wend., 25; 9 Id., 815.] *Supreme Ct.*, 1844, *Myers v. Malcolm*, 6 Hill, 292.

47. The special injury resulting from a public nuisance, which will sustain a private action, must be peculiar to the plaintiff, and not common to him and many others; if it operates equally, or in the same manner, upon many individuals constituting a particular class, though a very small portion of the community, it is not a special damage to each within the meaning of the rule. *Supreme Ct.*, 1828, *Lansing v. Smith*,* 8 Cow., 146; S. P., 1821, *Butler v. Kent*, 19 John., 228. Compare *Mills v. Hall*, 9 Wend., 815.

48. To make conducting a lawful business a private nuisance, it is not necessary that the plaintiff should be driven from his dwelling by it; it is enough that the enjoyment of life and property has been rendered uncomfortable. If manufacturing boilers of steam-engines annoys and injures a neighbor, he may have redress by action. *Supreme Ct.*, 1847, *Fish v. Dodge*, 4 Den., 811.

49. No individual can maintain an action for damages from a public nuisance, unless he has sustained an injury which is special in its character, or which is not common to others

affected by the nuisance. Thus, where the nuisance consisted in maintaining piles of wood, on the street constituting the bulkhead in front of the plaintiff's storehouse, injury to the rental of the storehouse is an injury which it suffers in common with all other property in the neighborhood, and will not sustain an action. *N. Y. Superior Ct.*, 1847, *Dougherty v. Bunting*, 1 Sandf., 1.

50. A railroad company is liable to a religious corporation, in an action for a nuisance, for disturbances made in the use of the road on Sunday, whereby the usefulness of the plaintiff's place of public worship is impaired, and its value diminished. *Supreme Ct.*, 1848, *First Baptist Church v. Schenectady & Troy R. R. Co.*, 5 Barb., 79. To the contrary, 1847, *First Baptist Church v. Utica & Schenectady R. R. Co.*, 6 Id., 313.

51. Effect on property. In an action for a nuisance, it is sufficient to show that the property has been rendered less valuable for the purposes to which the owner has seen fit to devote it. *Supreme Ct.*, 1848, *First Baptist Church v. Schenectady & Troy R. R. Co.*, 5 Barb., 79. Compare *Squier v. Gould*, 14 Wend., 159; *First Baptist Church v. Utica & Schenectady R. R. Co.*, 6 Barb., 818.

52. That gas works are not within the ordinary uses of real estate; and whenever they create a special injury they are to be regarded as a private nuisance, and an action will lie in favor of the person sustaining the special injury. *Supreme Ct.*, 1856, *Carhart v. Auburn Gaslight Co.*, 22 Barb., 297.

53. A resident or taxpayer of the city who does not own real property on the street where a railroad is proposed to be laid, and to whom it will not be specially injurious, cannot maintain an action to restrain the construction of such road. *Ct. of Appeals*, 1856, *Davis v. Mayor, &c.*, of N. Y., 14 N. Y. (4 Kern.), 506. See, also, *CAUSE OF ACTION*, 8, 9.

54. Form of action, &c. That the action which is substituted for the writ of nuisance is governed by all the rules of the Code in regard to amendments, pleading, parties, &c. [8 Abbotts' Pr., 446.] *Supreme Ct.*, 1857, *Hubbard v. Russell*, 24 Barb., 404.

55. Any one may abate, of his own motion, a public nuisance,—e. g., a palpable encroachment upon a highway, to the serious interruption of the public use upon it. *Supreme Ct.*, 1835, *Wetmore v. Tracy*, 14 Wend.,

* The judgment was affirmed, but was questioned as to this point, the chancellor being of opinion that every individual who receives actual damage from a nuisance, may maintain a private suit for his own injury, although there were many others in the same situation. *Ct. of Errors*, 1829, *Lansing v. Smith*, 4 Wend., 9; and his opinion was approved in *First Baptist Church v. Schenectady & Troy R. R. Co.*, 5 Barb., 79; but compare *First Baptist Church v. Utica & Schenectady R. R. Co.*, 6 Id., 313.

Who liable for Nuisance.

Continuance of a Nuisance.

250. *Ct. of Errors*, 1832, *Hart v. Mayor, &c.*, of Albany, 9 *Id.*, 571; affirming S. O., 8 *Paige*, 218; and see *Denning v. Roome*, 6 *Wend.*, 651.

56. A municipal corporation, whose jurisdiction extends over the place of its erection, may abate it. *Ct. of Errors*, 1832, *Hart v. Mayor, &c.*, of Albany, 9 *Wend.*, 571; affirming S. O., 8 *Paige*, 218.

57. **Highway encroachments.** The provisions for proceedings to compel removal of encroaching fences, and for a trial of the question of encroachment, do not take away the common-law remedies of abatement by individuals of such encroachments as amount to public nuisances. *Supreme Ct.*, 1835, *Westmore v. Tracy*, 14 *Wend.*, 250; and see *Hart v. Mayor, &c.*, of Albany, 9 *Id.*, 571; affirming S. O., 8 *Paige*, 218.

58. The act of plaintiff in abating the nuisance does not bar him of an action for damages. The abatement is preventive merely. So held of a public nuisance. *Supreme Ct.*, 1827, *Pierce v. Dart*, 7 *Cow.*, 609.

59. **Who liable. Landlord.** One who lets his premises to be used in carrying on a lawful business, is not answerable for damages if it turns out a private nuisance, unless he knew, or had reason to believe that it would prove so to the plaintiff. *Supreme Ct.*, 1847, *Fish v. Dodge*, 4 *Den.*, 811; S. P., 1856, *Pickard v. Collins*, 28 *Barb.*, 444.

60. If a building is so constructed as to be a nuisance in its ordinary use, and let by the owner, he is still liable. *Ib.*

61. The lessor of premises offensively used as a livery stable, is not liable in damages, unless when he demised the premises he had reason to believe that the business would be a nuisance. *N. Y. Superior Ct.*, *N. P.*, 1851, *Morris v. Brower*, *Anth. N. P.*, 368.

62. **Erector.** Defendant had built a dam on his land, but before any damage had occurred from it to the adjoining owner, he left the possession and another assumed it. Held, that as the latter was presumptively the owner, there being no proof that he was defendant's tenant, defendant was not liable in damages. *Supreme Ct.*, 1836, *Blunt v. Aikin*, 15 *Wend.*, 522. Compare *Fish v. Dodge*, 4 *Den.*, 811.

63. One who erects a structure that is a nuisance, and conveys the premises with covenants for quiet enjoyment, and the right to maintain such erection, is liable for damages for a continuance of the nuisance by his grantee, for by his relation with the occupier he affirms the nuisance, and it may be deemed continued by himself. [Reviewing many cases.] *Supreme Ct.*, 1846, *Waggoner v. Jermaine*, 8 *Den.*, 306.

64. At common law the writ of nuisance lies only against the party who erected the nuisance, and if it be continued by his alienee, against both, and the Revised Statutes have not changed the rule. It does not lie against the alienee alone for continuing the nuisance. *Supreme Ct.*, 1849, *Brown v. Woodworth*, 5 *Barb.*, 550.

65. **Continuance of a nuisance.** The successor to the title and possession of property, who omits to abate a nuisance erected thereon by another, after notice to do so, is liable for the damage caused by its continuance; and, it seems, that notice to him to abate it is not necessary. *Ct. of Appeals*, 1855, *Brown v. Cayuga & Susquehanna R. R. Co.*, 12 *N. Y.* (2 *Kern.*), 486.

66. Every continuance of a nuisance is, in judgment of law, a fresh nuisance. [8 *Blacks.*, 220.] *Ib.* *Supreme Ct.*, 1845, *Vedder v. Vedder*, 1 *Den.*, 257.

O.

OATH

1. **Form of oath of witnesses prescribed.** 2 *Rev. Stat.*, 408, §§ 82-86.

2. **An oath irregularly administered by mistake,—e.g., upon Watts' Psalms and Hymns, instead of upon the Gospels,—is a valid oath.** If the party taking it makes no objection at the time, he is deemed to have assented to the

particular form adopted, and is liable to perjury, as if the oath had been regularly administered. *Ct. of Appeals*, 1853, *People v. Cook*, 8 *N. Y.* (4 *Seld.*), 67.

3. **A Jew is usually sworn upon the Hebrew Bible, and with his head covered.*** *People v.*

* See an interesting note on the proper oath of Jews and of idolaters, in *Fryatt v. Lindo*, 8 *Edw.*, 289.

In General.

Jackson, 8 *Park. Cr.*, 590; and see 2 *Rev. Stat.*, 408, § 86.

4. **Affirmation.** That the legal effect of an affirmation is the same as that of an oath. *N. Y. Gen. Sess.*, 1818, *Pendegrast's Case*, 8 *City H. Rec.*, 11.

5. **Officer's refusal.** The officers before whom oaths and affidavits "may be taken" (2 *Rev. Stat.*, 284, § 49; *Laws of 1840*, 187), are bound to administer the same, when requested. The word "may" is tantamount to "shall;" and an intentional refusal is wilful, and indictable as a misdemeanor under 2 *Rev. Stat.*, 696, § 38. *Supreme Ct.*, 1845, *People v. Brooks*, 1 *Den.*, 457.

6. **Out of the State.** An oath administered out of this State by a judge of this State, is void. *Supreme Ct.*, 1806, *Jackson v. Humphrey*, 1 *Johns.*, 498.

7. **Where a statute requires an oath of a principal,** the oath of an agent is not enough. *Ct. of Appeals*, 1849, *People v. Fleming*, 2 *N. Y.* (3 *Comst.*), 484.

As to Oaths of Office, see OFFICER.

As to what is Perjury, see PERJURY.

OCEAN STEAMSHIP COMPANIES.

NAVIGATION COMPANIES.

OFFICER

Under this title are presented the doctrines applicable to public officers in general, reserving for the titles of the various classes of officers, which will be found enumerated at the end, matters peculiarly applicable to each particular class. The effect of official certificates is treated under EVIDENCE.]

I. IN GENERAL.

II. APPOINTMENT AND ELECTION. QUALIFYING, REMOVAL, &c.

III. OFFICERS DE FACTO.

IV. COMPENSATION.

V. BUYING AND SELLING OFFICE.

VI. OBLIGATIONS VOID AS TAKEN BY COLOR OF OFFICE.

VII. LIABILITY OF OFFICERS FOR THEIR CONDUCT.

VIII. HOW FAR PROCESS IS A PROTECTION.

IX. SUING AND BEING SUED.

X. COMPELLING DELIVERY OF BOOKS AND PAPERS.

I. IN GENERAL.

1. **Public.** Every office is considered public, the duties of which concern the public. [5 *Bac. Abr.*, 180; 2 *Tom. Dict.*; 5 *Bing.*, 91.] *So held*, of commissioners to lay out a road. *Supreme Ct., Sp. T.*, 1852, *People v. Hayes*, 7 *How. Pr.*, 248. To similar effect, see *Wood's Case*, 2 *Cow.*, 29, *note*; *People v. Bedell*, 2 *Hill*, 196; and see ATTORNEY AND CLIENT, 8-5.

2. Commissioners appointed by the governor, under a statute, to superintend the construction of a building, are officers within section 16 of art. 4 of the Constitution; and if their term is not prescribed by the Constitution or law, they are removable at the pleasure of the appointing power. Even if they were regarded merely as agents, the executive power to remove them would be the same. *Supreme Ct.*, 1839, *People v. Comptroller*, 20 *Wend.*, 595.

3. The superintendent, or principal keeper of the Albany county penitentiary is a public officer within § 124 of the Code. [8 *How. Pr.*, 248.] *Supreme Ct., Sp. T.*, 1855, *Porter v. Pillsbury*, 11 *How. Pr.*, 240.

4. **Offices of the State,** what are. *People v. Conover*, 17 *N. Y.* (8 *Smith*), 64; *Devlin's Case*, 5 *Abbotts' Pr.*, 281.

5. The Board of Metropolitan Police Commissioners are not State officers, within the meaning of the Laws of 1851, 920 (*q. v.*, INJUNCTION, 127). They are officers of a locality or district, and, in a proper case, may be restrained by a court of equity, like other local or county officers. *N. Y. Com. Pl., Sp. T.*, 1858, *N. Y. & Harlem R. R. Co. v. Mayor, &c.*, of *N. Y.*, 1 *Hill*, 562, 585.

As to who are County officers within the meaning of the Constitution, see CONSTITUTIONAL LAW, 824-827.

6. **A person employed by an officer** who is not authorized to appoint a deputy is to be regarded as a mere servant, and his acts in delivering property on an illegal agreement, and taking security, do not conclude the State, but the State may waive the tort and enforce the security. *Supreme Ct.*, 1842, *State of N. Y. v. City of Buffalo*, 2 *Hill*, 484.

7. **Delegation.** That an official power which is not exclusively ministerial cannot be delegated. *Ct. of Appeals*, 1850, *Powell v. Tuttle*, 3 *N. Y.* (3 *Comst.*), 396.

Appointment and Election. Qualifying, Removal, &c.

8. Permissive statutes. In general, where a public duty is imposed by statute upon officers, whether by words peremptory or permissive, they have no discretion to refuse its performance, as against a party having an interest in such performance. [5 Cow., 188, 198; 4 Dowl. & Ryl., 197; 1 Id., 148; 2 Id., 172, 176, and note.] *Supreme Ct.*, 1841, *Martin v. Mayor, &c.*, of Brooklyn, 1 *Hill*, 545.

9. Imprisonment. An officer having charge of a prisoner, may, in his discretion, increase the rigor of confinement, according to the disposition manifested by him; and this extends as well to military as civil offenders. *Supreme Ct.*, 1817, *Schuneman v. Diblee*, 14 *Johns.*, 285.

10. Serving process. That a general officer, such as a marshal or sheriff, while serving process, is not bound to show it, though it may be discreet to do so. *Gen. Sess.*, 1818, *Brown's Case*, 8 *City H. Rec.*, 56.

11. Property alleged to be stolen, coming into the custody of an officer, to be held subject to the order of a magistrate. 2 *Rev. Stat.*, 746, § 80.

12. Power to sell bonds. Commissioners were appointed by a statute to sell, at par, State bonds, bearing interest. *Held*, that a sale by them for the face of the bonds, but allowing the purchaser time to pay, without charging him with interest, was unauthorized as being not a sale at par, and moreover a sale on credit. *Ct. of Errors*, 1841, *Delafield v. State of Illinois*, 26 *Wend.*, 192; 2 *Hill*, 159; affirming S. C., 8 *Paige*, 527.

13. Trover. An officer seizing goods under an execution, acquires a special property, and though he receipt them, he may maintain trover for a subsequent wrongful conversion of them. *Supreme Ct.*, 1842, *Dezell v. Odell*, 3 *Hill*, 215.

14. Unauthorized loans. In an action by public officers for moneys lent by them, to sustain a defence that the money was lent illegally, it must appear that the loan was in violation of public policy, or of a statute. Mere absence of an express authority to make the loan will not sustain it. *Supreme Ct.*, 1843, *Commissioners of Cortlandville v. Peck*, 5 *Hill*, 215. Compare *State of N. Y. v. City of Buffalo*, 2 *Id.*, 434.

15. Return of attachment. Under 2 *Rev. Stat.*, 587, § 17,—requiring an officer executing process for contempt to return it during the

sitting of the court on the return-day,—even though the attachment is returnable at a particular hour of the day, the officer is not compellable to return it at the hour, except by order of the court, when he is present. If he is absent, an *ex-parte* order for an attachment against him, entered before the adjournment of the sitting of that day, is irregular. *Chancery*, 1839, *People v. Wheeler*, 7 *Paige*, 438.

16. Mode of requiring an officer to return process, &c., under Code of Procedure. *Rule 8 of 1858.*

17. Expenses of suits. Officers sued for an act done by them as such, in the course of their agency, and pursuant to authority, and who acted faithfully and without fault, are entitled to be reimbursed for every thing reasonably and necessarily disbursed in and about their defence, and which could not be included in the taxation of costs, in the judgment recovered by them. *Supreme Ct.*, 1822, *Powell v. Trustees of Newburgh*, 19 *Johns.*, 284.

18. The rule that laches is not imputable to the government, does not apply to the prejudice of the rights of individuals. *A. V. Chan. Ct.*, 1843, *Hayden v. Auburn State Prison*, 1 *Sandf. Ch.*, 195. See *Seymour v. Van Slyck*, 8 *Wend.*, 408; and *People v. Russell*, 4 *Id.*, 570.

19. Surety's agreement to pay. Where an instrument given as the official bond of a constable was not sealed, and defendants, the sureties, on a default, gave their notes to the party aggrieved,—*Held*, that they must be presumed to have known the defect in the instrument, and had waived any objection thereto. *Supreme Ct.*, 1817, *Raymond v. Lent*, 14 *Johns.*, 401.

20. Emigrant business. No officer of the United States, or of this State, or of any of its cities, to be concerned in forwarding emigrants. *Laws of 1848*, 832, ch. 219, § 8.

As to **Buying lands** in suit, see **CHAMPERTY AND MAINTENANCE**, 19.

As to the cases in which **Several officers** must concur, or may act separately, see **POWERS**.

II. APPOINTMENT AND ELECTION. QUALIFYING, REMOVAL, &c.

21. Public officers. The number and classification of public officers; and general provisions relating to their residence, term of office, qualifying, their powers, and their removal. 1 *Rev. Stat.*, 5 ed., 878.

Appointment and Election. Qualifying, Removal, &c.

22. State officers, how elected, &c. *Const. of 1846, art. 5.*

23. Members, &c., of the Legislature not to receive civil appointments. *Const. of 1846, art. 3, § 7; 1 Rev. Stat., 108.*

24. Choosing and removing officers to be provided for by law, and vacancies declared. *Const. of 1846, art. 10, §§ 2, 7, 8.*

25. Term. Offices of which the duration is not prescribed, are held during the pleasure of the authority appointing. *Const. of 1846, art. 10, § 8.*

26. A person chosen to fill a vacancy in any elective office, not to hold longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy. *Const. of 1846, art. 10, § 5.*

As to the **Constitutionality** of statutes affecting an officer's tenure of office, or compensation, see CONSTITUTIONAL LAW, 63, 124, 186, 179, 180, 229-236.

As to the **Construction and effect** of the constitutional provisions relating to offices, see CONSTITUTIONAL LAW, 252-265, 274-353.

27. Power to appoint not to be delegated. Public trusts for the appointment of officers at pleasure, can never be devested, nor delegated. *So held,* of the power of trustees of academies, under statute to appoint and remove teachers. *Chancery, 1824, Auburn Academy v. Strong, Hopk., 278.* Consult, also, CONSTITUTIONAL LAW, 248, 249.

28. Loss of ballots. Where the ward canvassers returned specially the returns from three out of the four election districts of the ward, and that they could not declare who had been elected, because the ballots cast in the fourth district had been lawlessly dispersed before they were counted;—*Held,* that the canvassers, having returned the names of the candidates and the number of votes cast for them respectively in the three districts, had substantially complied with the statute (2 *Rev. L. of 1813, 347, § 11*),—requiring them to certify and declare who had the majority of votes for each respective office,—and the candidates so appearing to have the majority were elected. The accidental loss of the ballots in a single subdivision of an election district, even though it prevents a return, does not of itself detract from the election as it stands on the votes which are properly returned. *Supreme Ct., 1842, Exp. Heath, 3 Hill, 42.*

29. Justices' appointment. The appointment of officers by three justices of a town, upon failure to elect or refusal to act, is a judicial act, and if jurisdiction appears, cannot

be questioned collaterally. [8 T. R., 424.] *Supreme Ct., 1811, Wood v. Peake, 8 Johns., 69; 1819, Wildy v. Washburn, 16 Id., 49; 1843, People v. Seaman, 5 Den., 409.*

30. Joint ballot of two boards. Under the act of 1832,—providing that superintendents of the poor should be appointed by joint ballot of the board of supervisors and the county judges, in case their separate nominations should not agree,—one board nominated, and the other refused to nominate upon the pretence that they could not agree. *Held,* that a subsequent election by joint ballot was valid. *Supreme Ct., 1834, Exp. Humphrey, 10 Wend., 612.*

31. In the appointment of superintendents of the poor, if no nomination is made by a majority of the board of supervisors, after an ineffectual attempt for that purpose, and a nomination is made by the judges, the two chambers, when convened to compare their nominations, may proceed to elect by ballot, in the same manner as if, on comparison, it was found that there was a disagreement in nomination. *Id.*

32. The act of 1836 (since repealed), directed that county treasurers be appointed by the judges of the Common Pleas and the supervisors, each body to meet in its own chamber and make a nomination, both then to assemble in joint meeting, and if the nominations agreed, the nominee to be considered as appointed; otherwise, a choice should be then made by joint ballot, from the persons nominated. An invitation was given by one body to the other, to assemble in joint meeting for the purpose of making a particular appointment; the two bodies assembled in joint meeting for the transaction of other business, and, when thus assembled, it was agreed by a majority to proceed to the contemplated appointment, and on the announcement of a nomination by one of the bodies, the other declared they had made no nomination, and refused to act. *Held,* that the appointment by a majority of the whole number of both bodies was a valid appointment, though all the members of the body which had omitted to make a nomination left the joint meeting and took no part in the appointment. *Ct. of Errors, 1841, Whiteside v. People, 26 Wend., 684; reversing S. C., 23 Id., 9.*

33. Where a statute vested the appointment of officers in the board of supervisors and the

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judges of two courts, to act by joint ballot;—*Held*, that, on due notice to all, a majority of all constituted a quorum able to make the appointment. *Supreme Ct., Sp. T.*, 1856, *People v. Walker*, 28 *Barb.*, 304; *S. C.*, 2 *Abbotts' Pr.*, 421.

34. Under the laws of 1855, 502,—which conferred the appointment of clerk of the district courts in the city of New York upon the mayor, and the members of the board of aldermen, or a majority thereof, and directed their meeting to be in convention, prescribing the mode in which they should be called together, and declaring that the aldermen should not appoint in the absence of the mayor, unless after eight days' notice to him of the meeting;—*Held*, that notice must be given to all who legally composed the convention, before those who did attend, though a majority, could proceed, in the absence of the others. *Supreme Ct.*, 1858, *People v. Batchelor*, 28 *Barb.*, 310; affirmed, *Ct. of Appeals*, 1861, 22 *N. Y. (8 Smith)*, 128.

35. Since the statute above mentioned does not require the resolution of the board calling the convention to be adopted by a majority of the members, service upon the mayor of a copy, signed by the clerk of the board, of a resolution directing such clerk to give notice to the mayor that the board would meet in convention for the purpose, and inviting his attendance, is sufficient, although the resolution does not show on its face that it was passed by a majority of the board. *N. Y. Com. Pl.*, 1855, *Ganniff v. Mayor, &c.*, of *N. Y.*, 4 *E. D. Smith*, 480.

36. It is not necessary that the resolution making such appointment should show upon its face that it was adopted by a majority of all the members of the convention. *Id.*

37. **Holding over leaves no vacancy.** That where an officer whose term has expired, continues to discharge the duties of the office,—under 1 *Rev. Stat.*, 117, § 9, authorizing officers so to do until successors are duly qualified,—the office is not vacant, and the governor has no authority to appoint another person in his place, under 1 *Rev. Stat.*, 123, which authorizes him to fill vacancies in the recess of the senate. *Chancery*, 1842, *Tappan v. Gray*,* 9 *Paige*, 507; reversing *S. C.*, 8 *Blw.*, 450.

* The decree was affirmed by the Court of Errors,

38. Power of governor to fill vacancy.

The provision of the Laws of 1849, ch. 28,—authorizing the governor to fill vacancies, for filling which no provision is made,—is applicable only to officers of the State which are filled at the general elections for a regular term, commencing with the year succeeding such election. It does not apply to offices held by appointment. Thus it does not apply to the office of street-commissioner of New York, an office which existed merely as an agency of the city Corporation until after the act of 1849, when it was created by statute, with power in the Corporation to appoint and remove. *Ct. of Appeals*, 1858, *People v. Conover*, 17 *N. Y. (8 Smith)*, 64; affirming *S. C.*, 26 *Barb.*, 516. Compare *People v. Keeler*, 17 *N. Y. (8 Smith)*, 870; reversing *S. C.*, 25 *Barb.*, 23, 421.

39. — **in elective office.** Under the provisions of the Constitution of 1822, and of the Revised Statutes, the governor was authorized, in case of the death of a county clerk in office, to appoint a person to execute the office until the next general election. *Supreme Ct.*, 1840, *People v. Fisher*, 24 *Wend.*, 215.

40. This power has not been abrogated by the Constitution of 1846, or by the legislation under it. *Ct. of Appeals*, 1856, *People v. Snedeker*, 14 *N. Y. (4 Kern.)*, 52.

41. If a county clerk dies in office, his deputy is immediately authorized to perform all the duties of the office, and if no appointment by the governor were made, he would continue the incumbent until the next general election. [1 *Rev. Stat.*, 876, § 59; amended by Laws of 1880, ch. 320, § 4.] But the governor is required to make an appointment, and when he does so his appointee is thenceforth to execute the office until the election. [1 *Rev. Stat.*, 124, § 49; Laws of 1880, ch. 58, § 2; Laws of 1849, ch. 28.] In either case the vacancy is to be filled at the next annual election, unless the term of the clerk who died would have expired at the end of the year, and in that case the election is to be for the full term. [Laws of 1842, 111, § 8.] The power of appointment vesting in the governor, to fill a vacancy in an office made elec-

1848 (7 *Hill*, 259), two members of the court indicating their concurrence as to the jurisdiction of chancery, but not as to the legality of the appointment. No other opinions are reported.

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tive by the Constitution, is not unconstitutional. [24 Wend., 215.] *Id.*

42. Removal of acting sheriff. The provision of 1 Rev. Stat., 122, § 38,—that all officers appointed by the governor for a certain time, or to supply a vacancy, may be removed by him,—applies to the case of a person appointed under 1 Rev. Stat., 124, § 49, to execute the duties of a vacant office of sheriff until the election of a sheriff at the next general election: and the governor may remove such temporary appointee, and make another appointment, at pleasure. The removal upon charges is confined to elected officers. *Supreme Ct.*, 1848, *People v. Parker*, 6 *Hill*, 49.

43. Two titles. Where a town officer was falsely declared re-elected, and took oath and gave bond accordingly,—*Held*, that though claiming under the latter election would not preclude him from setting up the other title, the re-election having been accepted by him was conclusive against his claim that he was entitled to hold over because no one had been elected. *Supreme Ct.*, 1837, *People v. Jones*, 17 *Wend.*, 81.

44. Two offices. The appointment of a person to an office incompatible with one already held by him, is valid, and he has a right to elect between the two. [Ang. & A. on Corp., 255.] If he accepts, takes the oath, and enters on the duties of the second office, the first office is absolutely determined. [Vid. Willc. on Mun. Corp., 240, pl. 617; 8 Burr., 1616; 2 T. R., 87.] *Supreme Ct.*, 1841, *People v. Carrique*, 2 *Hill*, 93.

45. The oath of office prescribed. *Const. of 1846*, art. 12, § 1; 1 *Rev. Stat.*, 119.

46. Designation of person to administer an oath to an officer.—*Held*, merely directory. *Exp. Heath*, 3 *Hill*, 42; *Canniff v. Mayor, &c.*, of N. Y., 4 *E. D. Smith*, 480.

47. Refusal to administer. Though minors and aliens cannot hold office, it is not for the officer to whom application to administer the oath of office is made, to determine on the question of capacity of the applicant. *Supreme Ct.*, 1830, *People v. Dean*, 3 *Wend.*, 438.

48. Official bonds, regulated. 1 *Rev. Stat.*, 120.

49. Where the mode of resignation is not declared by law, and the appointment is not by deed, resignation may be by parol; and the acceptance of it need not be in writing,

but it is enough that the office is treated as vacant,—*e. g.*, by appointing a successor. [1 *Ld. Raym.*, 563; 2 *Salk.*, 438; 1 *Ld. Raym.*, 1804; *Fost.*, 275; 11 *Mod.*, 270; 12 *Id.*, 402; *Holt's R.*, 450.] *Supreme Ct.*, 1842, *Van Orsdall v. Hazard*, 8 *Hill*, 243; and see *People v. Albany C. P.*, 19 *Wend.*, 27.

50. A resignation in writing, without seal, is effectual, though the statute requires the appointment to the office in question to be under seal; for the provisions of the statute relating to resignations are silent as to a seal; and it seems, that acceptance of the resignation is unnecessary. *Supreme Ct.*, 1851, *Gilbert v. Luce*, 11 *Barb.*, 91.

51. Power to remove, implied. That a power of appointment given by law in general terms and without restriction, for the purpose of carrying out some project of which it forms only a part, implies the power of removal. *So held*, of a municipal corporation having power to appoint commissioners of estimate and assessment in cases of local improvements. *Supreme Ct.*, 1848, *People v. Mayor, &c.*, of N. Y., 5 *Barb.*, 43. *N. Y. Superior Ct.*, 1850, *Laimbeer v. Mayor, &c.*, of N. Y., 4 *Sandf.*, 109.

52. Removal by new appointment. Though, as a general rule, where an office is held during the pleasure of the appointing power, the appointment of a successor removes the incumbent; yet, where removal is required to be by the senate, on the recommendation of the governor, a mere appointment of A. by the governor, with the consent of the senate, though expressed to be in the place of B., is not a removal of the latter. *Supreme Ct.*, 1841, *People v. Carrique*, 2 *Hill*, 93; and see *Van Orsdall v. Hazard*, 8 *Id.*, 243.

53. Where appointment to office was to be by nomination by the aldermen.—*Held*, that the removal of the incumbent by the mayor, and nomination of a successor, did not take effect, so as to deprive the former of his salary, until the confirmation of the successor. *N. Y. Com. Pl.*, 1855, *White v. Mayor, &c.*, of N. Y., 4 *E. D. Smith*, 563.

54. Holding over. An officer whose term has expired, has no right, at common law, to hold over by reason of the failure of the proper authorities to appoint an officer in his place at the expiration of his term. There is no common-law rule by which a public officer appointed or chosen for a fixed time can hold office beyond that term, upon the failure of

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the proper body to appoint a successor. Acts of officers may sometimes be sustained under such circumstances, to protect the rights of a third party; but the officer himself cannot claim to hold over, unless by some provision of law authorizing it. *Supreme Ct., Sp. T., 1859, People v. Tieman, 8 Abbotts' Pr., 359.*

III. OFFICERS DE FACTO.

55. To constitute an officer de facto, there must be color of title. A claim, under appointment, of title to an office which by law is elective; or a claim, under election, to an office which by law must be filled by appointment, is no color of title, and cannot constitute the claimant an officer *de facto*, so that perjury can be assigned of an oath administered by him. *Greene County Ct., 1853, People v. Albertson, 8 How. Pr., 363.*

56. Though all officers are required to take oath [1 Rev. Stat., tit. 6, ch. 20], and assuming office without doing so is a misdemeanor, and forfeits the office [Id., 121], a justice who assumes office without taking the oath is an officer *de facto*, and he is not a trespasser in issuing process. [Citing 1 Hill, 674; 5 Id., 616; 1 Den., 575; and distinguishing 8 Johns., 409; 18 Id., 218.] *Supreme Ct., 1848, Weeks v. Ellis, 2 Barb., 320.*

57. What constitutes possession of a public office; and of the distinction between an officer *de jure* and an officer *de facto*. *People v. Peabody, 6 Abbotts' Pr., 228; S. C., sub nom., Conover v. Devlin, 15 How. Pr., 470; Mayor, &c., of N. Y. v. Flagg, 6 Abbotts' Pr., 296; and see People v. White, 24 Wend., 520.*

58. That there cannot be an officer *de jure* and an officer *de facto* in possession of the same office at once. *Chancery, 1843, Boardman v. Halliday, 10 Paige, 223.*

59. Acts valid as to strangers. The acts of an officer *de facto*, who comes into office by color of title, are valid as it concerns the public, or third persons who have any interest in his acts; for this is necessary to prevent the failure of justice. *Supreme Ct., 1811, People v. Collins, 7 Johns., 549; S. P., 1812, McIntire v. Tanner, 9 Id., 185; 1830 [citing also 8 Johns., 486; 12 Id., 296; 4 T. R., 866; 17 Vin., 114; 2 Campb., 181; 9 Mass., 281], Wilcox v. Smith, 5 Wend., 281.* To the same effect [citing many cases], *Supreme Ct., 1843, People v. Stevens, 5 Hill, 616; 1845, People v. Hopson, 1 Den., 574. Chancery, 1840, Parker v. Baker, 8 Paige,*

Ct. of Appeals, 1853, People v. Cook, 8 N. Y. (4 Seld.), 67; affirming S. C., 14 Barb., 259; S. P., HIGHWAYS, 41, 89.

60. The title to office of an officer *de facto*, cannot be inquired into collaterally. *Supreme Ct., 1835, Hall v. Luther, 13 Wend., 491.*

61. Hence on an indictment for assaulting an officer and resisting the execution of process, proof that he had not taken the oath of office, or given the security required by law, is no defence. *Supreme Ct., 1845, People v. Hopson, 1 Den., 574.*

62. That this principle cannot be applied to an unconstitutional exercise of power. *Ct. of Errors, 1840, People v. White, 24 Wend., 520.*

63. The testimony of the officer on the trial that he is such officer, is, if uncontradicted, presumptive proof of his authority. *N. Y. Com. Pl., 1854, Mayor, &c., of N. Y. v. Ryan, 2 E. D. Smith, 368.*

64. Trustees, &c., of school district. The principle that the official character of public officers may be established by proving that they are generally reputed to be, and have acted as, such officers, without producing their commission or other evidence of their appointment, is applicable to the trustees or collector of a school district. *Supreme Ct., 1831, Ring v. Grout, 7 Wend., 341; 1832, McCoy v. Ourtice, 9 Id., 17.*

65. The trustees of a school district, justifying as such, are not bound to prove that the district was duly organized; it is enough, if they show that it had been, in fact, organized. *Supreme Ct., 1847, Stevens v. Newcomb, 4 Den., 487.*

66. Inspectors of election. A challenged voter swearing falsely before a *de facto* board of inspectors, is as liable as if the oath had been administered by inspectors *de jure*. *Ct. of Appeals, 1853, People v. Cook, 8 N. Y. (4 Seld.), 67; affirming S. C., 14 Barb., 259.*

67. Acts void as to the officer. The doctrine that the acts of an officer *de facto* are valid, extends only to prevent mischief to such as confide in officers who are acting without right. [7 Johns., 549; 7 Serg. & R., 386.] The office is void as to the officer himself, though valid as to strangers. [10 Serg. & R., 249; 2 Rawle, 139, 140; 9 Mass., 281.] Thus where a minor elected to office serves, the office is no protection where he is sued as a trespasser. [Distinguishing *Wood v. Peake, 8 Johns., 69.*] *Supreme Ct., 1840, Green v.*

Compensation.

Burke, 23 *Wend.*, 490. To the same effect, 1845 [citing, also, 24 *Wend.*, 526], *People v. Hopson*, 1 *Den.*, 574.

68. On a *quo warranto*, the officer must show a good title, not a colorable one, nor one resting upon his own neglect. *Supreme Ct.*, 1831, *People v. Bartlett*, 6 *Wend.*, 422.

69. The compensation of a public office is an incident to the title to the office, not to its mere occupation or exercise. The principle which avails to sustain the acts of officers *de facto*, as respects third persons, will not avail to sustain the claim of such an officer to salary or fees. *Supreme Ct.*, *Sp. T.*, 1859, *People v. Tieman*, 8 *Abbotts' Pr.*, 859.

70. *Liability*. One who is an officer *de facto* but not *de jure*, is not liable for omissions of duty as an officer. [7 *Serg. & R.*, 386; 23 *Wend.*, 502.] *Supreme Ct.*, 1858, *Bentley v. Phelps*, 27 *Barb.*, 524; distinguishing *Dean v. Gridley*, 10 *Wend.*, 254.

71. The Court of Chancery ought not to assume the jurisdiction to oust an officer, in no way connected with the administration of justice there, and over whose appointment it has no control, from an office, the duties of which he is discharging under color of an appointment by the executive of the State. *Chancery*, 1842, *Tappan v. Gray*,* 9 *Paige*, 507; reversing S. O., 3 *Edw.*, 450. Followed, *Supreme Ct.*, *Sp. T.*, 1857, *Mayor, &c., of N. Y. v. Conover*, 5 *Abbotts' Pr.*, 171.

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72. *Extra services*. A salaried officer cannot make title to an increased compensation on the sole ground that a new duty has been cast upon him by the Legislature. *Supreme Ct.*, 1841, *People v. Supervisors of N. Y.*, 1 *Hill*, 362. *N. Y. Superior Ct.*, 1849, *Palmer v. Mayor, &c., of N. Y.*, 2 *Sandf.*, 318.

73. Though the extra service be required and rendered on Sundays, and may therefore be unlawfully required, the officer has no valid claim for remuneration. *N. Y. Superior Ct.*, 1849, *Palmer v. Mayor, &c., of N. Y.*, 2 *Sandf.*, 318.

74. A person accepting an office of a municipal corporation is deemed to act with

reference to the charter; and there can be no implied contract to pay him, other than that which arises from its provisions. *Ct. of Appeals*, 1859, *Baker v. City of Utica*, 19 *N. Y.* (5 *Smith*), 326.

75. *Services to another officer*. Where one public officer, at the request or designation of another, performs service for which he was entitled to compensation from the public treasury, no right of action accrues between them, except under special circumstances. *Supreme Ct.*, 1848, *Vedder v. Superintendents of Schenectady*, 5 *Den.*, 564.

76. *Title necessary*. Where one exercising a public office seeks to compel payment of his salary by mandamus, he must show himself entitled of right to the office. *Supreme Ct.*, *Sp. T.*, 1859, *People v. Tieman*, 8 *Abbotts' Pr.*, 859.

77. *Reduction of salary*. Public offices in this State are not incorporeal hereditaments, nor have they the character or qualities of grants. They are agencies. Except in the special cases where the Constitution prohibits it, the Legislature may control the unearned emoluments of office. *Ct. of Appeals*, 1851, *Conner v. Mayor, &c., of N. Y.*, 5 *N. Y.* (1 *Seld.*), 285; affirming S. O., 2 *Sandf.*, 355. S. P., *N. Y. Com. Pl.*, 1857, *Phillips v. Mayor, &c., of N. Y.*, 1 *Hill*, 438; *q. v.*, CONSTITUTIONAL LAW, 124.

78. "No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office." *Const. of 1846*, art. 6, § 20.

79. *Private compensations*. An officer employed by the public for the performance of a public trust, and paid by his country for his services, cannot take additional and private compensations for the discharge of his official duties. Bribes for doing a duty, are not lawful, any more than for omitting a duty. *Chancery*, 1828, *Weaver v. Whitney*, *Hopk.*, 11.

80. A ministerial officer whose compensation for particular services is fixed by law,—*e. g.*, a constable,—cannot recover an extra compensation for the performance of such services, though it was promised by the party, and though he used more than ordinary diligence. [2 *Rev. Stat.*, 650, § 5; *Latch*, 54; *W. Jones*, 65; S. O., 1 *Hawk.*, P. O., ch. 68, § 4; 1 *Ohitt.*, 175; *Id.*, 295; 1 *Campb.*, 218; 3 *Id.*, 874; 4 *Conn.*, 471; 1 *Pick.*, 175; 7 *Serg. & R.*, 447; 2 *Har. & Gill*, 54; 1 *Bail.*, 70.] *Ct. of Errors*, 1835, *Hatch v. Mann*, 15

* The decree was affirmed by the Court of Errors, 1848 (7 *Hill*, 259), two members of the court indicating their concurrence as to the jurisdiction of chancery, but not as to the legality of the appointment. No other opinions are reported.

Buying and Selling Office.

Obligations Void as taken by Color of Office.

Wend., 44; reversing *S. C.*, 9 *Id.*, 262. Approved, *N. Y. Superior Ct.*, 1849, *Palmer v. Mayor, &c.*, of *N. Y.*, 2 *Sandf.*, 318; *S. P.*, *Pilots*, 1; and see *Parker v. Newland*, 1 *Hill*, 87.

V. BUYING AND SELLING OFFICE.

81. A person holding or exercising office under the laws or Constitution of this State, who for any reward or gratuity, grants to another the right or authority to discharge any of its duties, is guilty of a misdemeanor, and is forever disabled from holding such office. The grantee is also guilty of a misdemeanor. 2 *Rev. Stat.*, 696, §§ 35, 36.

82. Official acts done before a conviction for such offence valid. 2 *Rev. Stat.*, 696, § 37.

83. Deputy with fixed salary. Where deputies are, by law, entitled to part of the fees of the office, an appointment under an agreement that the deputy is to receive a fixed salary, which, by possibility, may be less than the fees to which he would be entitled, is a violation of the statute against selling office, &c.; and both parties being in *pari delicto*, the deputy cannot recover from the principal, the statute compensation. *Supreme Ct.*, 1882, *Tappan v. Brown*, 9 *Wend.*, 175. *S. P.*, *Chancery*, 1886, *Becker v. Ten Eyck*, 6 *Paige*, 68.

84. Sharing fees. Where there is no statute fixing the compensation of a deputy, and the fees belonging to the sheriff, the sheriff may take a bond from his deputy, conditioned for the faithful discharge of the deputy's duties, and to pay over a certain proportion of the fees of such business as should be done by him. [3 *Salk.*, 466; 6 *Mod.*, 284; 1 *Bro. P. C.*, 98; *Comb.*, 356; 12 *Mod.*, 90; *Com. Dig.*, tit. *Officer*, K. 1.] *Supreme Ct.*, 1841, *Mott v. Robbins*, 1 *Hill*, 21. To the same effect, *Chancery*, 1886, *Becker v. Ten Eyck*, 6 *Paige*, 68.

85. Contingent agreement. It was agreed between the principal and his deputy as the condition of the appointment of the latter, that the principal should receive \$2,500 out of the profits, if they should yield that sum, and all the profits if they should not: that the deputy should have no salary if the profits fell short of it; if they should exceed it, he should have the excess up to \$8,000, and the surplus, if any, should go to the principal.

Held, a legal contract and not an evasion of the statute respecting selling offices. The deputy's agreement to pay was not absolute, but contingent on the profits of the office. [2

Salk., 251, 575, n.; 3 *Swans.*, 174; 2 *And.*, 55, 107.] *A. V. Chan. Ct.*, 1842, *Stewart v. Glentworth*, 1 *N. Y. Leg. Obs.*, 217.

86. Pledging the fees of an office for the payment of the rent of premises essential to the conduct of its business, is not illegal. [3 *Younge & G.*, 146.] *Id.*

VI. OBLIGATIONS VOID AS TAKEN BY COLOR OF OFFICE.

87. Obligation. The sheriff's taking a transfer of a note, as security on an arrest, instead of bail, is illegal (1 *Rev. L.*, 428) and void. Any promise to save harmless is an obligation within the statute. *Supreme Ct.*, 1811, *Strong v. Tompkins*, 8 *Johns.*, 98.

88. No sheriff or other officer* shall take any bond, obligation, or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation, or security, taken otherwise than as herein directed, shall be void. 2 *Rev. Stat.*, 286, § 59.

89. Bond without order for bail. A bond taken by the sheriff, on an attachment issued on a rule of course and in a penalty exceeding \$100, but without any order fixing the amount of bail, is void as taken by color of office. [2 *Rev. Stat.*, 2 ed., 442, §§ 6, 11; *Id.*, 214, § 60.] *Supreme Ct.*, 1889, *Bank of Buffalo v. Boughton*, 21 *Wend.*, 57.

90. A bail-bond must be conditioned that the defendant will appear by putting in special bail within twenty days after the return-day, &c., in the terms prescribed by the Revised Statutes, or it will be void. A bond in the form used under the old statute, although its legal effect is the same as that of the form prescribed by the present statute, is a nullity. *Supreme Ct.*, 1889, *Barnard v. Viele*, 21 *Wend.*, 88. Compare *Sullivan v. Alexander*, 19 *Johns.*, 288.

91. Deposit to obtain permission to go at large. The policy of the law, in declaring void, bonds, agreements, &c., taken by officers *colore officii*, is to guard against both official oppression and a lax performance of duty to the injury of the plaintiff. The statute extends only to the officer, and not to the plaintiff in the process. Hence, where a party under arrest is permitted to go at large on depositing with a third person the amount of the demand, under an agreement that if he did not surren-

* This provision is contained in a division of the statute which relates to judicial officers.

Liability of Officers for their Conduct.

der himself at a given time, the money might be paid over to the plaintiff in the process, in an action to recover back the money from the person with whom it was deposited, the question is, whether the agreement was made with the officer or with the plaintiff, at whose suit the arrest was made. *Ct. of Appeals*, 1848, *Winter v. Kinney*, 1 *N. Y. (1 Comst.)*, 365.

92. Bastardy bond. A bond taken by a justice under the Bastardy Act, conditioned for payment of such sums as might be required by the sessions, instead of merely for indemnity as required by the act, is void, as taken *colore officii*. [2 Rev. Stat., 884, § 66.] *Supreme Ct.*, 1841, *People v. Meighan*, 1 *Hill*, 298; and see *People v. Locke*, 3 *Sandf.*, 443; but compare *People v. Mitchell*, 4 *Id.*, 466; *Hoogland v. Hudson*, 8 *Hov. Pr.*, 848.

93. The words "color of office," imply an illegal claim of right to take the security or do the act in question, by virtue of office; but an act not prohibited by the common law, or by statute, may lawfully be done by an officer,—*e. g.*, he may take a receipt for goods levied upon, conditioned for their safe-keeping to meet the execution. *Ct. of Errors*, 1840, *Burrall v. Acker*, 28 *Wend.*, 606; affirming *S. C.*, 21 *Id.*, 605. Compare *Browning v. Hanford*, 5 *Hill*, 588.

94. In what cases securities taken by public officers are to be deemed void, as taken *colore officii*, and in what cases they are valid, although not authorized by statute. *Decker v. Judson*, 16 *N. Y. (2 Smith)*, 439.

95. The statute is confined to public officers. It does not apply to a plaintiff in a process, and he may take such security as he pleases on discharging his debtor from arrest, though the officer must not be a party or interested in the agreement. *Ct. of Appeals*, 1848, *Winter v. Kinney*, 1 *N. Y. (1 Comst.)*, 365.

96. What officers. Though the provisions of the Revised Statutes, declaring obligations taken by sheriffs and other officers by color of office to be void, applies only to sheriffs, coroners, constables, and other officers of that description, and is not of universal application; yet securities taken by other officers without authority of law as a condition of the exercise of their official powers or discretion,—*e. g.*, a bond exacted by commissioners of highways from certain landowners to be specially benefited by laying out a road, to secure the town against the expense of it,—are void

as against public policy. *Supreme Ct.*, 1848, *Webb v. Albertson*, 4 *Barb.*, 51.

97. A bond taken in the statute form is valid, in so far, though some of its conditions are superfluous. *N. Y. Superior Ct.*, 1851, *People v. Mitchell*, 4 *Sandf.*, 466.

98. "Provided by law." The reference in 2 Rev. Stat., 286, to cases "provided by law," embraces not only exceptions provided by statute, but those cases also in which such security might be taken at common law. *Ct. of Appeals*, 1858, *Chamberlain v. Beller*, 18 *N. Y. (4 Smith)*, 115.

99. Obligation for benefit of third parties.

A bond taken by an officer, in discharge of a warrant against a vessel, though its condition is broader than the statute prescribes, is not a bond taken *colore officii*; for though taken by the officer, it is not a bond to him, but is for the benefit of the parties who sued out the warrant. *Ct. of Errors*, 1841, *Ring v. Gibbs*, 26 *Wend.*, 502. Followed, *N. Y. Superior Ct.*, 1850, *Franklin v. Pendleton*,* 3 *Sandf.*, 572.

100. A bond taken by one officer for the benefit of others, who should by the statute have been the obligees,—Held, not void *colore officii*. *Supreme Ct.*, 1850, *McGowen v. Deyo*, 8 *Barb.*, 340.

101. An obligation given to a justice under the act of 1845,—authorizing any person to sue for an excise penalty on giving security,—may be valid, though not conforming to the statute. Such an obligation is not void as taken by color of office, as it is not taken for the personal benefit of the justice. *Id.*

102. A replevin bond taken by the sheriff with one surety only,—under the statute requiring sufficient sureties,—is not void as a bond taken by color of office. A replevin bond is given by a plaintiff who is under no restraint. *Ct. of Appeals*, 1849, *Shaw v. Tobias*, 3 *N. Y. (8 Comst.)*, 188.

VII. LIABILITY OF OFFICERS FOR THEIR CONDUCT.

103. Mere volunteer not protected. Where an officer is a mere volunteer,—*e. g.*, a revenue officer in seizing goods,—and the statute does not provide for his protection, probable cause and good faith do not exonerate him. *Supreme Ct.*, 1804, *Imlay v. Sands*,

* Affirmed on other points, *Ct. of Appeals*, 1852, 7 *N. Y. (8 Seld.)*, 503.

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1 *Cai.*, 566; and see *Waggoner v. Jermaine*, 7 *Hill*, 357; reversing S. O., 1 *Id.*, 279.

104. Exercise of discretion. An officer, acting under a commission from government, who is enjoined by law to the performance of certain things, if in his judgment or opinion the requisites therein mentioned have been complied with; and who is inhibited, under the like exercise of his own discretion, from doing other things; who is sworn to discharge these duties to the best of his ability; and exposed also to penalties, as well for negligence as for acting where he ought not,—is not answerable to a party who may conceive himself aggrieved, for an omission arising from mistake or a mere want of skill, if there is no bad faith, corruption, malice, or some misbehavior, or abuse of power. *Supreme Ct.*, 1805, *Seaman v. Patten*, 2 *Cai.*, 312; S. P., 1814, *Jenkins v. Waldron*, 11 *Johns.*, 114; *Vanderheyden v. Young*, *Id.*, 150.

105. Inspectors of an election are not liable in an action, for refusing a vote, without proof of fraud or malice. *Supreme Ct.*, 1814, *Jenkins v. Waldron*, 11 *Johns.*, 114.

106. Inferior agents. When the law vests a person with power, and constitutes him a judge of the evidence on which he may exercise it, and contemplates the instrumentality of agents, he is invested with discretion, and his mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents, for it is not for them to question his determination. *Supreme Ct.*, 1814, *Vanderheyden v. Young*, 11 *Johns.*, 150.

107. Minutes of Corporation. An officer of a municipal corporation sued for abating an obstruction, may justify as an individual, and use the minutes of the corporate proceedings to establish that it was in a public street. The fact that he is their officer does not make their records inadmissible. *Supreme Ct.*, 1831, *Denning v. Roome*, 6 *Wend.*, 651.

108. Contingent duty. The cases in which a public officer is liable for special damages for neglect of duty, are those in which the services of the officer are not uncompensated or coerced, but voluntary and attended with compensation, and where the duty to be performed is entire, absolute, and perfect. Where the duty is very imperfect, and depending on contingencies for its creation, and resting much on discretion in its performance,—*e. g.*,

the duty of highway officers to repair bridges, which depends on their having funds applicable,—an action will not lie. *Ct. of Errors*, 1820, *Bartlett v. Crozier*, 17 *Johns.*, 439; reversing S. O., 15 *Id.*, 250. *Supreme Ct.*, 1831, *People v. Commissioners of Hudson*, 7 *Wend.*, 474; and see *Smith v. Wright*, 27 *Barb.*, 621; reversing S. O., 24 *Id.*, 170; and 12 *How. Pr.*, 555.

109. Judicial act. No public officer is responsible, in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. [Brown on Actions at Law, 191-200; 1 *Chit. Pl.*, 7 *Am. ed.*, 89, 209, 210; 2 *Saund. Pl. & Ev.*, 613; 2 *Stark. Ev.*, 7 *Am. ed.*, 586, 588, 1111, 1112; *Broom's Leg. Max.*, 40, 48; 5 *Johns.*, 282; 9 *Id.*, 394; 8 *Cow.*, 178; 11 *Wend.*, 90; 1 *Den.*, 598; *Comb.*, 116; 6 *B. & C.*, 611; 7 *St. Tr.*, 442; 1 *East*, 568, note; 8 *Taunt.*, 602; 12 *Co.*, 28; 1 *N. H.*, 377; 6 *C. & P.*, 249; 2 *Lutw.*, 387; 1 *B. & B.*, 432; 19 *Johns.*, 89; 1 *B. & C.*, 163.] This principle applied to the acts of assessors of taxes. *Supreme Ct.*, 1846, *Weaver v. Deven-dorf*, 3 *Den.*, 117. Followed, 1854, *Vail v. Owen*, 19 *Barb.*, 22; 1857, *Brown v. Smith*, 24 *Id.*, 419.

110. Public officers are not answerable in damages for their proceedings, on account of an error in judgment, when acting judicially,—*e. g.*, when the trustees of a school district adopt a wrong principle in apportioning the tax. If they have general authority in any case, a mere error in law or fact in exercising their authority, will not make their action a nullity, but it is valid until reversed or set aside. [Reviewing 7 *Wend.*, 89; 11 *Id.*, 90; 1 *Den.*, 214; 10 *Barb.*, 290; *q. v. Common Schools*, 28-36.] *Supreme Ct.*, 1855, *Hill v. Sellick*, 21 *Barb.*, 207.

111. Where an officer acts judicially, he cannot be made answerable as a trespasser, for an error in judgment. [6 *Bing.*, 85; 21 *Wend.*, 552; 1 *Brod. & Bing.*, 432.] *So held*, of a recorder of a city who made an order to hold to bail, upon an affidavit, which, though insufficient to sustain the order, presented a fair case for the exercise of his judgment. *Supreme Ct.*, 1845, *Harman v. Brotherson*, 1 *Den.*, 537. Compare *Tomkins v. Sands*, 8 *Wend.*, 462; and see *People v. Collins*, 19 *Id.*, 56.

112. Malicious and corrupt conduct in

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office cannot be alleged against a person acting under a special and limited jurisdiction, in contradiction to his own record, when it is declared by statute to be conclusive evidence. *So held*, of a commissioner under the insolvent law. *Supreme Ct.*, 1828, *Cunningham v. Bucklin*, 8 *Cow.*, 178. Compare *Mather v. Hood*, 8 *Johns.*, 44.

113. Ministerial officers.—*e. g.*, commissioners of excise,—who knowingly and corruptly disregard the statute defining their duties, are liable to indictment. *Supreme Ct.*, *Sp. T.*, 1849, *People v. Norton*, 7 *Barb.*, 477.

114. That an officer who violates a ministerial duty, though his office is primarily judicial, is liable therefor. *Supreme Ct.*, 1845, *Wilson v. Mayor, &c.*, of N. Y., 1 *Den.*, 595. *Ct. of Appeals*, 1850, *Rochester White Lead Co. v. City of Rochester*, 8 *N. Y.* (8 *Comst.*), 468.

115. The liability of a canal-commissioner for a neglect of duty, turns upon the character of the duty which the statute has imposed on him. If it is imperative and specific, he is liable to any person who has sustained an injury in consequence of his neglect of duty. [4 *Hill*, 630.] But if the duty is to be discharged according to his discretion and judgment, he cannot be held responsible to a party who has sustained an injury either by the manner in which he discharges it, or by a neglect to do any judicial act falling within the general scope of his duties. *Supreme Ct.*, 1855, *Griffith v. Follett*, 20 *Barb.*, 620.

116. Who may recover. A private action does not lie against an officer for the neglect of a duty, unless at the suit of a person for whose direct and immediate benefit the duty was imposed. A merely incidental benefit, which formed no part of the design of the statute, is not sufficient. [1 *Hill*, 545; 17 *Wend.*, 556; 19 *Vin. Ab.*, 518, 520; 1 *Salk.*, 19; 6 *Mod.*, 51; 1 *Am. Law Journ.*, N. S., 411.] Thus an officer required by law to publish notices in a paper having the largest circulation, is not liable to a publisher of such paper for refusing to employ him. *Supreme Ct.*, 1851, *Strong v. Campbell*, 11 *Barb.*, 185.

117. One who aids an officer in an act which is a trespass, is guilty of trespass. This is the rule at common law, and the provisions of 2 *Rev. Stat.*, 441, § 80,—authorizing any public officer finding or apprehending any re-

sistance in the execution of process delivered to him to command inhabitants to assist him, and making it a misdemeanor for any one to refuse,—does not alter the case. Those who come to his assistance under such command are trespassers if he is a trespasser. *Supreme Ct.*, 1838, *Elder v. Morrison*, 10 *Wend.*, 128.

118. Inadvertence is no excuse in an action for a penalty against an officer. Thus in an action for a penalty imposed for not returning and filing a warrant within the time limited by statute, proof that it was filed in the morning of the day on which the suit was commenced, and that the omission to file arose from inadvertence and misapprehension of the law, or from the fact that some of the property distrained was feloniously carried away by the plaintiff between the time of appraisal and sale, and that time was wanting for reasonable search for the goods so taken away, is inadmissible. *N. Y. Com. Pl.* (1842?), *Sherman v. Spencer*, 1 *N. Y. Leg. Obs.*, 172.

119. Every wilful neglect of a duty enjoined by law on any public officer or person holding public trust or employment, where there is no special provision for punishment, is a misdemeanor. 2 *Rev. Stat.*, 696, § 88.

120. An intentional refusal is necessarily a wilful one. [1 *Ashm.*, 299.] Ignorance of the law, and good faith in refusing to act, are no defence. [4 *Bl. Com.*, 227; 7 *Carr & P.*, 456; 5 *Durn. & East*, 618, 628.] *Supreme Ct.*, 1845, *People v. Brooks*, 1 *Den.*, 457.

121. Process without jurisdiction. That a mere ministerial officer will not be compelled to execute any process which was issued without jurisdiction in fact, and where the want of jurisdiction was admitted upon the record, although the process was regular upon its face. *Ct. of Appeals*, 1855, *People v. Schoonmaker*, 18 *N. Y.* (8 *Kern.*), 238; and see *Cornell v. Barnes*, 7 *Hill*, 85; *McDonald v. Bunn*, 8 *Den.*, 45; *Dunlap v. Hunting*, 2 *Id.*, 648.

122. That the officer, if satisfied that there was a want of jurisdiction to issue the process, may refuse to execute it. *Supreme Ct.*, 1837, *Earl v. Camp*, 16 *Wend.*, 562. Compare *Trustees of Rochester v. Symonds*, 7 *Id.*, 392.

123. Negligent custody. That if an officer, having authority to attach the goods of a person, keeps them in an unsafe place, or exposes them to destruction, he is liable if they are destroyed; and if the plaintiff in the attachment caused him to do so, the party in-

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jured has his election to sue the plaintiff or the officer. *Supreme Ct.*, 1812, *Jenner v. Jolliffe*, 9 *Johns.*, 881.

124. Exacting security. An officer who takes possession of property of a stranger, and being about to seize it, receives, instead, security for its forthcoming, as a condition of his not taking it away, is a trespasser. Every unlawful interference by one person with the property or person of another, is a trespass. *Supreme Ct.*, 1827, *Wintringham v. Lafoy*, 7 *Cow.*, 735. Followed, 1832, *Phillips v. Hall*, 8 *Wend.*, 610.

125. Pretence or color of process. Arresting, levying, or dispossessing under pretence of, but without legal authority, a misdemeanor. 2 *Rev. Stat.*, 692, § 11.

126. Fraud. A public officer—*a. g.*, a loan-commissioner, selling under a power in a mortgage, by virtue of his office—is responsible to a purchaser from him, for a false and fraudulent representation as to the title, made with intent to deceive and defraud. *Supreme Ct.*, 1831, *Culver v. Avery*, 7 *Wend.*, 880.

127. Levy on interest of mortgagor. An action will not lie against an officer who levies on the mortgagor's interest in chattels mortgaged, before default; nor, after default, will replevin in the *capit* lie for a mere denial of the mortgagor's right. The action should be for the detention. *Supreme Ct.*, 1887, *Randall v. Cook*, 17 *Wend.*, 58.

128. Officer not liable to plaintiff after recovery by another. If, after levy and satisfaction by a sale, a third person sues for the levy, and recovers the amount made by the officer, the officer is not liable to the plaintiff in the execution for the money collected, though he was indemnified and has sued upon the indemnity. *Supreme Ct.*, 1889, *Newland v. Baker*, 21 *Wend.*, 264.

129. Fees illegally taken and paid over. It is no defence for an officer against whom an action is brought to recover back fees illegally exacted by him, that he has paid them into the public treasury. The protection of an agent does not extend to an illegal exaction by the agent, without express direction from his principal. *N. Y. Com. Pl.*, 1853, *Townsend v. Dyckman*, 2 *E. D. Smith*, 224.

130. Executions. Where a constable, by virtue of prior executions, levies upon property sufficient to satisfy the same, and a deputy-sheriff levies upon the same property, under

subsequent executions issued against the owner, and sells the same for enough to satisfy the prior executions, he is liable to the constable for the amount of those executions, and this without proof of promise to pay. The law will infer a promise in such a case. *Supreme Ct.*, 1853, *Betts v. Hoyt*, 19 *Barb.*, 412.

131. Wages of collector's servant. A collector of customs of the United States is not, in the absence of an express promise, liable for the wages of a night-watch and oarsman employed by him. *Supreme Ct.*, 1856, *Nichols v. Moody*, 22 *Barb.*, 611.

132. Money borrowed for a public purpose, and on the credit of the county, by the agent of a board of supervisors, under its resolution passed without any legal authority, but not in violation of public policy or of positive statute, may be recovered by the board from such agent or his sureties, if borrowed within the terms of the authority assumed to be given by the resolution. *Ct. of Appeals*, 1858, *Supervisors of Rensselaer v. Bates*, 17 *N. Y.* (3 *Smith*), 242.

133. Mitigation of damages. Assuming that a constable has power to summon a jury and take an inquisition, the inquisition, though it may justify him against a false return, will not protect him in an action by defendant for taking his goods, but in that case goes only in mitigation of damages. *Supreme Ct.*, 1813, *Townsend v. Phillips*, 10 *Johns.*, 98; *S. P.*, 1811, *Bayley v. Bates*, 8 *Id.*, 185.

134. In an action against A. for a penalty, the constable, by mistake, served the summons on B., and returned it personally served, and judgment was rendered against A. *Held*, that in A.'s action for the false return, the constable might prove, in mitigation of the damages, that A. was actually guilty of the offence for which the judgment was rendered against him. *Supreme Ct.*, 1817, *Green v. Ferguson*, 14 *Johns.*, 389.

135. Official oppression indictable. *Rogers v. Brewster*, 5 *Johns.*, 125; *Parker v. Newland*, 1 *Hill*, 87.

136. Official acts. The distinction between acts performed *virtute officii* and those done *colore officii*, considered. *Walden v. Davison*, 15 *Wend.*, 575; *Dennison v. Plumb*, 18 *Barb.*, 89; and see *SHERIFF*.

137. Where a magistrate and an officer are together sued as trespassers, in respect to issuing and executing a warrant, and

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the jurisdiction of the justice is proved, the action cannot be sustained by proving an abuse of the process by the officer, unless the plaintiff discharges the justice at the trial. *Supreme Ct.*, 1839, *Stewart v. Hawley*, 21 *Wend.*, 552.

VIII. HOW FAR PROCESS IS A PROTECTION.

138. Erroneous proceedings. An officer may justify under erroneous proceedings, where there is no defect of jurisdiction,—*a. j.*, assessment of tax on real property as a dwelling, instead of as a lot and theatre. *Supreme Ct.*, 1803, *Henderson v. Brown*, 1 *Cal.*, 92; 1816, *Suydam v. Keys*,* 13 *Johns.*, 444.

139. A mere ministerial officer is not responsible for the issuing or the execution of process, so long as the authority under which the process is awarded had jurisdiction over the subject-matter. *Supreme Ct.*, 1812, *Beach v. Furman*, 9 *Johns.*, 229. *S. P.*, *Ct. of Appeals*, 1848, *Noble v. Halliday*, 1 *N. Y.* (1 *Comst.*), 380; reversing *S. C.*, 1 *Barb.*, 137.

140. There being jurisdiction of the subject, the officer is not bound to look behind the process to examine into the validity of the proceedings, or the process. *Supreme Ct.*, 1812, *Warner v. Shed*, 10 *Johns.*, 188; 1812, *Beach v. Furman*, 9 *Id.*, 229; 1830, *Savacool v. Boughton*, 5 *Wend.*, 170; 1831, *Trustees of Rochester v. Symonds*, 7 *Id.*, 392. *S. P.*, *Gen. Sess.*, 1818, *Brown's Case*, 8 *City H. Rec.*, 56.

141. Want of jurisdiction. Where the subject-matter is not within the jurisdiction of a court, all the proceedings are void, and the officer executing them, as well as the party, is a trespasser. *Supreme Ct.*, 1815, *Smith v. Shaw*,† 12 *Johns.*, 257.

142. Where a magistrate, having no jurisdiction, ordered the discharge of a prisoner from execution,—Held, that the discharge, being void, gave the sheriff no protection against an action for an escape. *Supreme Ct.*, 1818, *Oable v. Cooper*,‡ 15 *Johns.*, 152.

143. A ministerial officer is protected in the execution of the process of a court or

officer even of limited jurisdiction, although the court or officer has acquired no jurisdiction of the person, if it appears on the face of the process that the subject-matter of the suit is within the jurisdiction, and nothing appears upon the face of the process to show a want of jurisdiction in other respects. [Citing 2 *Strange*, 710, 1002; *Willes*, 30; 6 *T. R.*, 242, 653; 9 *Johns.*, 229; and disapproving 3 *Cranch.*, 381, and cases *supra*.] *So held*, in case of an execution on a justice's judgment. *Supreme Ct.*, 1830, *Savacool v. Boughton*, 5 *Wend.*, 170. Followed, 1834 [citing, also, 5 *Wend.*, 281, 240; 9 *Id.*, 17, 35; 7 *Id.*, 89; and distinguishing 6 *Id.*, 438], *Ooon v. Oongden*, 12 *Id.*, 495; 1853, *Henry v. Lowell*, 16 *Barb.*, 268. *Ct. of Appeals*, 1849, *Sheldon v. Van Buskirk*, 2 *N. Y.* (2 *Comst.*), 478. Approved, *Ct. of Errors*, 1836 [distinguishing 13 *Johns.*, 444, and 3 *Cranch*, 381], *Parker v. Walrod*, 16 *Wend.*, 514; affirming *S. C.*, 13 *Id.*, 296. *S. P.*, *Supreme Ct.*, 1834, *Parnelee v. Hitchcock*, 12 *Id.*, 96.

So held, of a justice who issued process in compliance with the highway acts, to enforce a tax assessed on a person not legally liable to be taxed. *Supreme Ct.*, 1812, *Beach v. Furman*,* 9 *Johns.*, 229.

So, also, in the case of a tax-collector, in collecting a tax upon property which in fact was entitled to exemption from assessment. *Ct. of Appeals*, 1851, *Chegary v. Jenkins*, 5 *N. Y.* (1 *Seld.*), 376.

So held, in the case of a tax-collector, where the trustees' apportionment of the tax had been made on a wrong principle. *Supreme Ct.*, 1831, *Alexander v. Hoyt*, 7 *Wend.*, 89.

So held, also, when the meeting which laid the tax was illegal. *Supreme Ct.*, 1846, *Abbott v. Yost*, 2 *Den.*, 86; *S. P.*, 1832, *Reynolds v. Moore*, 9 *Wend.*, 35.

So held, in the case of a sheriff taking B.'s goods from A.'s possession, under a writ of replevin against A., specifying the goods. *Supreme Ct.*, 1855, *Foster v. Pettibone*, 20 *Barb.*, 350; disapproving *Thompson v. Reynolds*, 14 *Id.*, 506.

144. This principle applies to every tribunal of special and limited jurisdiction,—*a. j.*,

* Compare, *Supreme Ct.*, 1830, in *Savacool v. Boughton*, 5 *Wend.*, 170; *Ct. of Appeals*, 1851, *Chegary v. Jenkins*, 5 *N. Y.* (1 *Seld.*), 376.

† Questioned in *Savacool v. Boughton*, 5 *Wend.*, 170.

‡ Commented on in *Savacool v. Boughton*, 5 *Wend.*, 170.

* Approved, and the adverse case of *Suydam v. Keys*, 13 *Johns.*, 444, disapproved, in *Savacool v. Boughton*, 5 *Wend.*, 170; and see *Chegary v. Jenkins*, 5 *N. Y.* (1 *Seld.*), 376.

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the superintendent of common schools,—and this is whether his determinations are termed orders or judgments. *Supreme Ct.*, 1845, *Bennett v. Burch*, 1 *Den.*, 141.

Also, where the objection was, that the justice whose process was executed was only an officer *de facto*. 1880, *Wilcox v. Smith*, 5 *Wend.*, 221; *S. P.*, 1848, *Weeks v. Ellis*, 2 *Barb.*, 320.

And in case of *de-facto* trustees of a school-district. 1882, *McCoy v. Curtice*, 9 *Wend.*, 17; *Reynolds v. Moore*, *Id.*, 85.

So, also, where the objection was, that the judgment on which the process issued had been satisfied. 1860, *McGuinty v. Herriek*, 5 *Wend.*, 240; 1881, *Lewis v. Palmer*, 6 *Id.*, 367. *S. P.*, *Ct. of Appeals*, 1848, *Ruckman v. Cowell*, 1 *N. Y.* (1 *Comst.*), 505.

That it should be applied to an obligatory *parol* order. 1841, *Jermaine v. Waggener*, 1 *Hill*, 279; and see reversal, 7 *Id.*, 357.

145. How far private persons or mere volunteers are protected by this principle. *Jermaine v. Waggener*, 1 *Hill*, 279; and see reversal, 7 *Id.*, 357.

146. That in the case of a tax-collector, nothing is necessary for his protection but a regular warrant. *Ct. of Appeals*, 1849, *Sheldon v. Van Baskirk*, 2 *N. Y.* (2 *Comst.*), 478; but compare *Van Rensselaer v. Witbeck*, 7 *N. Y.* (3 *Seld.*), 517; reversing *S. C.*, 7 *Barb.*, 138.

147. That where the illegality of a tax appears on the face of the warrant, the collector who levies it is liable in trespass. *Chancery*, 1834, *Bank of Utica v. City of Utica*, 4 *Paige*, 899. *Supreme Ct.*, 1837, *Clark v. Hallock*, 16 *Wend.*, 607. *S. P.*, applied in the case of an attachment, *Ct. of Appeals*, 1851, *Castallanos v. Jones*, 5 *N. Y.* (1 *Seld.*), 164.

148. Erroneous process no more than a protection. The rule that an officer is justified by his process, is one of protection merely, and beyond this does not confer any right; and if the proceedings are in fact void, the officer cannot, by virtue of the process, maintain an action against a third person. *Supreme Ct.*, 1887, *Earl v. Camp*, 16 *Wend.*, 562; 1841, *Horton v. Hendershot*, 1 *Hill*, 118; *S. P.*, 1846, *Dunlap v. Hunting*, 2 *Den.*, 648.

Nor against another officer who, under an equally void process, has taken from him property which was in his custody under void process held by himself. 1837, *Earl v. Camp*, 16 *Wend.*, 562.

149. Errors in special proceedings.

Where a judge acquires jurisdiction in a special statutory proceeding, even if subsequently he erroneously suspends the matter instead of adjourning it during the pendency of an injunction, or if he erroneously pronounces his judgment in the absence of the defendant,—these errors are not such as can be taken advantage of collaterally, and do not make him or the plaintiff in the proceedings a trespasser. [7 *Wend.*, 200.] *N. Y. Superior Ct.*, 1849, *Stanton v. Schell*, 3 *Sandf.*, 823.

150. The apparent defects which leave the officer without protection, are such as apprise him of a want of jurisdiction in the court issuing the process, either over the subject-matter, or the person of the defendant. If the defects are amendable, it matters not whether they are apparent on the face of the process or not. They do not, until it is set aside, deprive the process of its protecting efficacy. Thus, an execution having the seal of a wrong court, though erroneous, is amendable, and therefore the officer is protected by it. *Supreme Ct.*, 1848, *Dominick v. Eaker*, 8 *Barb.*, 17.

151. Knowledge of want of jurisdiction.

If there was jurisdiction of the subject-matter, and the process is regular on its face, the officer executing it is protected; and proof that he knew the facts avoiding it, is inadmissible.* *Supreme Ct.*, 1840, *Webber v. Gay*, 24 *Wend.*, 485; 1843, *People v. Warren*, 5 *Hill*, 440.

152. Taking an indemnity does not deprive the officer of the protection which his process affords. *Supreme Ct.*, 1841, *Horton v. Hendershot*, 1 *Hill*, 118.

153. Process to wrong officer. Where a statute requires a warrant to be executed by a constable of a particular town, if the justice issuing it directs it to "any constable of the county," this might be disregarded if it were delivered to a constable of the proper town; but if delivered to the constable of a different town, and executed by him, the justice and the constable are liable as trespassers. *Supreme Ct.*, 1827, *Reynolds v. Orvis*, 7 *Cow.*, 269.

* But a contrary view was taken in *Parker v. Walrod*, 16 *Wend.*, 514; affirming *S. C.*, 18 *Id.*, 296; where it was said that the officer is not protected where the want of jurisdiction arises from a fact of public notoriety, which is legally presumed to be within the knowledge of the officer as well as others.

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154. Officer not named. An officer executing a warrant is not protected by it if it is not directed to him, or to a class of officers of which he is one. *Supreme Ct.*, 1849, *Russell v. Hubbard*, 6 *Barb.*, 654.

155. Illegal provision. If a warrant is void on its face by reason that its execution is commanded in an illegal manner, the officer is not protected in executing it in a legal manner. *Supreme Ct.*, 1887, *Clark v. Hallock*, 16 *Wend.*, 607. Compare *Stroud v. Butler*, 18 *Barb.*, 327.

156. If the warrant, issued by the trustees of a school district, for the collection of a school-tax, directs the collector to collect the amount of the assessments, together with five cents on each dollar,—contrary to the Laws of 1845, ch. 180, § 81, which direct the collector's fees not to be inserted in the warrant,—this is an excess of authority in the trustees, so far as relates to the fees, and the warrant is no protection to the collector. *Supreme Ct.*, 1854, *Stroud v. Butler*, 18 *Barb.*, 327.

157. Officer not bound to inquire as to judgment. Where an execution is delivered to an officer, he is not bound to inquire whether there is a judgment to support it, or whether the execution corresponds exactly with the judgment. If it is regular upon its face, it is his duty to execute it. Irregularity or error in it affects the parties, not the ministerial officers. [*So held*, on many authorities.] *Supreme Ct.*, *Sp. T.*, 1850, *Hutchinson v. Brand*, 6 *How. Pr.*, 73; affirmed (*Ct. of Appeals*, 1853), 9 *N. Y.* (5 *Seld.*), 208.

158. Wrongful levy. Where an officer is sued for taking plaintiff's property, upon process against another person, proof that the goods were possessed by the latter, claiming to be owner, shortly before, throws the burden upon the plaintiff, of showing a previous right, or a subsequent title derived from such owner; and if he fails to do so, the process alone, if regular, and issued by a court of competent jurisdiction, protects the officer. *Ct. of Errors*, 1886, *Parker v. Walrod*, 16 *Wend.*, 514; affirming *S. C.*, 18 *Id.*, 296.

159. Strangers. Voluntary assignees of a defendant in an execution, who became such after a levy, are not strangers within the rule which requires an officer justifying against a stranger to show a judgment as well as an execution. It is sufficient in an action by such assignees against a sheriff, for the latter

to produce his execution. *N. Y. Superior Ct.*, 1848, *Heath v. Westervelt*, 2 *Sandf.*, 110.

160. Authority to levy. Where the officer is sued by one who claims as a purchaser from the debtor, and he attempts to overthrow the sale on the ground of fraud, he must go back of his process, and show authority for issuing it. Thus, if he seizes under an attachment, he must show the attachment regularly issued. *Supreme Ct.*, 1848, *Noble v. Holmes*, 5 *Hill*, 194.

161. As to the cases in which the judgment must also be proved, see *Sheldon v. Van Buskirk*, 2 *N. Y.* (2 *Comst.*), 478.

162. An officer distraining for rent can justify only when the landlord can; and in trespass must prove whatever would be required of a defendant in replevin under a common-law cognizance for taking the goods as a distress for rent. Though the statute requires distress to be made only by certain officers, they do not act as officers in so doing, but as private attorneys. *Supreme Ct.*, 1848, *Lord v. Brown*, 5 *Den.*, 845. To the same effect, 1848, *Webber v. Shearman*,* 6 *Hill*, 20; 1848, *Moulton v. Norton*, 5 *Barb.*, 286; disapproving *Van Rensselaer v. Quackenboss*, 17 *Wend.*, 84, in so far as that is to the contrary.

163. A constable of another State, who there levied on and sold personal property mortgaged here and taken into such other State by the mortgagor,—*Held*, not protected by his process, against an action here; the mortgage being valid by our law as against creditors, but void by the law of his State. *Supreme Ct.*, *Sp. T.*, 1851, *Martin v. Hill*, 12 *Barb.*, 681.

164. Exempt property. An officer is not protected by the execution in taking property which is exempt from execution. *Supreme Ct.*, 1858, *Hoyt v. Van Alstyne*, 15 *Barb.*, 568.

165. Tardy execution. If the collector of school-taxes sells property after the expiration of the time limited in the warrant, he acts without authority and becomes a trespasser. *Supreme Ct.*, 1854, *Stroud v. Butler*, 18 *Barb.*, 327; distinguishing *Sheldon v. Van Buskirk*, 2 *N. Y.* (2 *Comst.*), 478.

166. Void process wrongly executed. An officer who issues void process is not responsible for its execution, if executed after

* Reversed on other points, *Ct. of Errors*, 1845, 2 *Den.*, 362.

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the return-day; nor will his receiving the money collected by its execution, in ignorance of the fact that it was so executed, make him liable for the trespass. *Ct. of Appeals*, 1852, *Van Rensselaer v. Kidd*, 6 *N. Y. (2 Seld.)*, 331.

167. Arrest without jurisdiction. Where a warrant of arrest, under the Non-imprisonment Act is issued upon an insufficient affidavit, the warrant is void for want of jurisdiction in the officer; and an action for false imprisonment will lie after the proceedings have been reversed upon certiorari. *Supreme Ct.*, 1853, *Vredenburg v. Hendricks*, 17 *Barb.*, 179. Compare *Mosher v. People*, 5 *Id.*, 575.

168. — on insufficient evidence. A magistrate having jurisdiction to issue a warrant, is not liable in a civil action for deciding on insufficient evidence that a warrant should issue; for in determining whether there is sufficient evidence to authorize the issuing of a warrant, he acts judicially; and he is not liable while thus acting, even if he erred in judgment. [7 *Wend.*, 200; 8 *Id.*, 462; 19 *Id.*, 56; 1 *Den.*, 537, 540, 590; 5 *Barb.*, 467; 8 *Den.*, 117; 1 *Kern.*, 578.] Yet in making the warrant and delivering it to the officer, he acts ministerially [6 *Wend.*, 597, 608; 8 *Id.*, 462; 3 *Seld.*, 521; 1 *Den.*, 589]; and if the warrant is void on its face, it will not protect him, although he acts in good faith, and was authorized by the evidence before him, to issue a valid warrant. *Supreme Ct.*, *Sp. T.*, 1856, *Blythe v. Tompkins*, 2 *Abbotts' Pr.*, 468.

169. Making record. When a statute confers authority on an officer—*e. g.*, the mayor of a city—to try a specified class of offences, and punish by fine or imprisonment, and does not require him to make a formal record of his decision, such record is not necessary to his protection. It is enough that it was reduced to writing when made. *N. Y. Superior Ct.*, 1856, *Willis v. Havemeyer*, 5 *Duer*, 447.

IX. SUED AND BEING SUED.

170. Implied power to sue. Where a public office is instituted by the Legislature, an implied authority is conferred on the officer, as incident to his office, to bring all suits which the proper and faithful discharge of his official duties requires.* *So held*, of overseers

of the poor. *Supreme Ct.*, 1820, *Overseers of Pittstown v. Overseers of Plattsburgh*, 18 *Johns.*, 407; 1826, *Todd v. Birdsall*, 1 *Cow.*, 260; 1828, *Grant v. Fancher*, 5 *Id.*, 309; 1830, *Armire v. Spencer*, 4 *Wend.*, 406; 1843, *Supervisor of Galway v. Stimson*, 4 *Hill*, 186. To the contrary was (1816) *Shear v. Mallory*, 18 *Johns.*, 496.

So held, of the supervisor of a town. *Supreme Ct.*, 1824, *Jansen v. Ostrander*, 1 *Cow.*, 670.

171. — to be sued. For the same reason the overseers of the poor may be sued; and as well for a liability incurred by their predecessors as one incurred by themselves. *Supreme Ct.*, 1828, *Todd v. Birdsall*, 1 *Cow.*, 260; *S. P.*, 1829, *Palmer v. Vandenberg*, 3 *Wend.*, 198.

So held, of trustees of school districts in an action for a teacher's wages, under a contract with their predecessors. [2 *Rev. Stat.*, 476, § 108.] *Supreme Ct.*, 1831, *Silver v. Cummings*, 7 *Wend.*, 181; 1843, *Williams v. Keech*, 4 *Hill*, 168.

172. Trustees of a school district, who go out of office before the time of payment upon their contract arrives, cannot be sued. *Id.*

173. The bond of a town collector, taken in the name of the supervisor, passes to his successor, and should be sued in the name of the supervisor in office when the default happens; except that where the latter is dead, the suit should, under Laws of Sess. 44, ch. 195, be in the name of his personal representatives. *Supreme Ct.*, 1824, *Jansen v. Ostrander*, 1 *Cow.*, 670.

174. Name. An action by a public officer should be brought in his individual name, with the addition of his name of office. An action in the name of office merely,—*e. g.*, by "the Supervisor of A.,—cannot be maintained. *Supreme Ct.*, 1843, *Supervisor of Galway v. Stimson*, 4 *Hill*, 186. Followed, 1843, *Commissioners of Cortlandville v. Peck*, 5 *Id.*, 215.

175. After expiration of term. Though overseers of the poor are personally liable for torts, they cannot, after they have gone out of office, be sued as late overseers for mere non-feasance. Such suits, like suits for debts, must be brought against their successors. *Supreme Ct.*, 1826, *Grant v. Fancher*, 5 *Cow.*, 309.

176. Foreign officer. Where property is vested in an officer for the time being of a foreign government, and he is authorized to

* Limited to those cases where there is no statute prescribing other means, in *Cornell v. Town of Guilford*, 1 *Den.*, 510.

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maintain an action therefor in his own name by the country he represents, he may maintain such action in this State. *Supreme Ct.*, 1858, *Peel v. Elliott*, 28 *Barb.*, 200; S. C., 7 *Abbotts' Pr.*, 488; S. C., 16 *How. Pr.*, 481.

177. Substituting successor. Under 2 Rev. Stat., 474, § 100 (*q. v.*, *ABATEMENT*, 62-65), it is no objection to substituting a successor in office as plaintiff in a suit brought by his predecessor, that he is himself the defendant in the suit. *Supreme Ct.*, 1847, *Thayer v. Lewis*, 4 *Den.*, 269.

178. Motion of third party. Where a suit for a penalty is brought under a statute by a third person, in the name of officers whose term of office expires pending the suit, their successors cannot be substituted on the motion of the plaintiff in the suit, and against the opposition of the successors and of the defendant. *Id.*

179. When one of several successors consents, and the other declines to be substituted, the order will not be made. *Id.*

180. Where a proceeding is against officers whose terms expire together,—*e. g.*, the commissioners of highways of a town,—but one application ought to be made to substitute the successors of all. *Supreme Ct.*, 1847, *People v. Sage*, 3 *How. Pr.*, 56.

Consult, also, 2 *Rev. Stat.*, 388, § 14.

X. COMPELLING DELIVERY OF BOOKS AND PAPERS.

181. Proceedings to compel the delivery of, to successor in office, provided. 1 *Rev. Stat.*, 124, 125.

182. Town officers. These provisions made applicable to enforce delivery of books, &c., and moneys, by supervisors, town clerks, commissioners of highways, and overseers of the poor, and their representatives. 1 *Rev. Stat.*, 858, §§ 5-9.

183. Canal officers. The statute applies as well to superintendents and collectors of tolls on the canals, as to other officers. In so far as the different proceedings against certain canal officers, given by the Laws of 1820, 188, § 12 (same stat., 1 *Rev. Stat.*, 249, § 188), contemplate the same remedy, they are concurrent. *Supreme Ct.*, *Chambers*, 1858, *Cobee v. Davis*, 8 *How. Pr.*, 367.

184. Application, to whom made. An application under 1 *Rev. Stat.*, 125, §§ 51-53, and § 438 of the Code,—to compel the delivery of the books and papers appertaining to a public office,—is not a motion in the Supreme

Court, but an application to a justice out of court. [1 *Rev. Stat.*, 125, § 51.] Neither is it a motion in any suit pending, nor an anticipated suit, in that court. It does not, therefore, fall within the provision of the Judiciary Act (*Laws of 1847*, 884, § 51), restricting motions in suits, &c., to counties adjacent to the venue, or the residence of a party. Hence, any justice of the Supreme Court has jurisdiction. *Supreme Ct.*, *Sp. T.* (1852?), *Welch v. Cook*, 7 *How. Pr.*, 282.

185. The books and papers "belonging or appertaining" to a public office,—*e. g.*, that of street-commissioner of the city of New York,—belong to the officer for the time being; and he has a right to the possession and use of them for all the purposes of the office. *Supreme Ct.*, *Sp. T.*, 1857, *Conover v. Mayor, &c.*, of N. Y., 5 *Abbotts' Pr.*, 393.

186. By devoting the books and papers appertaining to the office of street-commissioner of the city of New York to the uses of that office, the city, which originally owned them, has consented to part with all its rights inconsistent with their use for the purposes of the office. The city has no right to a possession of the books adverse to the officer, or to interrupt the possession or use of them by him. *Id.*

187. Clear title necessary. A warrant under 1 *Rev. Stat.*, 124, to compel the delivery of official books and papers, cannot be issued, unless the applicant's title to the office is clear. *Supreme Ct.*, 1848, *Matter of Hodgkinson*, 5 *Hill*, 631, *note*; *Sp. T.*, 1857, *Conover's Case*, 5 *Abbotts' Pr.*, 73. *N. Y. Com. Pl.*, *Sp. T.*, 1857, *Devlin's Case*, *Id.*, 281.

188. But where the title is clear, and defendant not in possession under color of lawful right, the application should be granted. *Supreme Ct.*, *Sp. T.*, 1848, *Matter of Whiting*, 2 *Barb.*, 518.

189. In order to give the magistrate jurisdiction of the application, if the defendant is an officer *de facto*, the applicant's title must be clear and free from reasonable doubt. [5 *Hill*, 616-629; 2 *Barb.*, 518-518.] If it is not, the warrant is void for want of jurisdiction. But *prima-facie* evidence of such title is enough; and on habeas corpus to relieve from imprisonment under a warrant issued in these proceedings, the magistrate is not to go behind such evidence,—*e. g.*, a regular certificate of election,—and inquire into irregulari-

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ties. *Supreme Ct.*, 1855, Matter of Baker, 11 *How. Pr.*, 418.

190. Judgment of ouster. No proceedings to obtain the books and papers of a public office, under section 438 of the Code, can be instituted, until a judgment of ouster has been regularly entered against the person executing the duties of the office. *Supreme Ct.*, *Sp. T.*, 1852, Matter of Welch, 14 *Barb.*, 396; *S. C.*, *sub nom.* Welch v. Cook, 7 *How. Pr.*, 173.

191. If the petition alleges such a judgment, the opposing affidavits may deny it. *Id.*

192. Of the requisite mode of the entry of such judgment. *Id.*

193. The right to exercise an office should not be tried on an application for an order under 1 Rev. Stat., 125, § 56, for the delivery of the books and papers appertaining to such office; but should be determined in an action in the nature of *quo warranto*. It is only one who is an actual successor to the office,—i. e., who is in possession of the office,—who may invoke these proceedings to gain possession of its books and papers. *Supreme Ct.*, *Sp. T.*, 1857, Conover's Case, 5 *Abbotts' Pr.*, 78. *N. Y. Com. Pl.*, *Sp. T.*, 1857, Devlin's Case, *Id.*, 281.

194. The application involving the legality of the removal of the one and the appointment of the other claimant, is not to be denied because a resort may be had to an action to try the title. The remedies are concurrent. *Supreme Ct.*, *Sp. T.*, 1854, Matter of Bartlett, 9 *How. Pr.*, 414.

195. Possession. On the death of the street-commissioner of the city of New York, O. was appointed by the governor to fill the vacancy. He took the oath of office and gave the bond, and attempted to exercise the office in the rooms appropriated to its business; but the deputy of the late incumbent refused to recognize him, and he was afterwards forcibly expelled from the rooms; and subsequently D. was appointed to the same office by the mayor of the city, and he gained possession of the rooms and books and papers. *Held*, that O. was the commissioner *de facto*, and was in fact in possession of the office, though excluded from the rooms; and was entitled to an order for the delivery of the books and papers. *Supreme Ct.*, *Sp. T.*, 1857, Conover's Case, 5 *Abbotts' Pr.*, 78. To the contrary, see Devlin's Case (*N. Y. Com. Pl., Chambers*, 1857), 11, 291; *People v. Peabody* (*Supreme Ct.*,

Sp. T., 1858), 6 *Id.*, 228; *S. C.*, *sub nom.* Conover v. Devlin, 15 *How. Pr.*, 470.

196. Stipulation not to proceed. Where the attorney-general, representing the people and the relator, stipulated, in an action to oust defendant, that "no execution or other proceeding should be taken by the party in whose favor the decision should be, until the expiration of ten days after notice of judgment perfected should be served on the defendant,"—*Held*, that the relator could not move for a delivery of the books, &c., until the ten days had expired. *Supreme Ct.*, *Sp. T.*, 1852, Matter of Welch, 14 *Barb.*, 396; *S. C.*, *sub nom.* Welch v. Cook, 7 *How. Pr.*, 173.

197. The nature and course of the proceedings under 1 Rev. Stat., 125, for obtaining the delivery of books or papers of an office, considered. *People v. Peabody*, 5 *Abbotts' Pr.*, 194; *S. C.*, less fully, 26 *Barb.*, 437.

198. The decision of the judge conducting such proceeding is conclusive upon the rights of the parties to it and their privies. *Supreme Ct.*, *Sp. T.*, 1857, Conover v. Mayor, &c., of N. Y., 5 *Abbotts' Pr.*, 393.

199. The officer in such a proceeding represents not only his own rights as individual, but also those of third persons entitled to the benefits of the office. Hence the city, as to its right to the books appertaining to the office, is bound by the decision in such a proceeding to which the actual officer was a party. *Id.*

200. Accordingly, where, in such a proceeding by O. against D., it had been decided that O. was the officer, and was entitled to the books, and the city afterwards claiming that D., and not O., was such officer, brought an action against O. to restrain the possession and use of them by him,—*Held*, that the city was bound by such decision, as a privy, it being represented therein by the officer, a party to it, and was estopped to dispute the title of the party therein adjudged to be entitled. *Id.*

201. The issuing of the warrants, after the magistrate has decided that the applicant is entitled to them, is a ministerial and not a judicial act, and is stayed by a certiorari. *Supreme Ct.*, *Sp. T.*, 1857, Conover's Case, 5 *Abbotts' Pr.*, 182; *S. C.*, less fully, *sub nom.* Conover v. Devlin, 26 *Barb.*, 429.

202. The warrant for the commitment of a former public officer for refusing to give up the books, &c., of his office to his successor, need not recite the adjournments. They may

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be intended, or proved by parol. *Supreme Ct.*, 1855, *Matter of Baker*, 11 *How. Pr.*, 418.

203. Of the requisites of a warrant of arrest and search-warrant granted on default to comply with an order for delivery of books and papers appertaining to an office. *Devlin's Case*, 5 *Abbotts' Pr.*, 281.

As to what constitutes a **Cause of action** against officers, see the titles of the causes of action, as **NEGLIGENCE**, &c.

As to **Officers of Municipal Corporations** and other **Civil divisions** of the State, see **MUNICIPAL CORPORATION**, **VILLAGES**, **COUNTIES**, **TOWNS**, and the titles respectively there referred to.

As to **Compelling or restraining official action**, see **INJUNCTION** and **MANDAMUS**.

As to **Officers of Corporations**, see **CORPORATION**, and titles there referred to.

As to **Election**, see **ELECTIONS** and **TOWNS**.

As to **Judicial officers**, see **JUDGE**, **COURT**, and the titles of the several classes of Courts and Judges, there referred to.

As to **Local officers**, see **CONSTITUTIONAL LAW**, 889.

As to matters peculiarly applicable to **Various classes** of officers, see their respective titles, viz.: **AMBASSADOR**; **ATTORNEY AND CLIENT**; **ATTORNEY-GENERAL**; **CANALS**; **COMMISSARY-GENERAL**; **COMMISSIONERS OF DEEDS**, **COMMISSIONERS OF EMIGRATION**; **COMMISSIONERS OF LAND OFFICE**; **COMMON SCHOOLS**; **COMPTROLLER**; **CONSTABLE**; **CONSUL**; **CORONERS**; **COUNTY CLERK**; **COUNTY JUDGE**; **COUNTY TREASURER**; **DEPUTY**; **DISTRICT-ATTORNEY**; **ELIZORS**; **EXORSE**; **EXECUTORS AND ADMINISTRATORS**; **FENCE-VIEWERS**; **GOVERNOR**; **GUARDIAN**; **HARBOR-MASTERS**; **HEALTH**; **HIGHWAYS**; **JUDGE**; **JUSTICE OF THE PEACE**; **LIEUTENANT-GOVERNOR**; **LOAN COMMISSIONERS**; **MARSHAL**; **MASTER IN CHANCERY**; **MILITIA**; **NOTARY**; **PILOTS**; **POLICE**; **PORTWARDENS**; **POSTMASTER**; **RECEIVER**; **SECRETARY OF STATE**; **SHERIFF**; **SUPERVISORS**; **SUPREME COURT COMMISSIONERS**; **SURROGATE**; **TOWNS**; **TREASURER**.

OILS.

Quality and sales of, regulated. *Laws of* 1886, 719, ch. 475.

ONONDAGA COMMISSIONERS.

1. The origin of the act to settle disputes concerning titles to lands in the county of Onondaga. (30th Sess., ch. 51.) *Jackson v. Huntley*, 5 *Johns.*, 59.

2. It is constitutional. *Supreme Ct.*, 1809, *Jackson v. Griswold*, 5 *Johns.*, 189.

3. Dissent. The limitation of the act, requiring dissent to be entered within two years, applies to non-resident aliens, except married women. *Supreme Ct.*, 1809, *Jackson v. Wright*, 4 *Johns.*, 75.

4. An award is conclusive, if a dissent was not filed within two years. *Supreme Ct.*, 1809, *Jackson v. Griswold*, 5 *Johns.*, 189.

Although no one was in possession. 1811, *Jackson v. McKee*, 8 *Id.*, 429; *Jackson v. Swartwout*, *Id.*, 490. *Chancery*, 1843, *Crowder v. Hopkins*, 10 *Paige*, 188.

5. Filing. Under the various statutes relating to the new county of Cayuga, a dissent may be filed in that county. *Supreme Ct.*, 1810, *Jackson v. Livingston*, 6 *Johns.*, 149.

6. Action. The limitation of sections 3 and 7,—requiring actions to recover the land, after dissent, to be brought in three years after the award,—extends only to cases where a claimant was in actual possession. *Supreme Ct.*, 1809, *Jackson v. Huntley*, 5 *Johns.*, 59.

But the possession need not be coeval with the award or dissent. 1820, *Jackson v. Root*, 18 *Id.*, 60.

7. If there is a trial on the merits, in a suit brought by either party against the other, or against one claiming under the other, it is sufficient. *Id.*

8. Disabilities. Infants and others under disability, must dissent within three years after its removal. [§ 8.] *Ct. of Errors*, 1820, *Jackson v. Lewis*, 17 *Johns.*, 475; affirming 8. C., 18 *Id.*, 504; and see *Jackson v. McKee*, 8 *Id.*, 429.

9. If a wife, without waiting for the removal of her disability, sues with her husband, a dissent within two years of the award must be shown. *Supreme Ct.*, 1818, *Jackson v. Ransom*, 10 *Johns.*, 407.

10. An award in favor of a grantor inures in favor of the grantee, who need not dissent. *Supreme Ct.*, 1810, *Jackson v. Teele*, 7 *Johns.*, 28.

11. Defect in title. A dissent by one who cannot deduce a title from the party under

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whom he claims,—*e. g.*, a grantee of executors who had no authority to convey,—does not avail. *Supreme Ct.*, 1810, *Jackson v. Todd*, 6 *Johns.*, 257.

ORDERS.

MOTIONS AND ORDERS.

OUTLAWRY.

1. Abolished, in civil actions and criminal cases, except treason. 2 *Rev. Stat.*, 558, § 15; *Id.*, 745, § 20.
2. Proceedings for outlawry after conviction of treason, provided. 2 *Rev. Stat.*, 744.

OVERRULED CASES.

See table of CASES CRITICISED, Vol. I., xxi.

OVERSEERS.

HIGHWAYS; POOR.

OWNERSHIP.

ACCUMULATION; ANIMALS; CHATTELS; REAL PROPERTY; SUSPENSION OF POWER OF ALIENATION; TENANTS.

OYER AND TERMINER.

1. By whom held. Powers, &c. 8 *Rev. Stat.*, 5 ed., 295, 300, 1042; *Code of Pra.*, §§ 20-23.
2. Jurisdiction. Courts of Oyer and Terminer are courts of superior criminal jurisdiction, and every thing necessary to confer jurisdiction over the person of the defendant will be presumed. *Supreme Ct.*, 1855, *People v. Cavanagh*, 2 *Abbotts' Pr.*, 84; reversing S. C., 10 *How. Pr.*, 27; 1 *Park. Cr.*, 588; 2 *Id.*, 650.

OYSTERS.

Packages of, to be marked with quantity. *Laws of 1849*, 527, ch. 372.

P.

PARDONS.

1. Legislature may either pardon or commute in cases of conviction for treason. *Const. of 1846*, art. 4, § 5.

2. Governor empowered to grant reprieves and pardons, after conviction, for all offences except treason and cases of impeachment; and to suspend execution of sentence for treason until the case is reported to the Legislature, at its next session. *Const. of 1821*, art. 8, § 5; 1 *Rev. Stat.*, 164, § 8, subd. 2. Same provision, substantially, continued, *Const. of 1846*, art. 4, § 5.

3. — to report reprieves to Legislature. *Const. of 1846*, art. 4, § 5.

4. Effect of pardons. By a pardon the disabilities flowing from the judgment are removed. A proviso in a pardon, that nothing in it "shall be construed so as to relieve from the legal disabilities, from the conviction, sentence, and imprisonment," is void, because repugnant to the pardon itself, and must be rejected. *Ct. of Errors*, 1808, *People v. Pease*, 8 *Johns. Cas.*, 883.

5. The effect of a pardon is to acquit the offender of the penalties annexed to the conviction, and restore his credit and capacity. But it cannot divest any person of rights or

interests acquired in consequence of the judgment. It revives the legal relation of parent and child, but cannot affect the validity of a second marriage of the prisoner's wife entered into in consequence of the judgment. *Supreme Ct.*, 1818, *Matter of Deming*, 10 *Johns.*, 282; S. C. again, *Id.*, 488.

6. Thus, a pardon restores to the convict the custody of his infant children, who had been placed under guardianship during his civil death, notwithstanding the second marriage of his wife meantime. *Id.*

7. Pardon granted since April 12, 1822, to person sentenced to imprisonment for life, does not restore such person to the rights of any previous marriage, or to the guardianship of any children, the issue of such marriage. 2 *Rev. Stat.*, 139, § 7.

8. After conviction and before sentence, the keeper of a prison has no right to discharge a criminal convict upon the production of a pardon; the court only is to judge of its validity. *Gen. Sess.*, 1819, *Merritt's Case*, 4 *City H. Rec.*, 58.

9. A pardon may be alleged in opposition to a conviction; and may also be alleged as

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an answer to a return on habeas corpus. *Cayuga County Ct.*, 1853, *In re Edymoin*, 8 *How. Pr.*, 478.

10. Variance. Where a pardon was made out, executed, and delivered to the warden of the state-prison for the discharge of Francis B. Edymoire, and it appeared, on return by the warden to a writ of habeas corpus, that the name of the prisoner, in fact, was Francis B. Edymoin,—*Held*, that the variance was unimportant, and did not vitiate the pardon. *Ib.*

11. Pardon fraudulently or irregularly procured. Where the governor had jurisdiction to pardon, and has exercised it, the court cannot go behind the pardon, if regular and valid on its face, to inquire into the regularity of the proceedings on the application; nor even into fraudulent representations made to the governor to induce him to grant it. *Ib.*

12. Thus, where a pardon was obtained by false pretences, and without giving to the district-attorney notice of the application, as required by Laws of 1849, 450, ch. 810, and was produced on habeas corpus to inquire into a subsequent arrest of the prisoner,—*Held*, that the court could not go behind the pardon. *Ib.*

13. Conditions. In all cases in which the governor is authorized by the Constitution to grant pardons, he may grant the same upon such conditions, and with such restrictions, and under such limitations, as he may think proper. 2 *Rev. Stat.*, 745, § 21.

14. Where a criminal has been conditionally pardoned, he may, upon breach of the condition, be remanded to prison, and the execution of the original sentence may be enforced by the court in which he was convicted, or by any court of superior criminal jurisdiction. *Supreme Ct.*, *Chambers*, 1845, *People v. Potter*, 1 *Park. Cr.*, 47.

15. Condition extended. Prisoner who had been pardoned on condition of leaving the United States, but who had failed to do so within the time limited, through temporary insanity, discharged, and further time allowed him. *Supreme Ct.*, 1804, *People v. James*, 2 *Cai.*, 57.

16. District-attorney may be required to furnish governor with statement of case, as proved on trial, of person applying for pardon, with other facts, &c. *Laws of 1849*, 450, ch. 810, § 1.

17. Notice of application for pardon required

to be served on district-attorney of county in which conviction was had, before the application is acted upon. *Laws of 1849*, 450, ch. 810, § 2.

18. Notice to be published in newspaper. *Laws of 1849*, 451, ch. 810, § 3.

19. Record. Governor to keep record of applications for pardons, &c. *Laws of 1858*, 129, ch. 64, § 1.

20. Execution of sentence after respite. Where the execution of the sentence, in a capital case, is respite by the governor to a particular day, it is the duty of the sheriff to execute it at that day, unless a further respite is granted, or the judgment has been reversed or annulled in the mean time. *Ct. of Errors*, 1884, *People v. Enoch*, 18 *Wend.*, 159.

PARENT AND CHILD.

[Under this title we present cases and statutes respecting the relation of parent and child, and matters incident thereto. The general subject of infancy and the property of infants is discussed under *INFANT*; and other illustrations of the principles relating to the custody and support of children will be found under *GUARDIAN AND WARD*; while rights of action for injuries to children will be found under their respective titles.]

I. OF THE RIGHT TO THE CUSTODY OF CHILDREN.

II. MUTUAL DUTY OF SUPPORT.

III. SERVICES AND EARNINGS OF CHILDREN, AND INJURIES TO THEM.

I. OF THE RIGHT TO THE CUSTODY OF CHILDREN.

1. Where a habeas corpus is directed to a private person to bring up an infant, the court are bound *ex debito justitiae*, to set the infant free from improper restraint; but whether they shall direct the infant to be delivered over to any particular person, even to the father, rests in their discretion. [3 *Burr.*, 1484; 2 *Str.*, 982.] *Supreme Ct.*, 1811, *Matter of McDowle*, 8 *Johns.*, 328; 1816, *Matter of Waldron*, 18 *Id.*, 418. *Chancery*, 1819, *Matter of Wollstonecraft*, 4 *Johns. Ch.*, 80; 1839, *People v. Mercein*, 8 *Paige*, 47. *Supreme Ct.*, *Sp. T.*, 1856, *Matter of Murphy*, 12 *How. Pr.*, 518; and see *People v. Pillow*, 1 *Sandf.*, 672; *People v. Olmstead*, 27 *Barb.*, 9.*

* Compare, also, *People v. Porter*, 1 *Duer*, 709, where the power of the court to award the custody on habeas corpus was denied; but the contrary was held in *People v. Cooper*, 8 *How. Pr.*, 388. See *HABEAS CORPUS*.

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2. Where an infant was serving as apprentice, not being a party to the indenture, but there being no evidence of restraint on the part of the master, the court, on habeas corpus at suit of the father, refused to award to him the custody, but gave the infant leave to go where he pleased. *Supreme Ct.*, 1811, Matter of McDowle, 8 *Johns.*, 828; S. P., 1816, Matter of Waldron, 18 *Id.*, 418.

3. Where the infant was, and long had been, in the custody of the grandfather, but no improper restraint was shown, and it appeared that it would be more for the benefit of the infant to remain with her grandfather than with her father,—*Held*, that the father's application by habeas corpus should be denied, leaving him to pursue his remedy, if any, in chancery. *Supreme Ct.*, 1816, Matter of Waldron, 18 *Johns.*, 418; and see *People v. Kling*, 6 *Barb.*, 366; but compare *Wilcox v. Wilcox*, 14 *N. Y. (4 Kern.)*, 575.

4. So, also, where the wife had justifiably refused to follow her husband abroad, and the child in her possession was of the tender age of twenty-one months and had no property, the court refused to order her to deliver it to the father. *Chancery*, 1839, *People v. Mercein*, 8 *Paige*, 47.

5. Upon a subsequent suit in the Supreme Court, after the child was four years and a half old, the court being of opinion that the father was an equally proper person to have the custody, and that the wife had no excuse for not returning to him,—*Held*, that the custody should be awarded to the father, he having the superior right. *Supreme Ct.*, 1842, *People v. Mercein*, 3 *Hill*, 899.

6. On a habeas corpus the court acts for and in behalf of the children, to see that they are under no improper restraint, and will interfere so far as to permit the children to go where they please, when they are old enough to understand their own wishes, and those wishes lead to no improper custody. *So held*, on habeas corpus brought by a master against the father of his apprentices. *N. Y. Superior Ct.*, 1848, *People v. Pillow*, 1 *Sandf.*, 672.

7. The fact that a father had regained his children whom he had apprenticed, by means of a writ *de homine replegiando*, is no answer to a writ of habeas corpus sued out by the master. *Id.*

8. The statute of habeas corpus does not take away the common-law right of a parent

to bring the writ as parent, when his child is improperly detained. The provision requiring the application to be in behalf of the person detained, cannot in all cases require a special authority to the relator. *Supreme Ct.*, 1842, *People v. Mercein*, 3 *Hill*, 899.

9. **Removal of child.** No action can be maintained by a father to recover damages for the removal of his infant child so as to prevent the production of the body of the child upon a habeas corpus, when it appears that the father had not an absolute right to the custody of the child, and that the child was incapable of rendering any services of value. *N. Y. Superior Ct.*, 1853, *Rising v. Dodge*, 2 *Duer*, 42.

10. **No distinction of color.** The law in this State recognizes no distinction of color or race; and all fathers, whatever may be their standing in society, have precisely the same legal authority and control over their children. *Supreme Ct.*, *Sp. T.*, 1853, *People v. Cooper*, 8 *How. Pr.*, 288.

11. **Bastard.** Of the mother's right to the custody of a bastard. *Id.*; and see *BASTARDY*, 1.

12. **The father** is the natural guardian of his infant children, and in the absence of good and sufficient reasons, such as ill usage, grossly immoral principles or habits, want of ability, &c., is entitled to their custody, care, and education.* [1 *Str.*, 579; 2 *Ld. Raym.*, 1834; 8 *Burr.*, 1436; 5 *East*, 221; 9 *J. B. Moore*, 278; 10 *Ves.*, 51; 12 *Id.*, 492; 2 *Russ.*, 1; *Jac.*, 245; 4 *Cond. Ch.*, 115; 2 *Sim.*, 35; 2 *Cond. Ch.*, 299; 8 *Johns.*, 828; 2 *Kent's Com.*, 194, 220; 1 *Dow.*, *N. S.*, 152; 2 *Fonbl.*, 282, n.; 2 *Bro. C. C.*, 101; *Lofft.*, 74, 8; 1 *Dow. P. C.*, 81; 2 *Cox*, 242.] *Supreme Ct.*, 1837, *People v. —*, 19 *Wend.*, 16; 1836, *People v. Chagaray*, 18 *Id.*, 637. *A. V. Chan. Ct.*, 1840, *Ahrenfeldt v. Ahrenfeldt*, *Hoffm.*, 497. *Supreme Ct.*, 1842, *People v. Mercein*, 3 *Hill*, 899; *Sp. T.*, 1857, *People v. Olmstead*, 27 *Barb.*, 9.

13. The right of a father to the custody of his minor children is paramount to that of the mother; and though he may forfeit that right

* An exception, in the case of early infancy, was stated in *People v. Mercein*, 3 *Hill*, 899; and noticed in *Ahrenfeldt v. Ahrenfeldt*, *Hoffm.*, 497, where it was said that the right of the father as against the mother was much weakened in this country. See *GUARDIAN*, I.

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by misconduct, or lose it by disqualification, and it may be suspended by reason of the tender age of the child and its welfare requiring that it be with the mother, a strong case must exist to warrant depriving him of this right, even for a limited period. *Supreme Ct.*, 1857, *People v. Humphreys*, 24 *Barb.*, 521.

14. Where the child was less than six months old, and the father had made good provision for it,—*Held*, that the mother, who was not able to nourish it wholly by nursing, and who had without good cause left her husband, was not entitled to its custody. *Id.*; and see *People v. Olmstead*, 27 *Barb.*, 9.

15. The court is bound to give such direction, in relation to the custody of a child, as will be most for its interest; but, other things being equal, should prefer the claim of the parent as against third persons, and the father as against the mother. *Supreme Ct.*, 1849, *People v. Kling*, 6 *Barb.*, 366.

16. Though the claim of the father to the custody of his child has a preference to all others (other things being equal), the court will not deliver the children to his custody, when to do so will be manifestly to their detriment and discomfort. [18 *Johns.*, 419.] *Supreme Ct.*, *Sp. T.*, 1859, *Matter of Cuneen*, 17 *How. Pr.*, 516.

17. The doctrine that a father has an absolute right to the custody of his child, if personally unobjectionable, is not sustained in this State. The rights of the child are alone to be considered, and those rights clearly are to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the age of discretion, and if not, to have its personal safety and interests guarded and secured by the law acting through the agency of those who are called upon to administer it. The question must be determined by the exercise of a sound discretion, having reference solely to the present interests of the child. In all the cases, even those in which the superior right of the father seems to have been most strongly maintained, the principle is clearly recognized that there may be circumstances irrespective of any personal disqualification of the father which may defeat his claim. *N. Y. Superior Ct.*, 1847, *Matter of Gregg*, 5 *N. Y. Leg. Obs.*, 265.

18. Where a child, found in the custody of its mother, is of tender years, or of feeble and delicate health, and where the necessity of ma-

ternal care is evident, the law will not interfere to remove it from such custody. Though where the child has arrived at an age at which it becomes important to determine upon its course of education and mental training in reference to its future business and establishment in life, it may reasonably be supposed that the superintendence and judgment of the father will better subserve its true interests than those of the mother. *Id.*

19. Wife made joint guardian with husband. *Laws of 1860*, 159, ch. 90, § 9. Repealed, 1862, 344.

20. Giving away child. When both the parents freely and from good motives gave the child, soon after its birth, to an uncle and aunt;—*Held*, that after he had spent nine years with them as his adopted parents, the gift could not be revoked. *Supreme Ct.*, *Sp. T.*, 1856, *Matter of Murphy*, 12 *How. Pr.*, 518. Compare *People v. Mercein*, 8 *Hill*, 399.

21. Guardian. A court of equity—*e. g.*, a justice of the Supreme Court at chambers—has jurisdiction and authority to take a minor child from the custody of a general guardian appointed by a surrogate, and deliver it to the care and custody of its mother, where this is for the advantage of the child. *Ct. of Appeals*, 1856, *Wilcox v. Wilcox*, 14 *N. Y. (4 Kern.)*, 575; affirming *S. C.*, *sub nom.* *People v. Wilcox*, 22 *Barb.*, 178.

22. The preference of a child of nine years for remaining with those who had nurtured her, is no reason for not restoring her to the mother, but rather the contrary. *Id.* Consult, also, *GUARDIAN AND WARD*.

23. Custody as between parties to divorce. Where the parties live together pending their suit for a separation, the court will not break up the family by giving to either the exclusive charge of the children. *Chancery*, 1829, *Collins v. Collins*, 2 *Paige*, 9.

24. In general, an order concerning the care and custody of the children, pending a suit for a separation, should not be made *ex parte*. *Chancery*, 1841, *Laurie v. Laurie*, 9 *Paige*, 284.

25. The statute gives the court power to dispose of the care and custody of the minor children, in suits for a divorce where the husband is the guilty party, solely for the benefit and protection of the children; and an agreement as to their custody, made by the husband and wife, previous to the decree, will not control the court. *Chancery*, 1846, *Cook v. Cook*, 1 *Barb. Ch.*, 689.

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26. After decree for a divorce the complainant may petition for the custody of the children, though not given to her by the decree; and, if she has married again, she and her husband may petition without reviving the suit. *Id.*

27. Upon an application under 2 Rev. Stat., 148, § 59, after a decree for a separation obtained by the wife, such decree is to be deemed to place the parents on an equality, if it does not create a presumption in favor of the wife. *A. V. Chan. Ct.*, 1840, *Ahrenfeldt v. Ahrenfeldt*, *Hoffm.*, 497.

28. Where the wife had a decree for a separation for the husband's fault, the court directed a reference to frame a scheme for placing the child as a permanent boarder in school, and to make provision for communication between her and her father. *V. Chan. Ct.*, 1847, *Ahrenfeldt v. Ahrenfeldt*, 4 *Sandf. Ch.*, 498.

29. On an application for the custody of children pending a divorce suit, under 2 Rev. Stat., 148, § 59, the court will look into all the circumstances and decide in reference to the good of the child. Although the husband denies the offence, if his conduct appears to have been improper, a child of a tender age may properly be left with the mother. *Supreme Ct.*, *Sp. T.*, 1850, *Putnam v. Putnam*, 8 *Code R.*, 122.

30. The decision of a motion to dissolve an injunction restraining the defendant in a divorce suit from interfering with the custody of the child, is not conclusive on a subsequent application to the court to award the custody. *Id.*

31. Circumstances under which the custody of children has been awarded, in cases of divorce. *Codd v. Codd*, 2 *Johns. Ch.*, 141; *Barrere v. Barrere*, 4 *Id.*, 187.

32. If the mother breaks up the household, and departs from her husband's house, wrongfully, whether it be done of her own purpose, or from weakly yielding to the evil influences of others, she is not to be allowed to take with her the children. *Supreme Ct.*, *Sp. T.*, 1857, *People v. Olmstead*, 27 *Barb.*, 9.

33. Where parents separate without divorce, the wife may have habeas corpus to obtain custody of child. 2 *Rev. Stat.*, 148, §§ 1-7.

34. On habeas corpus, under 2 Rev. Stat., 148, § 1, by a wife to obtain custody of her child, the court may consider the condition of

the children and their wishes. *Supreme Ct.*, 1886, *People v. Ohegaray*, 18 *Wend.*, 687.

35. The court are not authorized to interfere where the wife has withdrawn from the protection of the husband and lives separate from him, without any reasonable excuse. *Supreme Ct.*, 1837, *People v. —*, 19 *Wend.*, 16.

36. Shakers. Habeas corpus by husband or wife, for child detained by the other, in the society of Shakers, authorized. 2 *Rev. Stat.*, 149, §§ 4-7.

37. What constitutes legal restraint of an infant of tender years. *Mercein v. People*, 25 *Wend.*, 64; *People v. Porter*, 1 *Duer*, 709; *People v. Cooper*, 8 *How. Pr.*, 288.

38. Relation to married child. A father is not liable, where, in case of his honest belief of ill-treatment of his daughter by her husband, he, in good faith, advises her to leave him, and receives her to his house. In respect to what facts will support an action by a husband for depriving him of his wife, there is, in principle, a clear distinction between actions against a parent and against a stranger. *Supreme Ct.*, 1856, *Bennett v. Smith*, 21 *Barb.*, 439; *S. P.*, 1809, *Hutcheson v. Peck*, 5 *Johns.*, 196.

39. Truant and idle children, how may be bound out. *Laws of 1853*, 858, ch. 185.

As to the power of a parent to dispose of the custody of a child by Deed or Will, see GUARDIAN AND WARD.

As to mode of proceeding upon Habeas Corpus, see HABEAS CORPUS.

II. MUTUAL DUTY OF SUPPORT.

40. Maternal ancestor. A child is bound, under 1 *Rev. L.* of 1813, 286, § 21, to support his maternal, as well as his paternal grandparents. *Supreme Ct.*, 1826, *Exp. Hunt*, 5 *Cow.*, 284.

41. The father, mother, and children of any person unable to support himself must maintain him, and may be compelled to do so by the overseers of the poor. 1 *Rev. Stat.*, 614, §§ 1, 2. See, also, POOR.

42. The liability of a child to support an infirm and indigent parent, is created solely by statute (1 *Rev. Stat.*, 614, § 1), and can only be enforced in the mode there directed; and therefore, a promise from the child to pay for necessities furnished, without his request, to his indigent parent, is not implied by law; and an action to recover for necessities so

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furnished cannot be maintained. *Supreme Ct.*, 1819, *Edwards v. Davis*, 16 *Johns.*, 281.

43. A son-in-law is not bound to support his wife's mother. The statute extends only to natural relatives. *Ontario Gen. Sess.* (1845?), Anonymous, 3 *N. Y. Leg. Obs.*, 354.

44. Legal obligation. That there is no legal obligation on a parent to maintain his child, independent of the statutes. [Questioning many authorities.] *Supreme Ct.*, 1851, *Raymond v. Loyl*, 10 *Barb.*, 483; but see *Eitel v. Walker*, 2 *Bradf.*, 287.

45. Equity cannot compel a parent to support an infant child. The legal remedies must be pursued. *Chancery*, 1844, *Matter of Ryder*, 11 *Paige*, 185; affirming S. C., 4 *Edw.*, 388.

46. Parent's liability for necessaries. Although, if a parent neglects to provide necessaries for his child, a third person may supply them, he must take notice of what is actually necessary for the infant, according to his situation in life; and where the infant is under the control of his parent, there must be a clear and palpable omission of duty, in that respect, on the part of the parent, in order to authorize any other person to act for, and charge the expense to the parent. *Supreme Ct.*, 1816, *Van Valkinburgh v. Watson*, 18 *Johns.*, 480; 1852, *Chilcott v. Trimble*, 18 *Barb.*, 502; 1857, *Clinton v. Rowland*, 24 *Id.*, 684. Followed, *N. Y. Com. Pl.*, 1856, *Henry v. Betts*, 1 *Hill.*, 156; but compare *Raymond v. Loyl*, 10 *Barb.*, 483.

47. It must appear that the articles supplied were furnished with the assent, or by the authority of the father, or to keep the children from absolute want, or that there was absolute necessity for them. Testimony that "they were necessary for the children" is not enough. *N. Y. Com. Pl.*, 1856, *Poock v. Miller*, 1 *Hill.*, 108.

48. Abandonment by child. A child left his mother's family, in disobedience of her express commands, and went to live with the plaintiff, under an agreement to remain with him till majority;—*Held*, that a promise of the mother to pay for his support could not be implied. *Supreme Ct.*, 1851, *Raymond v. Loyl*, 10 *Barb.*, 483.

49. Emancipation by parent. Though a parent has given his infant child her time, if she becomes sick and infirm, while working for wages for another, he is liable for her necessary support. An emancipation is not

to be deemed irrevocable. *Supreme Ct.*, 1829, *Clark v. Fitch*, 2 *Wend.*, 459.

50. Where a minor son, over twenty years of age, having been a clerk in New York, receiving his own wages, but residing in his father's family, went to California with the consent of his father, who advanced the expenses of his passage, but neither received his earnings nor provided for his support abroad;—*Held*, that the father was not liable for necessaries furnished to the son. *N. Y. Com. Pl.*, 1855, *Johnson v. Gibson*, 4 *E. D. Smith*, 281.

51. Support by relative. Where a child resides in the family of a relative, supported by them without any request or culpable omission on the part of the father, a promise on his part to pay the relative for the support of the child will not be implied. And an express promise to pay, made after the consideration has been executed, is not sufficient without a precedent request. [1 *Saund.*, 264, n. 1; 14 *Johns.*, 878; *Id.*, 180; 13 *Id.*, 257; 24 *Wend.*, 97, 99] *Supreme Ct.*, 1852, *Ohiloott v. Trimble*, 18 *Barb.*, 502.

52. Agency. Evidence that a minor child ordered clothes of a person, for which his father subsequently paid without objection, is sufficient to warrant a finding of authority from the parent to the child to incur such obligations, and make such contracts on behalf of the father with the same person. *N. Y. Com. Pl.*, 1856, *Henry v. Betts*, 1 *Hill.*, 156.

53. Step-father. A husband is not bound to maintain his wife's child by a former husband. The statute (1 *Rev. L.*, 280, § 21) extends only to natural relations. [4 *T. R.*, 118; 4 *East*, 76.] *Supreme Ct.*, 1880, *Gay v. Bal-lou*, 4 *Wend.*, 403. To the same effect, 1849, *Williams v. Hutchinson*, 5 *Barb.*, 122. *Ct. of Appeals*, 1850, *Williams v. Hutchinson*, 3 *N. Y.* (8 *Comst.*), 312; *Bartley v. Richtmyer*, 4 *N. Y.* (4 *Comst.*), 88. *V. Chan. Ct.*, 1836, *Elliott v. Lewis*, 3 *Edw.*, 40.

54. Where a husband had supported the children of his wife by a former marriage,—*Held*, that their board and expenses constituted a just debt to him, notwithstanding a declaration that he did not intend to charge them. *V. Chan. Ct.*, 1836, *Elliott v. Lewis*, 3 *Edw.*, 40.

55. A step-father who receives into his family, supports, and educates the children of his wife by her former husband, cannot sus-

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tain an action at law against them for the necessities so furnished, without an express promise to pay, made after they have attained their majority. They will be deemed to have dealt with each other in the character of parent and child, and not as strangers. *Supreme Ct.*, 1851, *Sharp v. Cropsey*, 11 *Barb.*, 224; overruling, in this respect, *Gay v. Ballou*, 4 *Wend.*, 408.

56. Exposing child with intent to abandon it, punishable. 1 *Rev. Stat.*, 665, § 35.

As to liability for support of **Bastard child**, see **BASTARDY**, 5; **DAMAGES**, 259.

III. SERVICES AND EARNINGS OF CHILDREN, AND INJURIES TO THEM.

57. Parents may recover for services.

In general, whatever a child earns belongs to, and is to be recovered in the name of the parent. Where there is no agreement, express or implied, that payment may be made to the child, the parent alone is entitled to his earnings, and the action must be brought in his name. *Supreme Ct.*, 1880, *Shute v. Dorr*, 5 *Wend.*, 204. Followed, 1842, *Letts v. Brooks*, *Hill & D. Supp.*, 36.

58. Parent's contract for child's service.

A father can bind himself by his contract, that his minor child shall serve another during the period for which he is by law entitled to them, for a compensation to be paid to himself, and for the support and education of the child. [7 *Mass.*, 154; 5 *Pick.*, 250; 8 *Johns.*, 328.] *Supreme Ct.*, 1852, *Van Dorn v. Young*, 18 *Barb.*, 286.

59. That indentures which do not conform to the statute relating to apprentices, may, if executed by the father, be held binding on him, both at common law, and under 2 *Rev. Stat.*, 3 ed., 209, § 1, which expressly authorizes him to dispose, by deed, of the custody of his child during his minority, or for a less term. *Supreme Ct.*, 1850, *Fowler v. Hollenbeck*, 9 *Barb.*, 309.

60. Legitimacy. One suing for compensation of services rendered by his child, must show, if the relationship be denied, that the child is legitimate, and for that purpose must give some evidence of a marriage. Testimony that the plaintiff was the father is not sufficient, because it is consistent with illegitimacy. *Supreme Ct.*, 1851, *Armstrong v. McDonald*, 10 *Barb.*, 300. Opposed, *Haight v. Wright*, 20 *How. Pr.*, 91.

61. Child's services to parent. Where a daughter lived with her father for thirty years as a member of his family, and was taken care of by him as such, without any agreement for compensation for her services,—*Held*, that the law could not imply one. The family relation, in the absence of any express agreement or promise to pay, is a bar to any right of recovery. *Supreme Ct.*, 1851, *Dye v. Kerr*, 15 *Barb.*, 444; and see *Cropsey v. Sweeney*, 27 *Id.*, 810; *S. C.*, 7 *Abbotts' Pr.*, 129.

62. *So held*, although an executor had given a note for the amount of the demand. *Supreme Ct.*, 1851, *Dye v. Kerr*, 15 *Barb.*, 444.

63. A father promised to pay his infant daughter certain wages for her services, and she worked for him, in his family, during and after her minority. *Held*, in an action to recover for the services rendered after she came of age, that the agreement was evidence of their value. *Supreme Ct.*, 1850, *Fort v. Gooding*, 9 *Barb.*, 371.

64. Step-father not liable for services.

Although a step-father is not by law entitled to the custody or services of the children of his wife by a former husband, nor bound to maintain them, yet where he assumes the relation of a parent towards them, and receives them into his family and supports and educates them on the same footing as his own children, he is not liable to them in an action for services rendered to him by them during their minority, although the value of such services may exceed the expenses of their education and support. Under such circumstances a promise to pay wages cannot be implied. The infant's consent to waive his right to wages may be presumed; for they have power to make a beneficial contract to provide themselves with a home. *Ct. of Appeals*, 1850, *Williams v. Hutchinson*, 3 *N. Y.* (3 *Comst.*), 312; affirming a similar case, 5 *Barb.*, 122; and see *Bartley v. Richtmyer*, 4 *N. Y.* (4 *Comst.*), 38.

65. Marriage of widow. That where a widow, having children, marries again, she can no longer control their persons, property, or earnings. *Supreme Ct.*, 1849, *Williams v. Hutchinson*, 5 *Barb.*, 122.

66. Emancipation. The father may emancipate his child, or the child may, by the father's consent, be entitled to his own services. *Supreme Ct.*, 1827, *McCoy v. Huffman*, 8 *Cow.*, 84; and see *Shute v. Dorr*, 5

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Wend., 204; *Burlingame v. Burlingame*, 7 *Cow.*, 92; *Canovar v. Cooper*, 8 *Barb.*, 115.

67. Where, by the father's consent, an infant served for another, under the promise of the latter to do well by the infant,—*Held*, that it was to be inferred that the infant, and not the father, was entitled to the compensation of his services. *Supreme Ct.*, 1827, *Burlingame v. Burlingame*, 7 *Cow.*, 92.

68. The continued absence of the father, without supporting or controlling his son,—*Held*, evidence of consent that the son might labor for his own benefit. *Supreme Ct.*, 1848, *Canovar v. Cooper*, 8 *Barb.*, 115.

69. When a minor son makes a contract for his services on his own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his own earnings. [8 *Pick.*, 202.] *Supreme Ct.*, 1851, *Armstrong v. McDonald*, 10 *Barb.*, 300.

70. Notice to employer. The parent or guardian who claims wages of minor must notify the employer within thirty days after commencement of service, in default of which notice, payment to the minor is valid. *Laws of 1850*, 579, ch. 266; and see *Clinton v. Rowland*, 24 *Barb.*, 634.

As to **Indentures** of apprenticeship, and the rights of the parties under them, see **APPRENTICE**.

71. The father may sue for a son's services rendered under a contract made with the father, although he had permitted the son to receive his own wages. *N. Y. Com. Pl.*, 1854, *Wentworth v. Buhler*, 8 *E. D. Smith*, 305.

72. **Injuries to child.** A parent cannot maintain an action against the trustees of common schools for damages for expelling his child, nor for the costs of an appeal to the superintendent. In no case can a parent sustain an action for an injury to his child, unless some actual loss has accrued to him, or he has been subjected to the violation of some right from which a possibility of damage may arise. [2 *Carr. & Payne*, 578; 15 *Wend.*, 635; *Reeve's Domes. Rel.*, 291; 8 *N. Y. (3 Comst.)*, 498; 20 *Wend.*, 210.] *Supreme Ct.*, 1852, *Stephenson v. Hall*, 14 *Barb.*, 222.

73. **Negligence.** An infant of very tender years, who is negligently permitted to stray into a highway, and is there run over, through mere inadvertence, and not through wilfulness or gross negligence, cannot sustain an action for the injury; the negligence of the parent or

guardian is imputable to the child. *Supreme Ct.*, 1839, *Hartfield v. Roper*,* 21 *Wend.*, 615; and see *Gilligan v. N. Y. & Harlem R. R. Co.*, 1 *E. D. Smith*, 458.

As to actions for **Injuries to children**, see **DAMAGES**, 255-257; **DEATH**, II.; **NEGLIGENCE**; **SEDUCTION**.

PARTIES.

[Under this title are presented the cases and statutes relating to parties in suits. Other illustrations of the same principles will be found under the titles of the various causes of action, which should be consulted in connection with this title. The matters relating to the various special proceedings are reserved for their respective titles. The subjects of **ABATEMENT AND REVIVAL**, **AMENDMENT**, **APPEARANCE**, **CONSOLIDATION OF ACTIONS**, **GUARDIAN AD LITEM** and **NEXT FRIEND**, **INTERPLEADER**, **JOINDER**, **JURISDICTION**, **PLEADING**, **REMOVAL OF CAUSES**, **SECURITY FOR COSTS**, **SERVICE**, and the like, are the subjects also of separate articles; and the personal disabilities of **MARRIED WOMEN**, **INFANTS**, **INSANE PERSONS**, and **HABITUALLY DRUNKARDS**, will be found treated under their respective titles.]

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I. IN ACTIONS AT COMMON LAW.

1. *In General.*

1. **Two capacities.** A plaintiff may sue in two capacities if they are not inconsistent,—*e. g.*, as public administrator and as administrator *de bonis non*. *N. Y. Com. Pl.* (1848 ?), *Ketchum v. Morrell*, 2 *N. Y. Leg. Obs.*, 58.

2. **An action for a penalty**, of which one half is given to the prosecutor and one half to public officers, properly brought in the names of both. *Blasdel v. Hewit*, 8 *Cal.*, 187.

3. **Defendants not served.** Where several are named as defendants in an action for a tort, but all are not served with the process, some being returned not found, the suit is deemed to be pending only against those served. *Supreme Ct.*, 1847, *Norton v. Hayes*, 4 *Den.*, 245.

4. Where different parties to a bill or note are sued, but one only served, plaintiff may proceed separately against him. *Supreme Ct.*, 1839, *Scott v. Standart*, 19 *Wend.*, 642.

5. **Torts relating to real property.** As a general rule, in actions in form *ex delicto*, for a tort committed by several, the plaintiff may sue any of them, and the non-joinder of others cannot be pleaded in abatement. Where the action relates to real property, if it is such as to draw in question the title, all those jointly concerned should be joined,—*e. g.*, in an action on the case against joint-owners of land for damages arising from their neglect to perform a duty resulting from their ownership;—but where the act complained of consists in a malfeasance, such as the erection of a nuisance on the land, their title cannot come in question, and they are severally liable. [1 *Ohitt. Pl.*, 75, 76; 5 *T. R.*, 65; 7 *Hen. IV.*, 8.] *Supreme Ct.*, 1817, *Low v. Mumford*, 14 *Johns.*, 426.

2. *Rules concerning the Character or Relation of the Parties.*

A. Agents and their Principals.

6. **Remedies**, whether by action or distress, must be pursued in the name of the party in interest, and not in the name of the agent who made the contract, or who is appointed to make collection. [*Ham. on Parties*, 4, 29; 1 *Chitt. Pl.*, 2; 8 *Bos. & P.*, 147; 2 *Taunt.*, 374.] *Supreme Ct.*, 1839, *Buckbee v. Brown*, 21 *Wend.*, 110.

7. **Agreement by attorney.** By an agreement, A. as attorney of B. covenanted to convey land, and he executed the agreement as attorney of B. *Held*, that if the agreement was valid as the agreement of the principal, a suit upon it must be brought by him. In any case no action could be maintained upon it by the attorney. [2 *Ld. Raym.*, 1418; *Com. Dig.*, *Atty.*, 14.] *Supreme Ct.*, 1810, *Bogart v. De Bussy*, 6 *Johns.*, 94.

8. An attorney in fact, under a revocable power, cannot sue in his own name to recover from an attorney-at-law, whom he employed, money received by the latter for him. A mere agent or attorney, not having any beneficial interest in a contract, cannot maintain any action upon it in his own name. [8 *Bos. & P.*, 147.] *Supreme Ct.*, 1818, *Gunn v. Oantime*, 10 *Johns.*, 387; *S. P.*, *Herrick v. Carman*, *Id.*, 224.

9. Where there is an express written

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promise to the agent, and the principal ratifies the act of the agent, the action may be in the name of the agent. *Supreme Ct.*, 1842, *Harp v. Osgood*, 2 *Hill*, 316.

10. Implied. If even a mere agent or attorney has the legal title to a chose in action, he may recover on the promise which the law implies against one who has collected money thereon, and this although a like action might lie in favor of his principal. *Ct. of Appeals*, 1851, *Poor v. Guilford*, 10 *N. Y.* (6 *Seld.*), 278.

11. Business done in name of third party. In an action for goods sold, the pleadings showed that A. carried on business in the name of B., but in truth for his own profit, and on his own account, and at his risk; and that A. sold and delivered, &c., in the name of B. *Held*, that the suit was properly brought in the name of B. [*Cowp.*, 251.] *Supreme Ct.*, 1818, *Alsop v. Caines*, 10 *Johns.*, 896; and see *Raymond v. Johnson*, 11 *Id.*, 488.

12. Husband and guardian. Where a woman and her children were entitled to bounty money from the government, and her husband, as guardian for her children, gave a power of attorney to collect their share, and also united with her in a power to collect her share,—*Held*, that he might in his own name sue the attorney to recover the money collected. It was due to him, and it was not important to defendant what he was to do with it, or to whom it ultimately belonged. *Supreme Ct.*, 1828, *Foster v. Preston*, 8 *Cow.*, 198.

13. The duty of a bank to collect paper left with it for collection, not being founded on express contract but on an implied agreement arising from the custom of banks, the duty is raised, or the assumpsit implied in behalf of such person as may be beneficially interested in having the duty performed; so that if A. leaves a note for collection, and B. becomes the owner of it before the time for the performance of the duty arrives, the latter is the proper person to bring the suit for an injury arising from the neglect of that duty. *Ct. of Errors*, 1838, *Bank of Utica v. McKinster*, 11 *Wend.*, 478; affirming *S. C.*, 9 *Id.*, 46.

Consult, also, for other cases relating to banks, **BANKING**, I.

14. A receptor of goods levied on, who, by the consent of the parties, employs services to render the goods more salable, cannot recover for the failure of the person employed to return the property. The sheriff is the

proper party. It is only where the agent has a lien upon the property sold by him, or acts under a *del credere* commission, that he has a right to sue in his own name on a contract made for the principal, or to set off a demand due to his principal against his own debt. *Ct. of Errors*, 1834, *Butts v. Collins*, 18 *Wend.*, 189.

15. One who purchases through an agent, though his name is not disclosed at the time, may have an action upon a warranty given on the sale. The real principal when discovered is liable for the price, and on the same ground he may recover for a violation of the part of the agreement which is in his favor. In general, an action should be brought in the name of the party whose legal interest has been affected, against the party who committed the injury. [1 *Chitt. Pl.*, 1; *Hamm. on Parties to Act.*, 8; 1 *Bos. & P.*, 101, n. c.; 8 *Id.*, 149; 8 *T. R.*, 380; 10 *Johns.*, 387; 12 *Id.*, 1.] *Supreme Ct.*, 1834, *Beebe v. Robert*, 12 *Wend.*, 418. *S. P.*, *N. Y. Superior Ct.*, 1829, *Collman v. Collins*, 2 *Hall*, 569.

16. Mistake. Where an agent subscribed for stock and paid a part only, but received, by mistake, a receipt for the whole amount, and retained the residue of the money; and the corporation credited the principal with whole amount of the receipt;—*Held*, that an action against the agent must be in the principal's name, not in that of the corporation. *Supreme Ct.*, 1844, *Albany Exchange Bank v. Sage*, 6 *Hill*, 562.

17. An auctioneer who sells goods for a third person, may maintain an action in his own name, for the price. He has possession and a special property. [1 *H. Bl.*, 81.] *Supreme Ct.*, 1819, *Hulse v. Young*, 16 *Johns.*, 1. Compare *Minturn v. Main*, 7 *N. Y.* (3 *Seld.*), 220; affirming *S. C.*, *sub nom.* *Minturn v. Allen*, 8 *Sandf.*, 50.

18. The consignor, or the consignee, may either of them maintain trover against a stranger, who officiously intermeddles with the property consigned. [1 *Bos. & P.*, 47.] A recovery by one is a bar to an action by the other. *Supreme Ct.*, 1827, *Smith v. James*, 7 *Cow.*, 828.

19. Neither the consignor nor the consignee, as such, is to bring the action; but the owner of the goods. The presumption of ownership which results from an unqualified consignment may be rebutted; and if a third person sues, and it appears that he is the real owner,

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there is an end to the objection that the action should be brought in the name of the consignee. [1 Johns., 228; 5 Burr., 2680; 8 T. R., 880.] *Supreme Ct.*, 1836, Everett v. Salatus, 15 *Wend.*, 474; affirmed, *Ct. of Errors*, 1838, 20 *Id.*, 267. S. P., *Ct. of Appeals*, 1850, Price v. Powell, 8 *N. Y. (3 Comst.)*, 322.

As to the **Rights and Liabilities of agents**, see **PRINCIPAL AND AGENT**, and the titles there referred to.

B. Assignors and Assignees.

20. Injury after assignment. If notes are converted after they are assigned, the action for the conversion must be in the name of the assignee. *Chancery*, 1828, Chase v. Chase, 1 *Paige*, 198.

21. After a growing crop has been assigned, an action for a subsequent injury to it must be in the assignee's own name. *Supreme Ct.*, 1812, Carter v. Jarvis, 9 *Johns.*, 148. Compare Austin v. Sawyer, 9 *Cow.*, 39.

22. Assignment to one of several debtors. An assignment of a demand against three, to one of them, does not bar an action in the name of the assignor against the three nominally. Nor ought an assignment, which is merely by way of a pledge, to work a release. *Supreme Ct.*, 1839, Blanchard v. Ely, 21 *Wend.*, 342.

23. Escape. Where an assignee recovers judgment in the name of his assignor, he is to be protected throughout. If he issues execution giving the sheriff notice of his equitable interest; and the sheriff, having arrested the defendant, suffers him to escape, the assignee may sue therefor in the name of the assignor, and the sheriff cannot avail himself of a release from the nominal plaintiff. *Supreme Ct.*, 1816, Martin v. Hawks, 15 *Johns.*, 406.

24. Express promise to assignee. The assignee of a chose in action must sue in his own name, upon an express promise to him to pay it. *Supreme Ct.*, 1825, Compton v. Jones, 4 *Cow.*, 18; but compare Dubois v. Doubleday, 9 *Wend.*, 817; Granger v. Howard Ins. Co., 5 *Id.*, 200.

25. Without at least an express promise, the assignee cannot maintain the action; and a part-payment to him does not raise an implied promise. *Supreme Ct.*, 1882, Dubois v. Doubleday, 9 *Wend.*, 817. To similar effect, *Supreme Ct.*, 1842 [citing 4 *Cow.*, 18; 1 *Chitt. Pl.*, 9; 8 T. R., 595; 3 *N. H.*, 82; 4 *Id.*, 69;

14 *Mass.*, 107; 12 *Id.*, 281; 10 *Id.*, 816; 9 *Wend.*, 817; 5 *Id.*, 200], Jessel v. Williamsburgh Ins. Co., 3 *Hill*, 88.

26. Purchaser. Although the captain of a vessel has made a verbal arrangement with the owner for purchase of an interest, yet if he has not taken any conveyance, he is not a necessary co-plaintiff in an action by the owner upon a charter-party. [10 *Johns.*, 396; 4 *Wend.*, 629; 8 *Cow.*, 84.] *Ct. of Appeals*, 1858, Ward v. Whitney, 8 *N. Y. (4 Seld.)*, 442.

27. Nominal plaintiff. Where an action is brought in the name of an assignor, by the assignee, or person beneficially interested, defendant cannot avail himself of the plaintiff's want of interest. *Supreme Ct.*, 1818, Alsop v. Caines, 10 *Johns.*, 396; 1814, Raymond v. Johnson, 11 *Id.*, 488.

28. The fact that the holder and owner of a negotiable note prosecutes in the name of a stranger, without his knowledge or consent, is no bar to recovery. [11 *Johns.*, 52.] *Supreme Ct.*, 1836, Gage v. Kendall, 15 *Wend.*, 640; S. P., 1841, Guernsey v. Burns, 25 *Id.*, 411.

29. Suit against stockholders. The second indorsee and holder of a bill had obtained judgment against the drawers, and the second indorser who was liable, paid the amount to the holder and received from him an assignment of the judgment. The drawers were an incorporated company, the stockholders of which were personally liable for its debts. *Held*, that the assignee might use the name of the plaintiff in the judgment, in an action to enforce the liability of stockholders. *Supreme Ct.*, 1846, Harger v. McCullough, 2 *Den.*, 119.

30. Use of name of assignee in bankruptcy. That the assignee of a chose in action cannot sue at law in the name of the assignee in bankruptcy of his assignor, without their consent. *Chancery*, 1848, Ontario Bank v. Mumford, 2 *Barb. Ch.*, 596.

31. Party-wall. A subsequent purchaser of one lot cannot sue in his own name to recover the value of a party-wall, on a promise to pay for it, made to his grantor who built it. *N. Y. Com. Pl.*, 1846, Pentz ads. Brown, 5 *N. Y. Leg. Obs.*, 19.

C. Corporations and Associations.

32. Stock subscriptions. A joint-stock association was formed, and the members made subscriptions of stock, payable to the trustees or their successors. Subsequently the

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association was incorporated, and new trustees or directors chosen. *Held*, that an action on a subscription must be in the name of the original trustees, to whom the promise was made. *Supreme Ct.*, 1838, *Townsend v. Goe-wey*, 19 *Wend.*, 424. Followed, *Ct. of Appeals*, 1851, *Davis v. Garr*, 6 *N. Y.* (2 *Seld.*), 124. Compare *Cross v. Jackson*, 5 *Hill*, 478.

33. The president of a banking association organized under the statute may sue, as president, for a stock subscription made before the association was organized, and payable in terms to the directors. The intent of such subscription is to create a debt due the corporation upon its organization, and, as such, recoverable by the president under section 21 of the act. *Supreme Ct.*, 1841, *Stanton v. Willson*, 2 *Hill*, 158.

34. The cashier of a bank cannot sue, in his own name, a note belonging to the bank, at least without evidence that the bank directed the suit, or had assigned it to him. His possession of it is not in his individual capacity; he has only its custody; the bank has the possession. *Supreme Ct.*, 1830, *Olcott v. Rathbone*, 5 *Wend.*, 490.

35. A foreign corporation may sue in this State. [4 *Cow.*, 529.] And where, after such a corporation had sued, its charter was repealed and its property vested in trustees,—*Held*, that the trustees might be substituted as plaintiffs. *Supreme Ct.*, 1826, *N. J. Protection & Lombard Bank v. Thorp*, 6 *Cow.*, 46. Approved, *Ct. of Appeals*, 1851, *Hoyt v. Thompson*, 5 *N. Y.* (1 *Seld.*), 320.

36. An unincorporated company cannot sue in the name of the trustees. *Supreme Ct.*, 1815, *Niven v. Spickerman*, 12 *Johns.*, 401.

Consult, also, CORPORATION, and FOREIGN CORPORATION.

37. Trustees de facto of a religious society, though it be not duly incorporated, have possession of the house under color of right, and may bring suit against a trespasser. *Supreme Ct.*, 1832, *Green v. Cady*, 9 *Wend.*, 414.

As to actions on behalf of Joint-stock associations, &c., see *infra*.

D. Executors and Administrators.

38. Joinder. Where there are several executors, they must all join, even though some renounce. [9 *Co.*, 37; 1 *Chitt. Pl.*, 13; 1 *Saund.*, 291; 3 *Bac.*, 32; *Toll.*, 68.] *Supreme Ct.*, 1830, *Bodle v. Hulse*, 5 *Wend.*, 318.

39. In actions by or against executors, it is not necessary to join those to whom letters have not issued, and who have not qualified. *Laws of 1838*, 103, ch. 149, § 1.

40. Where there are two administrators, one only acting, he may sue alone in his own right on a guaranty, executed since the decedent's death, of a promissory note belonging to the estate. *Supreme Ct.*, 1836, *Packer v. Willson*, 15 *Wend.*, 343.

41. Suits in individual capacity. A promissory note, negotiable and indorsed in blank, coming to the hands of an administrator as such, may be sued by him in his proper name, as if indorsed to him individually. *Supreme Ct.*, 1800, *Cooper v. Kerr*, 3 *Johns. Cas.*, 2 ed., 606.

So of a foreign administrator. 1832, *Robinson v. Crandall*, 9 *Wend.*, 425.

42. That an administrator cannot recover, in his official capacity, for money lent. *N. Y. Com. Pl.* (1843?), *Ketchum v. Morrell*, 2 *N. Y. Leg. Obs.*, 58.

43. An executor may be sued individually on a note made by him as executor or on behalf of the estate. [13 *Wend.*, 557.] *N. Y. Com. Pl.*, 1843, *McSorley v. Leary*, 1 *N. Y. Leg. Obs.*, 410.

44. Note given to executor. An executor may sue in his own name, or as executor, a note given to him as executor for a debt to the intestate. [2 *Hill*, 210; 2 *N. H.*, 420; 1 *Pet.*, 686; 14 *Mass.*, 327.] *Supreme Ct.*, 1849, *Merritt v. Seaman*,* 6 *Barb.*, 330.

E. Governments and Officers.

45. Any State of the Union may sue in its corporate name in the courts of another State. *Ct. of Errors*, 1841, *Delafield v. State of Illinois*, 2 *Hill*, 159; and 26 *Wend.*, 192. Followed, *Supreme Ct.*, 1843, *State of Indiana v. Woram*, 6 *Hill*, 38.

46. Sheriff. It is not necessary, in a suit against the sheriff for the acts of his deputy, to describe him as sheriff; and if his name of office be added, it is merely *descriptio personæ*. *Supreme Ct.*, 1845, *Stillman v. Squire*, 1 *Den.*, 327.

47. Deputy. An action will not lie against a deputy-sheriff to recover money rightfully received by him in that character, although,

* Reversed on other points, *Ct. of Appeals*, 1852, 6 *N. Y.* (2 *Seld.*), 168.

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while the money is yet in his hands, he refuses to pay it on demand. An agent receiving money for his principal, in pursuance of a valid authority, without fraud, duress, or mistake, is not liable to an action in behalf of a person who is ultimately entitled to the money, for neglecting to pay the same upon request, and before it is paid over to the principal: the principal is alone responsible. [Cowp., 406; 7 Johns., 472; 5 Madd., 47; 4 Burr., 1984; 1 Chitt. Pl., 75; 2 Den., 118.] *Ct. of Appeals*, 1848, *Colvin v. Holbrook*, 2 N.Y. (2 Comst.), 126; affirming S. C., 3 Barb., 475.

48. That where a sheriff is liable for the act of his deputy, the party cannot maintain a joint action against both. [1 Pick., 62.] *Supreme Ct.*, 1848, *Moulton v. Norton*, 5 Barb., 286. Compare, however, *Waterbury v. Westervelt*, 9 N.Y. (5 Seld.), 598; *Moulton v. Norton*, 5 Barb., 286; *King v. Orser*, 4 Duer, 481.

49. **What name.** Actions brought by and against public officers must be brought, not by or against the office, but by or against the person holding it, by his name, adding his official designation. *Supreme Ct.*, 1845, *Agent of State Prison v. Rikeman*, 1 Den., 279.

So held, of a supervisor. 1848, *Supervisor of Galway v. Stimson*, 4 Hill, 136.

So, also, of commissioners of highways. 1848, *Commissioners of Cortlandville v. Peck*, 5 Hill, 215.

So, also, of overseers of the poor. 1844, *Overseers of Hebron v. Ely*, Hill & D. Supp., 279.

50. The statute relating to suits by and against the agents of the state-prisons (2 Rev. Stat., 763, § 25), does not prescribe a different rule for them. *Supreme Ct.*, 1845, *Agent of State Prison v. Rikeman*, 1 Den., 279.

Otherwise where, in an action against a county, the Board of Supervisors are named as defendants. *Sp. T.*, 1854, *Wild v. Supervisors of Columbia*, 9 How. Pr., 315.

51. **New election.** Town officers, sued as such, cease to be parties, on the election of their successors. Therefore they have no right to move for judgment as in case of nonsuit. The successors must first be substituted. *Supreme Ct.*, 1842, *Barker v. Norton*, 8 Hill, 474.

52. **Excise.** An action for penalties for selling liquor without license, under the Revised Statutes, is properly brought in the name of overseers of the poor, in a town in which it is

determined, pursuant to the act of 1845, to give no licenses, notwithstanding the latter act does not expressly give the right to them. *Ct. of Appeals*, 1854, *Manchester v. Herrington*, 10 N.Y. (6 Seld.), 164.

53. In a suit for an excise penalty brought in the name of the overseers, defendant cannot object, by motion or otherwise, that the suit is prosecuted by a third person in the name of the overseers, without their consent or without giving security for costs, nor that the overseers had not neglected for ten days to prosecute, so that no other person had, under the statute, a right to prosecute. *Supreme Ct.*, 1847, *Thayer v. Lewis*, 4 Den., 269.

F. Husband and Wife.

54. **When wife must join as plaintiff.** A husband cannot sue alone for a debt which accrued to the wife when sole. [Reeves' Dom. Rel., 126.] *Supreme Ct.*, 1835, *Morse v. Earl*, 18 Wend., 271.

55. In an action for rent, or any other cause, accruing before marriage, in regard to the real property of the wife, she must be joined with her husband; but for rent arising after marriage, she need not be joined. [1 Chitt. Pl., 17, 20.] Where he proceeds alone, he must show affirmatively that the rent accrued after the marriage. *Supreme Ct.*, 1818, *Decker v. Livingston*, 15 Johns., 479.

56. **Obligation to both.** On a bond to the husband and wife, conditioned for their maintenance, during their joint and several lives, a suit may be brought by the husband and wife, jointly. *Supreme Ct.*, 1818, *Schoonmaker v. Elmendorf*, 10 Johns., 49.

57. When a covenant is made to the husband and wife, and she has a distinct interest,—*e. g.*, in a contract for the sale of her lands and for payment to her,—she must be joined in an action on it. *Supreme Ct.*, 1839, *Smith v. Tallcott*, 21 Wend., 202.

58. Where in such a covenant the wife's trustee was named as a party to the covenant, but, instead of signing it, he indorsed thereon an agreement to do whatever was necessary on his part to effect it,—*Held*, that he also was a necessary party plaintiff in an action for a breach. [8 Barn. & C., 858.] *Id.*

59. In general, a wife cannot join with her husband in an action upon any contract made during coverture, whether with the wife alone as party, or with the two jointly, except where

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the wife is the meritorious cause of action, and a party to an express promise founded thereon. *Supreme Ct.*, 1845, *Thorne v. Dillingham*, 1 *Den.*, 254.

60. Marriage pending suit. If a feme sole, plaintiff, marries, after a report of referees in her favor, the husband must be made a party to the judgment, by *scire facias*, before execution is issued. *Supreme Ct.*, 1820, *Johnson v. Parmely*, 17 *Johns.*, 271.

61. Personal injury. An action to recover damages for personal injury and suffering of a wife, caused by defendant's negligence, is properly brought in the name of the husband and wife. [1 *Ohitt.* on Pl., 62.] *Ct. of Appeals*, 1852, *Thomas v. Winchester*, 6 *N. Y.* (2 *Seld.*), 397.

62. In an action for slander of a married woman, if the words are actionable *per se*, she must join; if not, the husband must sue alone. the fact that they live apart, under a deed of separation, does not affect the principle. *Supreme Ct.*, 1842, *Beach v. Ranney*, 2 *Hill*, 309.

63. For a conversion, after marriage, of personal property which belonged to the wife before marriage, the husband must sue alone. The husband, by marriage, acquires an absolute title to the personal property of the wife. The wife has no legal interest in it, and she is not a proper party plaintiff in the suit. [1 *Ohitt.* Pl., 62; 2 *Saund.*, 471; 6 *Watts*, 301; 1 *Russ.*, 67; 1 *Bibb*, 217.] *Supreme Ct.*, 1848, *Blanchard v. Blood*, 2 *Barb.*, 852.

64. The wife cannot be sued on a mere personal contract made during coverture, whether joined with her husband or not, unless the husband be *civilitur mortuus*, or banished, or transported. [1 *Ohitt.* Pl., 48; 2 *Saund.*, 180, n. 9.] *Supreme Ct.*, 1819, *Edwards v. Davis*, 16 *Johns.*, 281.

65. The husband cannot be sued alone for the debt of his wife, contracted before their marriage. [7 *T. R.*, 348.] *Supreme Ct.*, 1811, *Angel v. Felton*, 8 *Johns.*, 149; 1818, *Gage v. Reed*, 15 *Id.*, 408.

66. Covenant of both. That the wife cannot be joined with the husband in an action for a breach of a covenant in their deed. *Supreme Ct.*, 1818, *Whitbeck v. Cook*, 15 *Johns.*, 438.

67. Trustee. In an action by or against a married woman, as trustee, her husband must be joined. *Supreme Ct.*, 1833, *People v. Webster*, 10 *Wend.*, 554.

G. Insane Persons.

68. Ejectment. The committee of a lunatic, &c., have no estate in his lands; and an action of ejectment for the lunatic's land must be brought in the lunatic's name. *Supreme Ct.*, 1840, *Petrie v. Shoemaker*, 24 *Wend.*, 85.

69. Committee must sue. Actions on behalf of the lunatic must be brought in the name of the lunatic, and not in that of the committee. There is no distinction in this respect between actions concerning his realty, and those relating to his personal estate. [Noy., 27; Shelf. Lunatics, 395, ed. 1833; 19 *Ves.*, 812.] *Supreme Ct.*, 1841, *Lane v. Schermerhorn*, 1 *Hill*, 97. Followed, 1850, *McKillip v. McKillip*, 8 *Barb.*, 552.

70. All suits affecting the person or property of the lunatic must be prosecuted in his name, except those provided for by the Laws of 1845, 90, ch. 112. That statute does not embrace an equitable proceeding, by which an estate or interest in real property is sought to be established,—*s. g.*, a suit to establish an equitable lien in favor of the lunatic, upon defendant's land. *Supreme Ct.*, 1850, *McKillip v. McKillip*, 8 *Barb.*, 552.

H. Partners.

71. A surviving partner may sue in his own name, for a debt to the partnership, whether incurred before or after the death of his copartner. [2 *T. R.*, 476; *Comb.*, 382.] *Supreme Ct.*, 1801, *Bernard v. Wilcox*, 2 *Johns. Cas.*, 374.

72. That the special partner in a limited partnership under the statute, should not be joined with the general partner, in an action on a partnership obligation. *Phillips v. Stewart*, *Anth. N. P.*, 337.

73. A dormant partner need not, and ought not, to be joined in a suit by the firm. [2 *Esp.*, 468, 469, n.; 7 *T. R.*, 361, n.; 2 *Taunt.*, 324; 1 *Ohitt.* Pl., 9; 8 *Cow.*, 84.] *Supreme Ct.*, 1830, *Clark v. Miller*, 4 *Wend.*, 628. Otherwise under the Code, see *infra*.

74. Defendant cannot prevail on a plea of the non-rejoinder of his dormant partner. When the creditor, at the time the contract is made, is ignorant that the debtor has a secret partner, he has the option, on discovering the partnership, of suing the debtor separately, or of joining the dormant partner. *Supreme Ct.*, 1838, *N. Y. Dry Dock Co. v. Treadwell*, 19

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Wend., 525. To similar effect, 1824 [citing 1 *Ohitt*, Pl., 7, 8; 2 *Esp.*, 468; 2 *Taunt.*, 824, 826], *Clarkson v. Carter*, 3 *Cow.*, 84.

75. Breach of warranty. Where one partner makes a warranty on a sale, an action for its breach will lie against him without joining the other. *Supreme Ct.*, 1808, *Clark v. Holmes*, 8 *Johns.*, 148.

I. Surviving Debtor and Representative of Deceased.

76. An action at law for a partnership debt does not lie against the personal representative of a deceased partner. It must be brought against the survivor. *Supreme Ct.*, 1828, *Grant v. Shurter*, 1 *Wend.*, 148.

77. In a suit on a joint and several bond, the administrator of a deceased obligor cannot be joined with the survivors, for there cannot be the same judgment against the administrator as against the survivors. *Supreme Ct.*, 1848, *Brown v. Babcock*, 3 *How. Pr.*, 805; *S. C.*, 1 *Code R.*, 60.

78. When one of two joint covenantors dies, the remedy at law on the covenant is by action against the survivor; the representatives of the deceased covenantor being chargeable only in equity. After the death of both, the remedy at law is against the heir, &c., of the one who survived. *Supreme Ct.*, 1844, *Gere v. Clarke*, 6 *Hill*, 850.

J. Tenants in Common, &c.

79. Under 1 Rev. L. of 1818, 79, § 2, tenants in common may or may not join in a real action. *Supreme Ct.*, 1825, *Malcom v. Rogers*, 5 *Cow.*, 188.

80. Tenants in common. In an action of trespass brought by tenants in common, in relation to their lands, or in an action for the rent, or in any other action merely personal, they must all join as plaintiffs.* But in distresses and avowry for rent, which savor of the realty, they ought not to join. *Supreme Ct.*, 1818, *Decker v. Livingston*, 15 *Johns.*, 479; *S. P.*, 1816, *Austin v. Hall*, 18 *Id.*, 286; and see *Low v. Mumford*, 14 *Id.*, 426; but compare 2 *Rev. Stat.*, 841, § 11.

81. The general rule in relation to suits by tenants in common, against third persons, is this: When the action is in the realty, they

must sue separately; when in the personalty, they must join. *Supreme Ct.*, 1848, *Hill v. Gibbs*, 5 *Hill*, 56.

82. The owner of a mill, and the occupant, working it on shares, are tenants in common, and may sue jointly for any act which tends to lessen the profits of the mill. But when the occupant becomes a tenant paying rent, the action must be in his name alone; and if the landlord sues, it must be as reversioner. *Supreme Ct.*, 1828, *Rich ads. Penfield*, 1 *Wend.*, 880.

83. The owner of land, and one who sows it on shares, may maintain a joint action of trespass against a third person who cuts and carries away the crop. [*Oro. Eliz.*, 148.] *Supreme Ct.*, 1808, *Foot v. Colvin*, 8 *Johns.*, 216; distinguishing *Newcomb v. Rammer*, 2 *Id.*, 421, *note*; and see LANDLORD AND TENANT, 14.

84. Unapportioned fund. Where two persons jointly place securities, in which they were unequally interested, in another's hands for collection, one cannot maintain a several action for his share, especially without showing what proportion of the money belonged to him. *Supreme Ct.*, 1848, *Hill v. Gibbs*, 5 *Hill*, 56; and see CORPORATION, 108.

85. That one of several persons interested in a trust-fund, cannot sue the trustee at law until a distribution has been made, and the proportion of each, and his right thereto, ascertained. [1 *Johns.*, 165 (*q. v. ATTACHMENT*, 44); 1 *Stark.*, 872.] *Supreme Ct.*, 1848, *Rathbone v. Stocking*, 2 *Barb.*, 185.

K. Trustees, of Various Classes.

86. Trustees for benefit of creditors. Persons holding property as trustees, to sell for the benefit of creditors, must sue jointly. *Supreme Ct.*, 1828, *Brinckerhoff v. Wemple*, 1 *Wend.*, 470.

87. Where a landlord assigns all his property for the benefit of creditors, the trustee is the proper person to sue for use and occupation. *Supreme Ct.*, 1850, *Ryers v. Farwell*, 9 *Barb.*, 615.

88. A guardian having leased his ward's land for a term extending beyond the ward's minority,—Held, that an action would lie in the guardian's name, upon the lease, after the ward had attained his majority. *Supreme Ct.*, 1881, *Pond v. Curtiss*, 7 *Wend.*, 45; and see *Porter v. Bleiler*, 17 *Barb.*, 149.

* See exceptions to this rule, stated in *Sherman v. Ballou*, 8 *Cow.*, 804.

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89. Bankrupt, and his assignee. Where a debt is due to one who is decreed to be a bankrupt, or makes an assignment under the insolvent laws, an action at law for the recovery of the debt must be brought in the name of the assignee, only where the assignee has a beneficial interest in the debt as trustee. If the bankrupt was mere nominal owner, the action may still be in his name. *Chancery*, 1848, *Ontario Bank v. Mumford*, 2 *Barb. Ch.*, 596.

90. Foreign assignee. An action in this State by the assignees of an insolvent of another State, must be in the insolvent's name. [2 *Johns.*, 844.] The suit is not abated by a discharge obtained pending the suit, but it continues for the benefit of the assignees. [1 *Chitt. Pl.*, 14; 8 *T. R.*, 488.] *Supreme Ct.*, 1814, *Raymond v. Johnson*, 11 *Johns.*, 488. Consult, however, *BANKRUPTCY*, IV.

91. The insolvent act of 1819 vests the assignees with the debtor's things in action, with the same legal consequence as follows the sale of a thing in possession. The assignee can sue at law. Hence, an action on a judgment obtained by two, one having assigned under the act, must be brought in the names of his assignees and the solvent plaintiff. [8 *T. R.*, 140.] *Supreme Ct.*, 1840, *Willink v. Renwick*, 28 *Wend.*, 68. *S. P.*, *Chancery*, 1848, *Ontario Bank v. Mumford*, 2 *Barb. Ch.*, 596.

92. A purchaser from an assignee in bankruptcy stands on the same footing as any other assignee, and he can prosecute only in the name of the party to the contract. *N. Y. Superior Ct.*, 1848, *Gale v. Vernon*, 1 *Sandf.*, 679.

92 a. Where one holding a note pledged for less than its face, transfers it for its face, a suit to recover back the excess must be by the pledgor. *Supreme Ct.*, 1829, *Gregory v. Burall*, 2 *Wend.*, 891.

8. Rules applicable to Particular Actions and Causes of Action.

93. In assumpsit, plaintiff must prove a promise from all the persons alleged in the declaration to have made it. *Supreme Ct.*, 1807, *Tom v. Goodrich*, 2 *Johns.*, 218.

94. Case—Conspiracy. A writ of conspiracy at the common law lay only for conspiracy to indict for treason, or a capital felony, the party being acquitted. In such case, two defendants, at least, must not only be joined in the writ, but to sustain it as to one, both must be convicted. In all other

cases of conspiracy, the remedy is by action on the case; and one may be convicted, and the other acquitted. *Supreme Ct.*, 1827, *Jones v. Baker*, 7 *Cow.*, 445. See, also, *CONSPIRACY*.

95. Dower. A writ of dower *unde nihil habet* lies only against the tenant of the freehold. [*Com. Dig. Pl.*, 2, y, 1; *Fitz. N. B.*, 148.] *Supreme Ct.*, 1829, *Hurd v. Grant*, 3 *Wend.*, 840.

96. Arbitration fees. One of several arbitrators may sue on the implied promise to pay for his services. The suit should not be joint. *Supreme Ct.*, 1845, *Hinman v. Hapgood*, 1 *Den.*, 188.

97. Bet. Where an illegal wager is made by one person as agent for several who are not united in interest, each principal may maintain a several action for the recovery of the amount contributed by him. *Ct. of Errors*, 1814, *Yates v. Foot*, 12 *Johns.*, 1; and see *Vischer v. Yates*, 11 *Id.*, 28.

98. A party who stakes a sum of money on an illegal wager may, in an action under the provisions of the Revised Statutes relating to betting and gaming, recover so much thereof as belongs to himself, without joining in the action other persons who contributed specific portions of the fund. *Ct. of Appeals*, 1848, *Ruckman v. Pitcher*,* 1 *N. Y. (1 Comst.)*, 392. Consult, also, *BETTING AND GAMING*.

99. Bills and notes. The indorsee of a note given in a State where notes are not negotiable, may sue thereon in this State, in his own name. The *lex loci* does not control the remedy. *Supreme Ct.*, 1799, *Lodge v. Phelps*, 1 *Johns. Cas.*, 189; *S. C.*, less fully, 2 *Cai. Cas.*, 821.

99 a. Right of heir to sue negotiable paper. *Dean v. Hewitt*, 5 *Wend.*, 257.

100. Under the act of 1816 (ch. 228, § 8),—providing that bills, &c., payable in the bills or current notes of an incorporated company may be sued on by the bearer or holder,—a bill or note in the form of a bank-bill, payable on demand, in current bank-bills or in notes current at a specified bank, may be sued on by the bearer, whether issued before or after the act. He may recover on the money counts, without averring the facts specially. [12 *Johns.*, 90.] *Supreme Ct.*, 1819, *Throop v. Cheeseman*, 16 *Johns.*, 264.

* See this case in table of *CASES CRITICIZED*, Vol. I., *Anti*. Further decisions are reported in 18 *Barb.*, 556; and 20 *N. Y. (6 Smith)*, 9.

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101. — indorsed in blank. If a note is indorsed in blank, the court never inquires into the right of the plaintiff, whether he sues in his own right or as trustee. Any person in possession of the note may sue, and may, in court, if necessary, fill up the blank and make it payable to himself. A note payable to bearer is of the same nature. *Supreme Ct.*, 1799, *Livingston v. Olinton*; *Ct. of Errors*, 1800, *Cooper v. Kerr*; both cited and followed in *Conroy v. Warren* (*Supreme Ct.*, 1802), 8 *Johns. Cas.*, 259. *Supreme Ct.*, 1814, *Lovell v. Evertson*, 11 *Johns.*, 52; 1827, *Mauran v. Lamb*, 7 *Cow.*, 174; 1880, *Dean v. Hewit*, 5 *Wend.*, 257. *N. Y. Superior Ct.*, 1829, *Ogilby v. Wallace*, 2 *Hall*, 558.

102. The fact that the nominal plaintiff is a fictitious person, is, at most, evidence towards proving bad faith or fraud. *N. Y. Superior Ct.*, 1829, *Ogilby v. Wallace*, 2 *Hall*, 558.

103. — joint. Since a partnership note cannot in the first instance be enforced against an individual partner, where a joint and several note is made by a firm in the firm-name, and an individual, the members of the firm are considered as one maker; and they may be sued without joining the other maker. *Supreme Ct.*, 1828, *Van Tine v. Crane*, 1 *Wend.*, 524.

104. — money paid on. The second indorser of a note, who, after judgment by his indorsee against him, pays only a part of the judgment, but takes no transfer of the note, cannot maintain an action on the note in his own name, against the payee; but he may sue for money paid, &c. *Supreme Ct.*, 1828, *Butler v. Wright*,* 20 *Johns.*, 867.

105. — assignees of. Under Laws of 1835, ch. 197,—allowing an assignee “for a valuable consideration” of a note, &c., where the assignor is dead, if there be no personal representatives of the assignor, or they refuse to sue, to sue in his own name,—the assignment must be for a “valuable consideration.” A gift to a child is not founded on a valuable consideration, within the act. *Supreme Ct.*, 1849, *Van Derveer v. Wright*, 6 *Barb.*, 547.

106. — several parties to. The Laws of 1837, 72, do not authorize joining the maker of a guaranty or other special undertaking,

with the maker of the note. *Supreme Ct.*, 1842, *Miller v. Gaston*, 2 *Hill*, 188. Compare *Van Derveer v. Wright*, 6 *Barb.*, 547.

107. Bond for creditors. Where a statute requiring a bond to be given for the benefit of creditors (as in attachments against absconding debtors, 2 *Rev. Stat.*, 12, § 57) declares that the bond should be held for the common benefit of all the creditors, and might be prosecuted by them jointly, or by any one of them separately in respect to his separate demand,—a single creditor may maintain a suit on the bond in his own name, and need not in his action prosecute for the common benefit. *Ct. of Appeals*, 1849, *Pearce v. Hitchcock*, 2 *N. Y. (2 Comst.)*, 888; disapproving *Arnold v. Tallmadge*, 19 *Wend.*, 527. Followed, *N. Y. Superior Ct.*, 1856, *Bowdoin v. Colman*, 6 *Duer*, 182; *S. O.*, 8 *Abbotts' Pr.*, 481.

108. The bond in replevin is not assignable and cannot be sued in defendant's name, unless the taking was as a distress for rent. [*Gilb.*, 75; 1 *Saund.*, 195, n.; 2 *Mass.*, 517; 18 *Johns.*, 488.] *Supreme Ct.*, 1880, *Knapp v. Colburn*, 4 *Wend.*, 616.

109. Contract with A. for B. A contract to carry goods which admits receiving them from A. on account of B., is a contract with the latter, and A. cannot maintain an action upon it. *Supreme Ct.*, 1850, *Niles v. Culver*, 8 *Barb.*, 205.

110. Covenants—Money due another. One may have an action on a covenant to pay him money belonging to another person. *Supreme Ct.*, 1826, *Wolfe v. Washburn*, 6 *Cow.*, 261.

111. — to several covenantees. Where two lease jointly for a certain annual rent, and the lessee covenants to pay it “to them, to each an equal half,” both must sue. The interest in the rent is to be deemed joint, until it is severed by several payment. *Supreme Ct.*, 1838, *Tylee v. McLean*, 10 *Wend.*, 374.

112. If a covenant is made to several, all may sue upon it, though only a part of them signed and sealed it. [8 *Barn. & C.*, 853; 21 *Wend.*, 202.] *Ct. of Appeals*, 1849, *Smith v. Kerr*, 3 *N. Y. (3 Comst.)*, 144.

113. Although the interest of some of the covenantors had ceased prior to the breach, an action, before the Code, must be in the name of all. *Ct. of Appeals*, 1851, *Dunlop v. Gregory*, 10 *N. Y. (6 Seld.)*, 241.

114. — breach of, before assignment.

* See a further decision between same parties, 2 *Wend.*, 869; affirmed, 6 *Id.*, 284.

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The grantee of a covenant which was broken the instant it was made, cannot sue for the breach of it in his own name. [Cro. Eliz., 868; Com. Dig., tit. Covenant, B, 8.] *Supreme Ct.*, 1806, *Greenby v. Wilcocks*, 2 *Johns.*, 1.

115. — after assignment. An action on a covenant running with the land, for a breach occurring after assignment, must be brought by the assignee of the land, or part of it *pro tanto*. *Supreme Ct.*, 1817, *Kane v. Sanger*, 14 *Johns.*, 89.

116. The assignee may maintain the action, though the conveyance to himself was with warranty. *Supreme Ct.*, 1825, *Withy v. Mumford*, 5 *Cow.*, 187; 1824, *Garlock v. Oloss*, 5 *Id.*, 143, n.; 1838, *Suydam v. Jones*, 10 *Wend.*, 180; overruling dictum in *Kane v. Sanger*, 14 *Johns.*, 89.

117. The covenant cannot be affected, in his hands, by equities between the original parties, any more than the legal title itself. *Supreme Ct.*, 1838, *Suydam v. Jones*, 10 *Wend.*, 180.

118. Carrier's Liability. In an action on the case, upon the custom, against carriers, non-joinder of some of the partners is immaterial. But if the action is on a contract, or if plaintiff, though he states the custom, relies on an undertaking, whether general or special, all should be joined. [Reviewing many cases.] *Supreme Ct.*, 1829, *Bank of Orange v. Brown*, 3 *Wend.*, 158.

119. Upon a carrier's contract with a servant to carry him and his baggage, the master cannot recover in assumpsit, unless he shows that the baggage belonged to him. *Supreme Ct.*, 1838, *Weed v. Saratoga & Schenectady R. R. Co.*, 19 *Wend.*, 534. Compare *Piper v. Manny*, 21 *Id.*, 232; *Needles v. Howard*, 1 *E. D. Smith*, 54; *Grant v. Newton*, *Id.*, 95.

120. The owner of goods may maintain an action on the case against the carrier for negligence and carelessness by which the goods have been injured or lost, notwithstanding the special property vested in the forwarders by whom the goods were delivered to the carrier. *Ct. of Appeals*, 1855, *Green v. Clarke*, 12 *N. Y.* (2 *Kern.*), 843; affirming *S. O.*, 18 *Barb.*, 57; and see a previous decision in the same case, 5 *Den.*, 497. Compare *Dows v. Cobb*, 12 *Barb.*, 310.

121. In order to sustain a suit founded upon a breach of duty on the part of the defendant,

as a common carrier; or, in other words, an action of trespass on the case for negligence, and for a conversion; it is sufficient, as between the parties, that the relation of bailor and bailee existed. *Supreme Ct.*, 1851, *Dows v. Cobb*, 12 *Barb.*, 310.

122. Deed. If by a deed *inter partes*, one party covenants to pay money to a stranger, the action on the covenant must be in the name of the other party, not that of the stranger. *Supreme Ct.*, 1838, *Spencer v. Field*, 10 *Wend.*, 87; *Tylee v. McLean*, *Id.*, 874.

123. Where a covenant *inter partes*, two persons composing one party, binds each party to the other, to submit to arbitration and pay an award, if the award is made in favor of one of the two who form one party to the covenant, an action is properly brought in the names of both. An action on a contract, whether parol or sealed, must be brought in the name of the party in whom the legal interest in it is vested; but the legal interest in the contract, and the benefit to be derived from or under it, are very different things. *Supreme Ct.*, 1834, *Emery v. Hitchcock*, 12 *Wend.*, 156.

124. Ejectment. Before the Revised Statutes. In general one ought not to be made lessor, who has no claim to a subsisting title or interest in the premises. *Supreme Ct.*, 1809, *Jackson v. Richmond*, 4 *Johns.*, 483. Followed, 1818, *Jackson v. Selover*, 10 *Id.*, 368; 1824, *Jackson v. Paul*, 2 *Cow.*, 502.

125. Lessor named without his consent, may be struck out. *Supreme Ct.*, 1809, *Jackson v. Ogden*, 4 *Johns.*, 140.

126. A lessor in ejectment may be struck out, upon an affidavit that he has no subsisting interest in the premises. [4 *Johns.*, 483.] *Supreme Ct.*, 1818, *Jackson v. Selover*, 10 *Johns.*, 368; 1824, *Jackson v. Paul*, 2 *Cow.*, 502.

127. Plaintiff cannot recover under a demise from a lessor who had released to the defendant. [10 *Johns.*, 166; 9 *Id.*, 55.] *Supreme Ct.*, 1815, *Jackson v. Foster*, 12 *Johns.*, 488.

128. One of several lessors may be stricken out, on his own application, where it will not affect defendant's right to costs, or where defendant consents, on paying the attorney of the plaintiff his proportion of the costs incurred. *Supreme Ct.*, 1826, *Jackson v. Stiles*, 5 *Cow.*, 418.

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129. Ejectment cannot be sustained on a demise from one who was dead when the suit was commenced. *Supreme Ct.*, 1829, *Doe v. Butler*, 8 *Wend.*, 149.

130. The landlord cannot be admitted to defend alone, unless the tenant first neglects to appear. *Supreme Ct.*, 1828, *Jackson v. Stiles*, 1 *Cow.*, 184.

131. And this must be shown by the affidavit. *Ib.*

132. To admit one to defend, as a landlord, his receipt of rent need not be shown. Privilege of interest is the true test. *Supreme Ct.*, 1798, *Wisner v. Wilcocks*, *Col. & C. Cas.*, 62. Followed, 1819, *Jackson v. Babcock*, 17 *Johns.*, 112.

133. A mortgagee in possession after foreclosure and foreclosure, has such a privity that he may be let in to defend. *Supreme Ct.*, 1814, *Jackson v. Stiles*, 11 *Johns.*, 407.

134. The assignee of a mortgage may be let in to defend in ejectment. *Supreme Ct.*, 1819, *Jackson v. Babcock*, 17 *Johns.*, 112.

135. The fact that the landlord applying to defend in ejectment has parted with all his interest in the premises, is a conclusive answer to the application. *Supreme Ct.*, 1818, *Jackson v. Stiles*, 10 *Johns.*, 67; 1826, *The same v. The same*, 5 *Cow.*, 447.

136. One claiming in hostility to the tenant's title, cannot be considered as landlord. *Supreme Ct.*, 1824, *Jackson v. Flint*, 2 *Cow.*, 594.

137. Every person is considered a landlord for the purpose of defending, whose title is connected to and consistent with the possession of the occupier. And when the lessor claims an interest inconsistent with the landlord's title, the latter may defend. *Supreme Ct.*, 1828, *Stiles ads. Jackson*, 1 *Wend.*, 316.

138. If the lessor claims nothing inconsistent with the rights of the landlord, the latter cannot defend. *Supreme Ct.*, 1828, *Stiles ads. Jackson*, 1 *Wend.*, 108.

139. Application for leave to defend in ejectment denied, where the applicant's affidavit merely averred that he claimed title to the premises, and had a good and substantial defence to make. *Supreme Ct.*, 1808, *Jackson v. McEvoy*, 1 *Cai.*, 151.

140. — under the Revised Statutes. When, and by whom, may be brought. 2 *Rev. Stat.*, 303, §§ 1-3.

141. The beneficiary in a trust cannot, by

reason of that interest, maintain or defend ejectment; and in this respect a resulting trust is like any other trust. A court of law can look only to the legal estate. [Reviewing many cases.] *Supreme Ct.*, 1848, *Moore v. Spellman*, 5 *Den.*, 225.

142. Ejectment by tenants in common, must be by a joint suit by all, or a separate suit by one alone. *Supreme Ct.*, 1844, *Cole v. Irvine*, 6 *Hill*, 684.

143. — occupant, &c. The actual occupant, if any, must be named defendant; and if none, the action must be against some person exercising acts of ownership, or claiming title, or interest, at the commencement of the suit. 2 *Rev. Stat.*, 304, § 4.

144. Under 2 *Rev. Stat.*, 304, § 4, although where land is occupied, ejectment must be against the one actually possessing the land, though as a mere servant; yet if no one lives on the land, and a servant cultivates it for his employer, the latter is the person exercising acts of ownership within the statute, and the suit must be against him. *Supreme Ct.*, 1884, *Shaver v. McGraw*, 12 *Wend.*, 558.

145. Ejectment cannot be brought against the remainder-man, during the continuance of the particular estate, if he is not in possession. *Ib.*

146. Ejectment when brought for dower, as well as in other cases, must be against the actual occupant, or if none, then against any person exercising acts of ownership or claiming an interest. *Supreme Ct.*, 1842, *Sherwood v. Vandenberg*, 2 *Hill*, 308. Followed, *Ct. of Appeals*, 1852, *Ellicott v. Mosier*, 7 *N. Y.* (3 *Seld.*), 201; affirming *S. C.*, 11 *Barb.*, 574.

147. Ejectment for dower, must, under the Revised Statutes, be brought against an actual occupant of the premises of which the plaintiff is dowable,—*e. g.*, a tenant of a part of a building thereon,—and not as in, the former action of dower, against the tenant of the freehold; though it seems, the judgment in such case will not bind the tenant of the freehold. *Ct. of Appeals*, 1852, *Ellicott v. Mosier*, 7 *N. Y.* (3 *Seld.*), 201; affirming *S. C.*, 11 *Barb.*, 574.

148. Where the land is not occupied, the action lies against one who only makes a parol claim of title. [2 *Rev. Stat.*, 304, § 4.] *Supreme Ct.*, 1848, *Banyer v. Empie*, 5 *Hill*, 48.

149. A church, used only as a meeting-house by a religious corporation, is actually

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occupied by the corporation, and ejectment must be brought against it, and will not lie against one of its officers or members, who merely attends there for worship. *Supreme Ct.*, 1850, *Lucas v. Johnson*, 8 *Barb.*, 244.

150. The plaintiff cannot, in one suit, recover against several possessors of distinct parcels of the premises, though their common lessor is also a defendant; but must elect. [2 *Rev. Stat.*, 307, § 29.] *Supreme Ct.*, 1850, *Fosgate v. Herkimer Manufacturing & Hydraulic Co.*, 9 *Barb.*, 287.

151. The misjoinder, if any, cannot however be objected to if the pleadings show a joint-tenancy on the part of the lessees, and the contrary does not appear until the trial. *Ct. of Appeals*, 1855, *Fosgate v. Herkimer Manufacturing and Hydraulic Co.*, 12 *N. Y.* (2 *Kern.*), 580; affirming 8 *O.*, 12 *Barb.*, 352.

152. That it is no misjoinder of defendants to make the landlord a defendant at the outset, together with the tenant. *Id.*

153. Where several persons occupied different parts of a house under separate leases, with no demise of the lot on which it stood, but they had exclusive possession of the lot as an incident,—*Held*, that as regarded the lot their possession was joint, and for it, ejectment should be brought against all jointly. *Supreme Ct.*, 1850, *Pearce v. Colden*, 8 *Barb.*, 522.

154. At the expiration of a lease of land, a building erected thereon by the lessee was wrongfully continued upon the lot by those claiming under him. *Held*, that ejectment for the lot alone, would lie jointly against parties occupying separately the different stories of the building, as being joint trespassers on the land. *Ct. of Appeals*, 1851, *Pearce v. Ferris*, 10 *N. Y.* (6 *Seld.*), 280.

155. **Fraud.** One whose goods have been fraudulently obtained by A., through a conspiracy between A. and B., and delivered to B., and disposed of to his use, can maintain an action on the case against B. A. may be regarded as merely his agent. *Supreme Ct.*, 1881, *Moore v. Tracy*, 7 *Wend.*, 229.

156. **A guaranty of a promissory note is a separate contract, and not negotiable; and can be sued only by the guarantee.** *Supreme Ct.*, 1880, *Lamourieux v. Hewit*, 5 *Wend.*, 307.

157. **Insurance.** The suit for a return of premium must be brought against the insurer, not the broker. *Supreme Ct.*, 1803, *Bowne v. Shaw*, 1 *Cai.*, 489.

158. Several underwriters are not jointly liable. *Supreme Ct.*, 1806, *United Ins. Co. v. Scott*, 1 *Johns.*, 106.

159. Where a policy insured two individuals by name, and then the words "or whom it may concern" were added, and a clause was inserted in the policy that the loss, if any occurred, should be paid to the individuals named. *Held*, that an action might be maintained in their names, and that they were entitled to recover the whole sum insured, although it appeared that they were owners of but one half of the building insured, and that the other half belonged to a third person not joined as plaintiff. *Supreme Ct.*, 1831, *Jefferson Ins. Co. v. Cotheal*, 7 *Wend.*, 73.

160. — **assignment of.** Where the charter of an insurance company provided that, upon an assignment of the subject insured, and of the policy, before loss, with notice to the company, the assignee should have all the benefit of the policy, and might sue in his own name; and A. and B. insured, and A. assigned to B. *Held*, that B. alone could sue. *Supreme Ct.*, 1841, *Ferriss v. North American Fire Ins. Co.*, 1 *Hill*, 71. Compare *Mann v. Herkimer County Mutual Ins. Co.*, 4 *Id.*, 187; *Granger v. Howard Ins. Co.*, 5 *Wend.*, 200.

161. The assignee of a policy of insurance cannot sue at law upon it in his own name, though the assignment was with the defendant's consent. [5 *Wend.*, 200.] *Supreme Ct.*, 1842, *Jessel v. Williamsburgh Ins. Co.*, 3 *Hill*, 88.

162. Otherwise where the charter of the company provided that an assignee might have the policy ratified and confirmed for his own benefit, and he has done so. He then claims as the insured, not as assignee. *Supreme Ct.*, 1843, *Mann v. Herkimer County Mutual Ins. Co.*, 4 *Hill*, 187; and see *Bodle v. Chenango County Mutual Ins. Co.*, 2 *N. Y.* (2 *Comst.*), 53.

163. S. having a right to receive insurance money from O., or from parties who had insured O. for his benefit, assigned his right to N. The money was subsequently received by O. from the insurers. *Held*, that an action for money had and received must be in the name of N. *N. Y. Superior Ct.*, 1843, *Sandford v. Conant*, 2 *Sandf.*, 143.

164. **Libel.** Where the publication of a libel is the joint act of several persons, a joint action will lie. If separate suits are brought against each, plaintiff can have but one satis-

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faction, but may elect *de melioribus damnis*. *Supreme Ct.*, 1810, *Thomas v. Rumsey*, 6 *Johns.*, 26.

165. Money paid by sureties. Where two persons, partners in business, were subjected to the payment of a debt of a third person, the one as surety, and the other as heir of a co-surety, which debt was paid from the partnership funds,—*Held*, that a separate action might be maintained by each against the principal for a moiety of the money paid. If a promise on which a suit is brought is made jointly to two or more persons, they must all, if living, join. But if the promises are several, each must sue on the promise made to himself, for the damage which he has individually sustained; and no act of the persons to whom several promises are made, can enable them to sustain a joint suit at law against the promisor, without his consent, in relation to matters in which they had no joint interest at the time those promises were made. Where the promise is implied, it frequently becomes difficult to determine whether all should join or several actions be brought. But an implied contract between a principal and his sureties, unless such sureties are partners and become answerable for him in that character, is a promise to each to indemnify him individually. The law in such case will imply a promise corresponding with the original agreement and request, whether such surety pays the amount out of his own private funds or out of partnership funds. [4 *Hayw.*, 188; *Cooke*, 257; 3 *Bos. & P.*, 285; 5 *Esp.*, 194.] *Ct. of Errors*, 1880, *Gould v. Gould*, 6 *Wend.*, 268; affirming *S. C.*, 8 *Cow.*, 168.

166. Promise to one having an interest. Where there is a promise expressly to A., and he has a personal interest in its performance, though others may also be benefited by it, an action may be in his name. *Supreme Ct.*, 1841, *Steele v. Babcock*, 1 *Hill*, 527.

167. — to third party. Where A. promises to B. for the benefit of C., the latter may sue thereon. [2 *Lev.*, 210; 3 *Bos. & P.*, 149.] *Supreme Ct.*, 1806, *Schemerhorn v. Vanderheyden*, 1 *Johns.*, 189.

168. Where the promise is neither made to the plaintiff nor for his benefit, and the consideration does not move from him, he cannot maintain an action. *Supreme Ct.*, 1816, *Shear v. Mallory*,* 18 *Johns.*, 496; and see *Morgan v. Van Ingen*, 2 *Id.*, 204.

169. Where defendant agreed with plaintiff to pay to plaintiff's attorney the costs of a suit which had been brought against plaintiff,—*Held*, that a suit on the agreement must be in the plaintiff's name and not that of the attorney. *Ct. of Errors*, 1828, *Safford v. Stevens*, 2 *Wend.*, 158.

170. In cases of simple contract, where a promise is made to one for the benefit of another, the latter can sue only where he is exclusively interested in the subject of the promise. [Citing many cases.] Thus where a collector, having seized goods, deposited them with one who agreed to deliver them to the marshal or his deputy on demand,—*Held*, that the collector having an interest and the marshal none, the former must sue upon the agreement. *Supreme Ct.*, 1838, *Sally v. Cleveland*, 10 *Wend.*, 156.

171. Redemption money. Under 2 Rev. Stat., 870, 871,—relating to redemption from execution sales,—the representatives or assigns of a purchaser may sue in their own names for the money paid by a subsequently redeeming creditor. *Supreme Ct.*, 1848, *Colvin v. Holbrook*,* 8 *Barb.*, 475.

172. Rent. The assignee of rent without the reversion may sue in his own name for rent accrued after the assignment. *Supreme Ct.*, 1828, *Demarest v. Willard*, 8 *Cow.*, 206; 1842, *Willard v. Tillman*, 2 *Hill*, 274. To similar effect, *Chancery*, 1848 [citing, also, *Oro. Eliz.*, 637, 651; *Co. Litt.*, 215, a; 5 *Barn. & Cr.*, 512; 8 *Cow.*, 206, 211; 2 *Hill*, 274], *Childs v. Clark*, 8 *Barb. Ch.*, 52.

173. Trespass by replevin. Under 2 Rev. Stat., 525, § 18,—making the sheriff liable in damages and a penalty to the person or persons interposing a claim of property in replevin, if he delivers the goods contrary to the statute,—the action can be brought only in the name of all who made claim. *So held*, where it was a united or joint claim. *Supreme Ct.*, 1836, *Colton v. Mott*, 15 *Wend.*, 619.

II. IN SUITS IN EQUITY.

1. General Principles.

174. That all persons entitled to litigate the same questions are necessary parties.

by *Grant v. Fancher*, 5 *Cow.*, 809; and see *CONTRACTS*.

* The judgment was affirmed, *Ct. of Appeals*, 1848, 2 *N. Y. (2 Comst.)*, 126, without passing on this point.

* The authority of this case is somewhat shaken

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Chancery, 1880, *Bailey v. Inglee*, 2 *Paige*, 278; 1846, *La Grange v. Merrill*, 3 *Barb. Ch.*, 625.

175. All having interest, although remote, must be joined, or the bill be framed to give them opportunity to come in. *V. Chan. Ct.*, 1844, *Champlin v. Champlin*, 4 *Eaw.*, 228.

175 a. A person having no interest in the subject of dispute, cannot be a party litigant. *Ct. of Errors*, 1826, *Reid v. Vanderheyden*, 5 *Cow.*, 719; reversing *S. C.*, *Hopk.*, 408.

176. Persons are necessary parties when no decree can be made respecting the subject until they are before the court; or where those already before the court have such interest in having them made parties, as to authorize their objecting to proceed without them. *Chancery*, 1880, *Bailey v. Inglee*, 2 *Paige*, 278.

177. **Exceptions.** The rule that all whose interests may be affected by the decree must be made parties, ought to be restricted to parties to the interest involved in the issue, and necessarily to be affected. It is a rule of convenience merely, and is dispensed with when it becomes extremely difficult or inconvenient. *Chancery*, 1815, *Wendell v. Van Rensselaer*,* 1 *Johns. Ch.*, 844; *Wiser v. Blachly*, *Id.*, 487; and see *Murray v. Hay*, 1 *Barb. Ch.*, 59.

178. **Co-complainants.** Adverse parties not to be co-complainants. *Le Fort v. Delafield*, 3 *Edw.*, 82; *Grant v. Van Schoonhoven*, 9 *Paige*, 255; *Alston v. Jones*, 3 *Barb. Ch.*, 397.

179. **The surety in a joint note** has no right to make the principal debtor a complainant in a bill to establish a defence,—*e. g.*, that of usury,—without his consent; but if he refuses to consent, complainant must state the fact in the bill, and make him a defendant. *Chancery*, 1841, *Morse v. Hovey*, 9 *Paige*, 197; 1841 [citing 7 *Paige*, 278], *Beggs v. Butler*, 9 *Paige*, 226; reversing *S. C.*, *Clarke*, 517.

To the same effect in case of joint-debtors. 1842, *Savage v. Todd*, 9 *Paige*, 578; 1844, *Boughton v. Allen*, 11 *Id.*, 821; and see *Patterson v. Bangs*, 9 *Id.*, 627.

But where the defence is an equity peculiar to the surety, as such, his principal is not a necessary party, for in either event of the suit no decree can be claimed against him. 1839, *Miller v. McCan*, 7 *Paige*, 451.

180. **Assignees in insolvency.** Where some of the complainants became insolvent,

their assignees were made defendants on a bill of revivor, and it was objected at the hearing that they ought to have been made plaintiffs. *Held*, that they could not be made plaintiffs against their consent; and having answered as defendants, their refusal to be plaintiffs might be inferred. Being before the court as parties was sufficient. *Chancery*, 1816, *Osgood v. Franklin*,* 2 *Johns. Ch.*, 1.

181. **New parties.** The cases in which new parties should be brought in as complainants, and those in which they should be brought in as defendants, discussed; and the effect upon the proceedings, of bringing them in, considered. *Hutchinson v. Reed*, *Hoffm.*, 816.

182. **Striking out.** The name of a defendant cannot be struck out of a bill on motion of a co-defendant, without his consent, or notice of the application. *Chancery*, 1819, *Livingston v. Gibbons*, 4 *Johns. Ch.*, 94.

183. Plaintiff's motion to have his name stricken from the bill, on the ground that he was made plaintiff without his authority, is too late after publication passed, especially where he knew the fact at an early day. *Chancery*, 1821, *Sears v. Powell*, 5 *Johns. Ch.*, 259.

184. **Joinder of parties and matters.** A bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned; but their rights in respect to the general subject of the case may be distinct. [Reviewing many cases.] *Chancery*, 1822, *Brinkerhoff v. Brown*, 6 *Johns. Ch.*, 189. *Ct. of Errors*, 1825, *Fellows v. Fellows*, 4 *Cow.*, 682.

185. Thus several distinct and unconnected judgment-creditors of a corporation may maintain one suit for satisfaction, seeking in it to reach the property of the corporation which has been fraudulently withdrawn beyond the reach of executions; also to charge the trustees individually on the ground of fraud and neglect of duty; also to charge other defendants as stockholders; and also to redeem property purchased by certain defendants, and to impeach a fraudulent judgment confessed by others. In such case the general right claimed is the due application of the capital of the

* Approved, *Doe v. Doe*, 87 *N. H.*, 268.

* Affirmed, without passing on this point, *Ct. of Errors*, 1817, 14 *Johns.*, 527.

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company to the payment of complainants' judgments; and the only matter in litigation is the fraud in which all the defendants are implicated, though in different degrees and proportions. *Chancery*, 1822, Brikerhoff v. Brown, 6 *Johns. Ch.*, 189.

186. So a creditor's bill will lie against a debtor and his grantees under distinct and successive fraudulent conveyances. The matter in demand is the property of the debtor, and there is a common interest among all, centring in the point in issue in the cause. *Ct. of Errors*, 1825, *Fellows v. Fellows, 4 Cow.*, 682. Followed, *Supreme Ct.*, 1855, *Hammond v. Hudson River Iron & Machine Co.*, 20 *Barb.*, 378.

187. So where a clerk embezzled moneys, investing a part in the name of A. and a part in the name of B.,—*Held*, that all were proper parties to the employer's bill to reach the fund. *V. Chan. Ct.*, 1848, *Bank of America v. Pollock*, 4 *Edw.*, 215.

188. The same principle is applicable to the case of a complainant who proceeds as a judgment-creditor, after the return of an execution unsatisfied, under 2 Rev. Stat., 178, § 38. So that a joint suit will lie against two or more persons holding property of the judgment-debtor under distinct conveyances, or separately indebted to him. But a demand against one of them alone, and not dependent on the judgment, cannot be joined. *Chancery*, 1835, *Boyd v. Hoyt*, 5 *Paige*, 65.

189. Where several creditors of A. unite, and a part of the judgments are against B. jointly with A.,—B. is also a proper party. The common object is to collect all the judgments from A., but he might require B. to be joined in order to coerce contribution in respect to the joint-judgments. *A. V. Chan. Ct.*, 1844, *Blackett v. Laimbeer*, 1 *Sandf. Ch.*, 366.

190. *Watercourse*. Several proprietors of distinct lands, and of separate parts of a watercourse, have such a community of interests, that they may join in a suit to restrain a diversion. *Chancery*, 1825, *Reid v. Gifford*.* *Hopk.*, 416. To similar effect, 1832, *Belknap v. Trimble*, 8 *Paige*, 577.

* Followed, in the case of a bill to enjoin a nuisance, *Chancery*, 1845, *Murray v. Hay*, 1 *Barb. Ch.*, 59. *V. Chan. Ct.*, 1846, *Blunt v. Hay*, 4 *Sandf. Ch.*, 362; *Peck v. Elder*, 8 *Sandf.*, 129, *note*. *S. P.*, *Supreme Ct., Sp. T.*, 1848, *Brady v. Weeks*, 3 *Barb.*, 157.

191. *Nuisance*. Two or more persons, having separate and distinct tenements, which are injured or rendered uninhabitable by a common nuisance, or to which a private nuisance is a common injury, may join in a suit to restrain such nuisance. [*Hopk.*, 416.] *Chancery*, 1845, *Murray v. Hay*, 1 *Barb. Ch.*, 59. *Supreme Ct., Sp. T.*, 1848, *Brady v. Weeks*, 3 *Barb.*, 157.

192. *Common fund or interest*. Where it appears upon the face of a bill that there will be a deficiency in the fund, and that there are other creditors or legatees who are entitled to a ratable distribution with the complainants, and who have a common interest with them, such creditors or legatees should be made parties to the bill, or the suit should be brought by the complainants in behalf of themselves and all others standing in a similar situation; and it should be so stated in the bill. [2 *Sim. & Stu.*, 18; 2 *Ves.*, 311; 1 *Paige*, 20.] *Chancery*, 1832, *Egberts v. Wood*, 3 *Paige*, 517; *S. P.*, 1880, *Mitchell v. Lenox*, 2 *Id.*, 280.

193. *Several interests*. Where several persons have a common interest arising out of the same transaction,—*e. g.*, several beneficiaries under the same trust,—though their interest be not joint, they may join as complainants in one suit. *Chancery*, 1832, *Robinson v. Smith*, 8 *Paige*, 222.

194. Where a fund belonging to two firms, in unascertained proportions, comes to the hands of administrators, both firms should join in a bill for the recovery of the fund; and the bill of one, not making the other a party, and claiming a definite proportion, is defective, unless the administrators admit that the proportions belonging to the two are ascertained. *A. V. Chan. Ct.*, 1840, *Hutchinson v. Reed*, *Hoffm.*, 816; and see *Champlin v. Champlin*, 4 *Edw.*, 228.

195. *Indians*. Since, under the Revised Statutes, there appears to be no remedy at law to protect the rights of the Indians in respect to cutting timber, &c., on their lands, the Court of Chancery may, on a bill filed by some Indians in behalf of the others, and duly authorized, interpose to compel an account for such injuries, and enjoin them in the future. *Chancery*, 1845, *Strong v. Waterman*, 11 *Paige*, 607.

196. *Accounting*. Where several persons are interested in the taking of an account, they should all be made parties, either as com-

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plainants or defendants. A complainant may sometimes avoid the necessity of making particular persons parties to the bill, by waiving all claim against them; but this cannot be done to the prejudice of the rights of defendants in the suit. *Chancery*, 1845, *Dart v. Palmer*, 1 *Barb. Ch.*, 92.

197. Assignor cannot sue. An assignee of a thing in action cannot sue in chancery in the name of the assignor. *Chancery*, 1887, *Rogers v. Traders' Ins. Co.*, 6 *Paige*, 588. To the same effect, 1886, *Field v. Maghee*, 5 *Id.*, 539; 1888, *Gleason v. Gage*, 7 *Id.*, 121; 1845, *State of Indiana v. Sherwood*, 5 *Ch. Sent.*, 47.

198. The absolute assignor of a chose in action is not a proper party to a bill thereon. [9 *Ves.*, 269; 2 *Rand.*, 98; 7 *Johns. Ch.*, 144.] In this State, after an absolute assignment, the assignee, at law as well as in equity, is considered the real party to the suit. A decree in equity between the defendant and the assignee would now have the same effect at law, as if the assignor were a party to such decree. In a case of controversy between the assignor and the assignee in relation to the fact of the assignment, or the assignee's right, the court, in its discretion, might require the assignor to be made a party, so that both might be bound by the decree. But where there is an absolute assignment in writing, and nothing in the pleadings or proofs to induce a belief that the assignor has not parted with all his interest in the subject-matter, the assignor should not be joined. *Chancery*, 1880, *Ward v. Van Bokkelen*, 2 *Paige*, 289; and see *Miller v. Bear*, 8 *Id.*, 466.

199. Real party in interest. Proceedings in chancery must be in the names of the real parties.* Where the complainant sells his whole right to the subject-matter of the suit, either before or after a decree, the purchaser cannot carry on the litigation for his own benefit, in the name of the vendor. *Chancery*, 1887, *Mills v. Hoag*, 7 *Paige*, 18; 1839, *Van Hook v. Throckmorton*, 8 *Id.*, 33; S. P., 1845, *State of Indiana v. Sherwood*, 5 *Ch. Sent.*, 47. Compare *Sedgwick v. Cleveland*, 7 *Paige*, 287.

200. Where a creditor's bill was filed in the

plaintiff's name, after he had assigned the judgment upon an agreement that a bill was to be so filed,—*Held*, that the objection was technical, and not ground for requiring a revival. *Chancery*, 1844, *Hathaway v. Scott*, 11 *Paige*, 178.

201. A purchase of the subject-matter of a controversy, pending the suit, does not vary or affect the rights of the parties to the suit. [1 *Johns. Ch.*, 566; 8 *Johns.*, 479; 2 *Ves. & Beame*, 200; 2 *Ball. & B.*, 167.] *Chancery*, 1817, *Murray v. Lylburn*, 2 *Johns. Ch.*, 441.

202. A change of interest from the *cestui que trust* to another, *pendente lite*, is not sufficient to support the objection, at the hearing, of a want of parties. When the party in whom the legal title resides, and the *cestui que trust* existing at the filing of the bill are before the court, it is not bound to take notice of a purchase of the subject-matter, pending the suit. *Chancery*, 1821, *Cook v. Mancius*, 5 *Johns. Ch.*, 89.

203. A party who, pending the suit, acquires a new right or interest in the subject-matter by purchase, must, as a general rule, bring it before the court by supplemental bill, or by an original bill in the nature of a supplemental bill, to have the benefit of the proceedings. *Chancery*, 1882, *Wilder v. Keeler*, 8 *Paige*, 164.

204. Cross-bill. Though in general a cross-bill cannot be filed except by parties to the original suit, a purchaser, *pendente lite*, from a party, may file a bill in the nature of a cross-bill, to make himself a party. *Chancery*, 1847, *Whitbeck v. Edgar*, 2 *Barb. Ch.*, 106.

205. Where one of several defendants dies pending the suit, and the cause of action survives, but the surviving complainants are insolvent, the defendant, if he has demands against the deceased and surviving complainants jointly, will be permitted to file a cross-bill, in the nature of an original bill, against the surviving complainants and the personal representatives of the deceased complainant. *Chancery*, 1831, *Brown v. Story*, 2 *Paige*, 594.

206. Appointment of receiver. A suit, properly commenced, is neither barred nor abated by the appointment of a receiver of one of the defendants, *pendente lite*. If he be a necessary party, he should be brought in by a supplemental bill in the nature of a bill of revivor. *Chancery*, 1846, *Wilson v. Wilson*, 1 *Barb. Ch.*, 592.

207. After a decree has been affirmed on

* Except in certain cases where the complainant represents the rights of those for whom the suit is brought, both legally and equitably, as in the case of executors, or of trustees, or assignees under the insolvent acts. *Chancery*, 1838, *Sedgwick v. Cleveland*, 7 *Paige*, 287.

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appeal, the court have no power to permit a change of parties without the consent of the original parties. *Chancery*, 1886, *Bowen v. Idley*, 6 *Paige*, 46.

208. Absentees. Mere absence of a person interested, from the jurisdiction of the court, is not always a sufficient excuse for not making him a party; especially since under the Revised Statutes absentee defendants may be joined. The rule that when parties interested are out of the jurisdiction of the court, and it is so stated in the bill and proved, it is not necessary to make them parties, is not applicable where the absent parties have rights wholly distinct from those of the other parties. *Ct. of Appeals*, 1851, *Gray v. Schenck*, 4 *N. Y. (4 Comst.)*, 460.

209. No persons are parties defendants in a bill, except those against whom process is prayed, or who are specifically named and described therein as such. [1 *Marsh. Kent.*, 594; 2 *Johns. Ch.*, 245; 2 *Dick.*, 707.] *Chancery*, 1831, *Verplanck v. Mercantile Ins. Co.*, 2 *Paige*, 438; *S. P.*, 1825, *Elmendorf v. De Lancey*, *Hopk.*, 555.

210. A bill filed in the name of husband and wife, is, in fact, the bill of the husband. [2 *Ves.*, 666, 452.] He has a right to release it so as to bar a further prosecution of it in his name; though if the release be a fraud upon the wife's right, she might commence a new suit, by next friend, to set it aside. *Chancery*, 1836, *Dewall v. Covenhoven*, 5 *Paige*, 581.

211. Under a decree for the benefit of creditors generally, all the creditors who may wish to come in under it, and avail themselves of its provisions, are, for every substantial purpose, considered as parties. And if the nominal complainant neglects to proceed, or the suit becomes abated, any such creditor may have leave to prosecute. *Chancery*, 1848, *Matter of City Bank*, 10 *Paige*, 378.

212. Next friend not a party. Where a father filed a bill as next friend of his infant children, to set aside on their behalf a mortgage on premises on which he had an estate by the curtesy; and the defendant's answer denied the equity of the bill, and prayed foreclosure of the mortgage, which was decreed;—*Held*, that the fact that the father acted as next friend did not make him a party, so as to affect his individual rights, and his interest was not cut off by the sale; wherefore the

purchaser was entitled to be released. *Ct. of Appeals*, 1852, *Darrin v. Hatfield*, *Seld. Notes*, No. 1, 86; reversing *S. C.*, *sub nom. Darvin v. Hatfield*, 4 *Sandf.*, 468.

213. That a stranger to the suit cannot interfere with the proceedings without making himself a party by supplemental bill. [6 *Mad.*, 275; *Id.*, 59; 1 *Russ. & Myl.*, 69.] *Chancery*, 1845, *Watt v. Crawford*,* 11 *Paige*, 470.

214. A mere consent of a person not a party to the suit, to be bound by the decree, does not authorize him to interfere in the suit. *Chancery*, 1844, *Kelly v. Israel*, 11 *Paige*, 147.

2. Rules concerning the Character or Relation of the Parties.

A. Agents.

215. In general, if an agent institutes a suit under an authority from his principal, he must do so in the name of his principal. [2 *Ves.*, 818.] Thus a bill by the agents of a foreign corporation must be in the name of the corporation, if it has power to sue, or if it has not, then in the name of the individuals composing it; or if they are very numerous, in that of a few on the part of all. *V. Chan. Ct.*, 1841, *Oakey v. Bend*, 3 *Edw.*, 492.

216. A person cannot be made defendant, on the mere ground of his being an agent of a party interested. *Chancery*, 1845, *Garr v. Bright*, 1 *Barb. Ch.*, 157.

217. A mere agent is not a proper party to a suit for specific performance. *Chancery*, 1846, *Boyd v. Vanderkemp*, 1 *Barb. Ch.*, 278.

218. An auctioneer having funds arising from a sale made by him for A., but which are claimed by B., who seeks a discovery as to the amount, and alleges that the fund is in danger in his hands, is a proper party to B.'s bill. *V. Chan. Ct.*, 1831, *Schmidt v. Dietrich*, 1 *Edw.*, 119.

B. Bankrupts and Insolvents.

219. Performance of insolvent's contract &c. The assignees of an insolvent who has obtained his discharge, must be parties to a bill to enforce an agreement, or trust, relative to his estate, existing prior to his assignment. *Chancery*, 1815, *Movan v. Hays*, 1 *Johns. Ch.*, 339.

* The decree was affirmed on appeal, *Ct. of Errors*, 1845, *sub nom. Ferris v. Crawford*, 2 *Den.*, 595.

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220. Where a party has been discharged under the insolvent act, his assignees are necessary parties to any suit or application in relation to his interest in the firm property.* *Chancery*, 1817, *Sells v. Hubbell*, 2 *Johns. Ch.*, 394.

221. Effect of assignment. Where a complainant assigns under the bankrupt or insolvent acts, his suit becomes defective; and the assignee, if he would continue it, must make himself a party by supplemental bill. [4 *Ves.*, 387; 9 *Wend.*, 649.] *Chancery*, 1838, *Sedgwick v. Cleveland*, 7 *Paige*, 287. Followed, *V. Chan. Ct.*, 1844, *Springer v. Vanderpool*, 4 *Edw.*, 362.

222. Where the defendant in a creditor's suit assigns in bankruptcy, pending the suit, the assignee is a necessary party, if the suit is persisted in as against the assignment. The bankrupt continues to be a necessary party, or ceases to be a proper party, according as the complainant seeks a personal decree against him for a deficiency or not. If the assignee has sold the property, the purchaser, and not the assignee, should be a party. *Chancery*, 1845, *Penniman v. Norton*, 1 *Barb. Ch.*, 246. Compare *Storm v. Davenport*, 1 *Sandf. Ch.*, 185.

223. An assignee in bankruptcy of one partner, is not a necessary party to a suit for the collection of a debt due to the firm, where the firm is insolvent, so that the assignee takes no beneficial interest in its effects. *Chancery*, 1844, *Coe v. Whitbeck*, 11 *Paige*, 42.

224. The statutory assignee under the Non-imprisonment Act is not a necessary party to a bill filed by the creditor against the debtor and his voluntary assignee under a general assignment made by the debtor, pending the proceeding, and prior to the execution of the assignment to such statutory assignee, to set aside such voluntary assignment as in fraud of the rights of such creditor to a priority. The voluntary assignment having been first executed, nothing passed to the statutory assignee, and he has no interest to be affected. *Ct. of Appeals*, 1848, *Spear v. Wardell*, 1 *N. Y. (1 Comst.)*, 144.

As to suits by Assignees, see **BANKRUPTCY**, 54-58.

C. Corporations and Associations, and their Officers.

225. Former officers of a corporation may

* Doubted in *Sterling v. Brightbill*, 5 *Watts*, 282.

be made parties to a bill against the corporation, when the knowledge of the facts of which discovery is sought, rests only with them, and especially when it relates to their own official acts. *Chancery*, 1828, *Fulton Bank v. Sharon Canal Co.*, 1 *Paige*, 219.

226. A bill against an agent or officer of the company for misconduct, producing loss to it, must be filed by the corporation, and not by stockholders. *V. Chan. Ct.*, 1841, *Forbes v. Whitlock*, 3 *Edw.*, 446.

227. The corporation is a necessary party to a bill against its officers or agents for a waste or misapplication of the corporate property. The corporation should be the complainant, unless the defendants have control, or the directors, by collusion, refuse to prosecute. *Chancery*, 1832, *Robinson v. Smith*, 3 *Paige*, 222; 1836, *Cunningham v. Pell*, 5 *Id.*, 607. Followed, *V. Chan. Ct.*, 1837, *Ferris v. Strong*, 3 *Edw.*, 127.

228. A bill by a part of numerous creditors or stockholders in such case, should be on behalf of the others. *Chancery*, 1832, *Robinson v. Smith*, 3 *Paige*, 222; 1836, *Cunningham v. Pell*, 5 *Id.*, 607; and see *Walker v. Devereaux*, 4 *Id.*, 229.

229. All the fraudulent directors are not necessary parties to a bill, filed to obtain satisfaction for a fraudulent breach of trust. This is an exception to the general rule that in a proceeding against trustees all must be made parties. *Chancery*, 1834, *Protection Ins. Co. v. Dummer*; cited and followed, 1836, in *Cunningham v. Pell*, 5 *Paige*, 607. *N. Y. Superior Ct.*, 1850, *Mayne v. Griswold*, 3 *Sandf.*, 463; *S. C.*, 9 *N. Y. Leg. Obs.*, 25.

230. Where the object of a bill is to divest a corporation of any of its property, or of its corporate rights or privileges, the other defendants in the suit have a right to insist that the corporation shall be made a party; to the end that the decree may be binding upon it, and that they may not be subjected to future litigation with it. *Chancery*, 1844, *Mickles v. Rochester City Bank*, 11 *Paige*, 118; and see *Lawyer v. Cipperly*, 7 *Id.*, 281. Compare *Barclay v. Macanly*, 3 *Ch. Sent.*, 56.

231. Stockholders' liability. Equity has cognizance of suits by creditors to enforce the individual liability of stockholders. Where the statute liability of the stockholders is several as well as joint, and for the whole amount of the debt, without reference to the amount

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of the stock owned, they may be sued before a decree is had against the corporation, and the corporation may be made a party to the suit against them. The creditor may file a bill against the corporation, and, upon discovery of the stockholders, bring them in by supplemental bill. *A. V. Chan. Ct.*, 1845, *Masters v. Rossie Lead Mining Co.*, 2 *Sandf. Ch.*, 301.

232. In a creditor's suit to charge stockholders of a corporation on their unpaid subscriptions, the bill should be filed by the creditor in behalf of all the creditors, and not by a receiver; and since, by 1 Rev. Stat., 600, § 5, each shareholder is liable only in due proportion with the others, it should be filed against the corporation, and all the shareholders who have not paid up their subscriptions, so that an account may be taken of the debts and assets of the corporation, of the amount of capital not paid in, and the sum due from each shareholder. *Ct. of Appeals*, 1850, *Mann v. Pentz*, 8 *N. Y. (3 Comst.)*, 415.

233. A corporation is a necessary party to the bill filed by a simple contract-creditor to enforce the individual liability of its stockholders for a corporate debt. *Ct. of Appeals*, 1852, *Bogardus v. Rosendale Manufacturing Co.*, 7 *N. Y. (3 Seld.)*, 147.

234. Dissolution. A suit commenced in the name of the president of a banking association cannot be continued in his name after the dissolution of the corporation. *Chancery*, 1842, *Talmage v. Pell*, 9 *Paige*, 410.

235. A foreign corporation may sue in its corporate name in this State, in chancery as well as at law; and may file a bill for the sale of land in this State, under a mortgage taken to secure money lent. Though the loan and mortgage were concurrent acts, if they were pursuant to a previous agreement, they may be deemed within a provision of the charter, by which the corporation was authorized to take mortgages, &c., for the security of debts previously contracted. *Chancery*, 1820, *Silver Lake Bank v. North*, 4 *Johns. Ch.*, 870.

236. Joint-stock association. In a suit against the trustees of a joint-stock association to compel an account and settlement of the affairs, the shareholders being numerous and the defendants having legal power over the property, the bill is properly filed by one of the shareholders in behalf of himself and the others. *Chancery*, 1847, *Mann v. Butler*, 2 *Barb. Ch.*, 362.

237. Representation. On a foreclosure of a mortgage made by trustees of a joint-stock association for the purchase of lands, the stockholders, being very numerous (over 250 in this case), are not necessary parties. The trustees sufficiently represent them. *Chancery*, 1816, *Van Vechten v. Terry*, 2 *Johns. Ch.*, 197.

D. Executors and Administrators.

238. Joinder. To a bill against an administrator, charging fraud, defendant pleaded that the acts were done by him and another jointly, as co-administrators,—*Held*, that the co-administrator must be made a party. *Chancery*, 1819, *Bregaw v. Olaw*, 4 *Johns. Ch.*, 116.

239. One of two devisees cannot file a bill for an account against one of two executors who by the will have the charge of the real estate, without making the other devisee and executor parties. *Chancery*, 1828, *Fabre v. Colden*, 1 *Paige*, 166.

240. If one executor renounces, his co-executors cannot join him as complainant; but if he is a necessary party, they may make him a defendant, stating, in their bill, the reason. *Chancery*, 1829, *Thompson v. Graham*, 1 *Paige*, 884; 1843, *Tooker v. Oakley*, 10 *Id.*, 288.

241. If they omit to join him, and he applies to have the suit dismissed, they will have leave to amend. *Chancery*, 1843, *Tooker v. Oakley*, 10 *Paige*, 288.

242. Foreign executor, &c. One of the next of kin or legatees of a decedent cannot maintain a suit against foreign executors for money received by them within this State; because by 2 Rev. Stat., 449, § 17, the executor or administrator with the will annexed, and he only, has the right to sue for a wrong done to the estate. *Chancery*, 1845, *Brown v. Brown*, 1 *Barb. Ch.*, 189, 217; *S. P.*, 1848, *Muir v. Leake & Watts Orphan House*, 3 *Id.*, 477.

243. Executors, &c., appointed in another State, may sue in their own names here, when they claim, not as such, but as residuary legatees or purchasers. *Supreme Ct.*, 1847, *Smith v. Webb*, 1 *Barb.*, 280.

244. Joining debtor. Though in general a creditor filing a bill against an executor cannot make a debtor of the estate a party, except where the executor is insolvent or there is collusion, it may be allowed in special cases; as where the complainant alleges that the

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deceased went into partnership with the defendant, using the complainant's money therein, and seeks an accounting from the defendant as the partner of the deceased. *Chancery*, 1814, Long v. Majestre, 1 *Johns. Ch.*, 805.

245. The insolvent surviving partner is not an improper defendant in a bill filed by a creditor of the firm against the representatives of the deceased partner to obtain satisfaction of his debts, so as to render it multifarious. *Chancery*, 1835, Butts v. Genung, 5 *Paige*, 254.

E. Governments and Officers.

246. That where the rights of the State are connected with the relief sought against a defendant, the attorney-general is a proper party. *Chancery*, 1835, Varick v. Smith, 5 *Paige*, 187; and see Jones v. Lynds, 7 *Id.*, 301; Garr v. Bright, 1 *Barb. Ch.*, 157.

247. That another State may be made a party defendant in a suit in the courts of this State; not for the purpose of enforcing a decree against it, but to enable it to appear and protect its rights, if any. *Chancery*, 1845, Garr v. Bright, 1 *Barb. Ch.*, 157.

248. Town. Private individuals cannot institute a suit in behalf of a town, respecting the town property, without the knowledge and consent of the town, duly declared. *Chancery*, 1817, Denton v. Jackson,* 2 *Johns. Ch.*, 320.

249. Sheriff, attorney. The sheriff brought an action on a replevin bond in his own name, but for the benefit of the defendant; and the plaintiffs in replevin then sued the defendant in trespass. It was then agreed to submit the controversy to referees, and upon their report judgment was entered, which the court refused to review, on the ground that it was only an arbitration. *Held*, that in a suit in equity to restrain further proceeding, the sheriff was properly a party, but the attorney was not a proper party. *Chancery*, 1832, Campbell v. Western, 8 *Paige*, 124.

250. Where a board of officers bring a suit to restrain private persons from usurping their franchise, since the injury to them is as individuals having a joint and common interest, the suit is properly brought in their own names instead of the name of the board. *Chancery*, 1846, Tyack v. Brumley, 1 *Barb. Ch.*, 519.

* The decree was affirmed in the Court of Errors. See 7 *Johns. Ch.*, 254, Index; and 2 *Wend.*, 182.

F. Husband and Wife.

251. A wife cannot sue separately from her husband without leave of court. *Chancery*, 1814, Perine v. Swaine, 1 *Johns. Ch.*, 24.

252. In a suit for the wife's legacy or distributive share, the wife must be made a party, for she has a contingent right of survivorship. [8 *Ves.*, 487; 5 *Id.*, 515; 10 *Id.*, 578; 9 *Id.*, 174; 12 *Id.*, 497; 16 *Id.*, 418.] *Chancery*, 1821, Schuyler v. Hoyle, 5 *Johns. Ch.*, 196.

253. Suit against husband's committee. A wife cannot file a bill in her own name against her lunatic husband's committee for maintenance from his estate, he not being a party, even when he has abandoned her and left the State. [Distinguishing 6 *Johns. Ch.*, 178.] *Chancery*, 1841, Hay v. Warren, 8 *Paige*, 609.

254. Debt to wife. In the case of a new security for the payment of money, given to the wife during coverture, the husband may sue alone, or join his wife, at his election. [Reviewing many cases.] *Chancery*, 1841, Searing v. Searing, 9 *Paige*, 288. Followed, 1846, Moehring v. Mitchell, 1 *Barb. Ch.*, 264; Thompson v. Ellsworth, *Id.*, 624.

255. Conflict of interest. Where the interests of the husband and wife are in conflict, she should be a defendant, for persons having adverse or connecting interests in the subject of litigation should not join as complainants; and a bill filed by the husband in the name of himself and his wife, is his bill merely, and the decree made in the suit is not binding upon her in any future litigation. *Chancery*, 1841, Grant v. Van Schoonhoven,* 9 *Paige*, 255; 1848, Alston v. Jones, 8 *Barb. Ch.*, 397.

256. Separate estate. That a bill for the recovery of the wife's separate estate is not properly brought in the name of the husband and wife jointly. *Chancery*, 1843, Bowers v. Smith, 10 *Paige*, 198.

257. A decree in a suit brought by husband and wife, in relation to her separate property, is not conclusive upon the wife; and, where the defendant takes the objection seasonably, it is of course to amend the form of the suit by appointing a next friend for her, and making the husband defendant instead of complainant. But if the objection be made after a litigation upon the merits, it ought not, in

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

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general, to be sustained. *Supreme Ct., Sp. T.*, 1848, *Stuart v. Kissam*, 2 *Barb.*, 498.*

258. A bill in the name of husband and wife, to call her trustees to an account, cannot be sustained. She should be the complainant, by her next friend. [*Stor. Eq. Pl.*, §§ 61, 63, 361; 9 *Paige*, 255; 2 *Ves.*, 452; 1 *Keen*, 7; 2 *Id.*, 59; 4 *S. & S.*, 188; 7 *Sim.*, 239; 1 *Sim. & Stu.*, 185.] And the objection may be made for the first time at the hearing, for the decree in a joint suit will not bind the wife; and the court will protect the accounting party from a second suit. The fact that there is also a demand of relief as to a joint interest, does not obviate the necessity that she should sue by next friend, independently of her husband. *Supreme Ct.*, 1849, *Sherman v. Burnham*, 6 *Barb.*, 408.

259. Suit against husband. A wife cannot join in a suit against her husband, except by her next friend; and even then suit cannot be brought in her name without her consent. *Chancery*, 1885, *Randolph v. Dickerson*, 5 *Paige*, 517.

260. Injunction to stay suit. The wife of the complainant is a necessary party to a bill for an injunction to restrain a suit at law against the husband and wife, affecting her interest. *Chancery*, 1847, *Booth v. Albertson*, 2 *Barb. Ch.*, 818.

261. Foreclosure. Where the husband files a bill to foreclose a mortgage owned by himself, and he and his wife have a judgment lien upon the premises, which makes them proper parties, she must be joined with him as complainant. *Chancery*, 1832, *Clarkson v. De Peyster*, 3 *Paige*, 386.

262. A woman who should have been a party in a foreclosure-suit, but was not, and who married after the bill was filed, must be brought in with her husband, by supplemental bill. *Chancery*, 1835, *Campbell v. Bowne*, 5 *Paige*, 34.

G. Insane Persons.

263. A creditor may file his bill for a debt of the lunatic, against the committee alone, without joining the lunatic. *Chancery*, 1816, *Brasher v. Van Cortlandt*, 2 *Johns. Ch.*, 242; *Id.*, 400. Compare *Beach v. Bradley*, 8 *Paige*, 146.

* Reversed on other points, *Supreme Ct.*, 1851, 11 *Barb.*, 271.

264. But in a case in which the committee has a personal interest in the controversy which may conflict with the lunatic's, the latter should be made a party, and a guardian appointed for him. *Chancery*, 1832, *Teal v. Woodworth*, 3 *Paige*, 470.

265. To a bill to set aside an act done by him while under mental imbecility, the lunatic is not a necessary party. [1 *Ch. Cas.*, 112; 1 *Eq. Cas. Abr.*, 279.] *Chancery*, 1828, *Ortley v. Messere*, 7 *Johns. Ch.*, 189; 1848, *Gorham v. Gorham*, 3 *Barb. Ch.*, 24.

266. Real property. A lunatic is a necessary party to a bill for a recovery, or partition, of his lands. A decree in partition, to which an habitual drunkard is not a party, will not transfer the legal title to his undivided share of that portion of the premises which may be set off to the defendant in severalty. *Chancery*, 1848, *Gorham v. Gorham*, 3 *Barb. Ch.*, 24.

267. The act of 1845 (*Laws of 1845*, 91) authorizing the committee of a lunatic or an habitual drunkard to sue in their own names, for any debt, claim, or demand, transferred to them, or to the possession and control of which they are entitled as such committee, does not affect such a case. *Id.*

H. Legatees, Heirs, Devisees, &c.

268. Contingent legacies. Where several legacies are given to be increased or diminished in proportion as the particular fund set by for their payment and for other purposes should prove deficient or exceed, one of the legatees may file a bill against the executors for an account and payment, in behalf of himself and the others who may choose to come in, the bill stating that it is so filed. Legatees other than residuary legatees, are exceptions to the general rule that all persons interested in the fund must be made parties. *Chancery*, 1818, *Brown v. Ricketts*, 3 *Johns. Ch.*, 558.

Followed under the Code of Procedure, *Supreme Ct.*, 1851, *McKenzie v. L'Amoureux*, 11 *Barb.*, 516.

To the same effect, *Chancery*, 1828 [citing 2 *Mas.*, 181], *Pritchard v. Hicks*, 1 *Paige*, 270. Compare, however, *Hallett v. Hallett*, 2 *Id.*, 15; and see *Davoue v. Fanning*, 4 *Johns. Ch.*, 199; *Fish v. Howland*, 1 *Paige*, 20.

269. Though the particular legacy, if allowed, will reduce the residuary fund, the interest of the residuary legatee is deemed

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protected by representation by the executors. [Calv. on P., 20; 1 Ves. Jr., 818; 1 Vern., 261; 1 Bro. C. C., 808.] *Chancery*, 1848, *Oromer v. Pinckney*, 8 *Barb. Ch.*, 466.

270. A residuary legatee, or other person suing for a distributive share of the estate, should make all other persons interested in the distribution parties to the suit, so that one account only may be taken. *Chancery*, 1828, *Pritchard v. Hicks*, 1 *Paige*, 270. To the same effect, 1818, *Brown v. Ricketts*, 8 *Johns. Ch.*, 558; 1819, *Davoue v. Fanning*, 4 *Id.*, 199. Compare, however, *Oromer v. Pinckney*, 8 *Barb. Ch.*, 466; *Hallett v. Hallett*, 2 *Paige*, 15.

271. The children of a legatee, whose legacy is charged upon the real estate of the defendant, are not entitled to recover the legacy without administering upon the estate of their father, although there were no debts due from the deceased legatee, and the taking out of letters of administration is a mere formal proceeding. *Chancery*, 1828, *Champeinois v. Champeinois*, cited in *Jenkins v. Freyer*, 4 *Paige*, 47.

272. Where debts or legacies are charged by will upon real estate, all the creditors or legatees whose claims are still due, must be made parties to a bill against the devisee; or if any are omitted, an excuse for not joining them must be averred in the bill,—*e. g.*, that it could not be ascertained, who or where they were. *Chancery*, 1829, *Hallett v. Hallett*, 2 *Paige*, 15; and see *Smith v. Wyckoff*, 11 *Id.*, 49.

273. A testator gave his estate to his children, directing that his debts should be borne and paid equally by each. *Held*, that one of the children could not file a bill against the executor for a demand against the estate, without renouncing all benefit of the will, or bringing the other children before the court as parties. *Chancery*, 1883, *Van Epps v. Van Deusen*, 4 *Paige*, 64.

274. Creditors may file a bill against heirs and devisees for an account, and sale, and distribution of the real estate, but a decree for a sale will not be made until the deficiency of the personal property be ascertained. *Chancery*, 1820, *Thompson v. Brown*, 4 *Johns. Ch.*, 619.

275. A decree for sale, in such a case, inures to the benefit of all the creditors, and draws the entire distribution of the assets into the court. *Id.*

276. Devisee party to bill against executors. That on a bill against the executors of a guardian, for a breach of his trust, the testator's will having made the timber on his land assets for the payment of his debts, the devisee ought to be made a party. *Chancery*, 1815, *Wiser v. Blachly*, 1 *Johns. Ch.*, 487.

277. Heirs and executors cannot be joined. Under the provisions of the Revised Statutes, a creditor of the decedent cannot file a bill against the heirs and personal representatives jointly, to obtain satisfaction of a debt out of the real and personal estate. Such a misjoinder of defendants renders the bill multifarious. *Chancery*, 1835, *Butts v. Genung*, 5 *Paige*, 254.

278. This proceeding is a substitute for the former action at law. *Id.* To same effect, 1838, *Parsons v. Bowne*, 7 *Id.*, 354.

279. The suit, if against legatees, must be against all, jointly, or only one [2 Rev. Stat., 451, § 26]; if against devisees, it must be against all, jointly. [2 *Id.*, 456, § 60.] A suit against a part of the legatees or devisees cannot be sustained. *Ot. of Appeals*, 1847, *Wambaugh v. Gates*, 1 *How. App. Cas.*, 247; affirming S. C., 11 *Paige*, 505. See, also, *Mersereau v. Ryers*, 3 *N. Y. (8 Const.)*, 261.

280. — what must be shown. A creditor cannot sue the personal representatives, and heirs, or devisees, jointly; nor can he sue the heirs, without showing that the personal estate is insufficient, or that he has exhausted his remedies against it; nor can he sue the devisees, without showing that both the personal and real estate descended were insufficient, or that he has exhausted his remedies against them; nor can he sue the heirs and devisees jointly, at least without averring that the real estate descended is insufficient. *Chancery*, 1841, *Sohmermerhorn v. Barhydt*, 9 *Paige*, 28. To similar effect, *Ot. of Appeals*, 1847, *Wambaugh v. Gates*, 1 *How. App. Cas.*, 247; affirming S. C., 11 *Paige*, 505.

281. Representatives of deceased executor. Legatees may file a bill in their own names to compel the personal representatives of the deceased executor to pay their legacies from moneys held by such deceased executor at the time of his death; and if the bill avers that the debts and funeral expenses of the testator have been fully paid, the administrator with the will annexed, of the original testator, is not a necessary party. *Chancery*,

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1846, *Goodyear v. Bloodgood*, 1 *Barb. Ch.*, 617.

282. The next of kin, or heir, cannot, as such, maintain a suit in equity for the recovery of personal property which belonged to the decedent, although he is exclusively entitled to the beneficial interest therein. Only the executor or administrator can represent the personalty, so as to give a valid discharge. [2 *Paige*, 16; 2 *McCord's Ch.*, 169; 5 *Monr.*, 574; 7 *Id.*, 217.] *Chancery*, 1838, *Jenkins v. Freyer*, 4 *Paige*, 47. To similar effect, *A. V. Chan. Ct.*, 1846, *Latting v. Latting*, 4 *Sandf. Ch.*, 81.

283. Next of kin cannot, as such, file a bill for an account of the personalty; and where only one of several complainants who file such a bill is entitled to letters of administration, the defect cannot be cured, but entirely defeats the bill. *V. Chan. Ct.*, 1836, *Olason v. Lawrence*, 8 *Edw.*, 48. Compare *Hunter v. Hallett*, 1 *Id.*, 388.

284. In a suit to avoid a conveyance of land obtained by fraud, if the grantor is dead, all his heirs or devisees must be parties. *Chancery*, 1831, *Livingston v. Peru Iron Co.*,* 2 *Paige*, 390.

285. Will. Heirs and next of kin held entitled to an immediate decision upon the legality of trusts created by the will, although the persons for whose benefit such trusts were created were not in existence or ascertained. *Lorillard v. Coster*,† 5 *Paige*, 172.

286. Heirs, &c., of joint obligor. A bill lies against the heirs or devisees of an obligor in a joint and several bond, the other obligor being also made a party, though the legal remedy has not been exhausted against the survivor. [6 *Mad. O. R.*, 118; 1 *S. & S.*, 246; *Edw. on Parties*, 99–102.] *V. Chan. Ct.*, 1838, *Valentine v. Farrington*, 2 *Edw.*, 53.

287. Suit against debtor. Where the plaintiff and defendant were the only children and heirs of their mother, who died intestate, and the defendant, who was indebted to the estate, would not administer, and there were no creditors or other person entitled to administer;—*Held*, that the plaintiff might file a bill for a moiety of the debt. Such a case forms an exception to the general rule that a bill by a creditor, or a person entitled to a distributive

share of personal estate, will not lie against a debtor to the estate. *Chancery*, 1822, *McDowd v. Charles*, 6 *Johns. Ch.*, 182.

288. Insolvent absentee.—Land out of the State. If an heir, or devisee, dies out of the State, insolvent, and without leaving any property here, his personal representatives need not be made parties. So if the land devised to one is in another State, and it does not appear that it was, by the law of that State, liable for a debt of the nature of plaintiff's claim, he need not be made a party. *Chancery*, 1845, *Wambaugh v. Gates*,* 11 *Paige*, 605.

289. Construction of will. An heir-at-law of a testator, or a devisee, who claims a mere legal estate in the real property, where there is no trust, cannot maintain a bill in equity merely to obtain a judicial construction of the will. *Chancery*, 1843, *Bowers v. Smith*, 10 *Paige*, 198.

I. Trustees, Cestuis que Trust, &c.

290. A mere nominal trustee cannot sue in equity in his own name, but the *cestui que trust* must be joined. [Prec. in *Ch.*, 275; 1 *Ball & B.*, 181.] *Chancery*, 1816, *Malin v. Malin*, 2 *Johns. Ch.*, 288.

291. Where a trust is such that, under the Revised Statutes, the legal estate is vested in the beneficiary, he, and not the nominal trustee, is a necessary party in a partition. *Chancery*, 1840, *Braker v. Devereaux*, 8 *Paige*, 518.

292. Cestui que trust. Where a trustee prosecutes a claim for the benefit of the *cestui que trust*, the latter should be a party. [Prec. *Ch.*, 275; 2 *Eq. Cas. Abr.*, 165.] *Chancery*, 1828, *Fish v. Howland*, 1 *Paige*, 20.

293. That a trustee and *cestui que trust* may join as complainants. [Pr. in *Ch.*, 275; 1 *Paige*, 20; 2 *Johns. Ch.*, 288.] *V. Chan. Ct.*, 1838, *Schenck v. Ellingwood*, 3 *Edw.*, 175.

294. Trustees for creditors. That trustees of a fund for the benefit of creditors may sue for the protection of the fund, or the collection of part of it, without making the *cestuis que trust* parties. [Mitf. Pl., 174; 8 *Ves.*, 76; 1 *Moll.*, 193; *Beat. Ch.*, 91.] *Chancery*, 1845, *Christie v. Herrick*, 1 *Barb. Ch.*, 254.

295. In a suit by a receiver against the trustee of a judgment-debtor, to reach the

* Reversed on another point, 9 *Wend.*, 511.

† Reversed on other points, 14 *Wend.*, 265.

* Affirmed, without passing on this point, *Ct. of Appeals*, 1847, *How. App. Cas.*, 247.

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equitable interest of the latter in a trust-fund, the debtor is a necessary party. *Ct. of Appeals*, 1852, *Vanderpoel v. Van Valkenburgh*, 6 *N. Y. (2 Seld.)*, 190.

296. Bill to enforce trust. Where a debtor makes an assignment in trust for the benefit of such of his creditors as should come in under it and release him, and to reassign to him the residue, the creditors who come in under the assignment, if any there are, are necessary parties to his bill against the trustees for an accounting. *Chancery*, 1880, *Mitchell v. Lenox*, 2 *Paige*, 280.

297. Where a creditor, whose debt is provided for in an assignment, files a bill against the assignees for an account of the trust, the other creditors are necessary parties, unless the bill alleges that they have been paid. *Chancery*, 1842, *Waldo v. Doane*, 2 *Ch. Sent.*, 7.

298. Where defendant was a trustee for himself and other creditors of an assignor, and during a continued litigation for twenty years those creditors did not assert their rights,—*Held*, that the court would not compel plaintiff to make them parties to the bill for an account. *Chancery*, 1822, *Mumford v. Murray*, 6 *Johns. Ch.*, 1.

299. In a suit to remove a trustee, or for an account, the *cestuis que trust* must all be parties. Where, in such a case, the trust was for a married woman for life, remainder to her child,—*Held*, that the child was a necessary party. *Supreme Ct.*, 1849, *Sherman v. Burnham*, 6 *Barb.*, 408.

300. If an accounting is demanded from testamentary trustees, in respect not only to the property which came to their hands as such, but also as to the general assets, the personal representatives are necessary parties. *Ib.*

301. — to defeat it. Where a complainant claims in opposition to a deed of trust or assignment, as fraudulent and void, he may proceed against the assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestui que trust*. *Chancery*, 1882, *Rogers v. Rogers*, 3 *Paige*, 379; *Wakeman v. Grover*,* 4 *Id.*, 28. Followed, *Supreme Ct.*, 1848, *Loomis v. Cline*, 4 *Barb.*, 453. To the same effect, *Supreme Ct.*, 1848 [citing also *Mif. Pl.*, 176; *Stor. Eq. Pl.*, § 215], *Russell v. Lasher*, 4 *Barb.*, 282.

302. Where a creditor sues to set aside an assignment for benefit of creditors, creditors not made parties are yet bound by the decree, if fairly and honestly obtained, even though by default or consent; for the assignee in a measure represents their interests. *Supreme Ct.*, 1848, *Russell v. Lasher*, 4 *Barb.*, 282.

303. Where trustees are changed pending a suit against the trust-fund, it is not absolutely necessary to bring them in, although the complainants have a right to do so before decree, by a supplemental bill. *V. Chan. Ct.*, 1838, *North American Coal Co. v. Dyett*, 2 *Edw.*, 116.

304. — substituted. A debtor assigned his property, in trust for creditors; and afterward, with the concurrence of the creditors, other trustees were substituted by an assignment to them by the first trustees, and the debtor recognized and dealt with the new trustees as such. *Held*, that even if he could hold the first trustees to an account, he must join the new trustees in the bill. *V. Chan. Ct.*, 1833, *Mitchell v. Lenox*, 1 *Edw.*, 428.

305. The articles of a voluntary association for the sale of lands provided that their trustee, in whom the title was vested, might employ a substitute, and that he should himself be liable, as trustee, only for gross misconduct or neglect. He appointed E. and S., successively, as such agent. *Held*, on his bill to close the trust, that E. and S., being also stockholders, were necessary parties; and that the bill was not multifarious for calling them severally to account; and that such accounting was indispensable to a final adjustment of the concern. *A. V. Chan. Ct.*, 1844, *Kent v. Lee*, 2 *Sandf. Ch.*, 105.

306. Trustees who refuse to act. Where lands are devised to trustees, they take the legal estate, though they refuse to accept; and if the *cestui que trust* is competent to protect his own interest, it is enough if he and the trustees are parties to a partition-suit. The appointment of new trustees for the purpose is unnecessary. Hence the complainant in such suit is not authorized, under 1 Rev. Stat., 780, to petition for a new appointment. *Chancery*, 1835, *King v. Donnelly*, 5 *Paige*, 46.

307. Breach of trust. Where there are several trustees who unite in a breach of trust, they are equally liable to the *cestui que trust*. And the latter, in seeking relief against the

* Affirmed, without discussing this point, *Ct. of Errors*, 1838, 11 *Wend.*, 187.

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breach of trust, may proceed against all or either of the trustees. [2 Paige, 279; 4 Id., 23; 1 Myl. & K., 126; 8 Swans., 74.] *Supreme Ct.*, 1850, *Gilchrist v. Stevenson*, 9 *Barb.*, 9.

3. Rules applicable to Particular Classes of Suits, or Grounds of Relief.

A. Contribution. Insurance. Interpleader. Waste.

308. Contribution. Where a judgment is a lien upon several parcels of land, the owner of one of them cannot file a bill against the judgment-creditors for leave to contribute in discharge of his land, nor to have the judgment assigned to him on full payment. All the owners of the land must be parties to a bill for contribution. *Chancery*, 1823, *Avery v. Petten*, 7 *Johns. Ch.*, 211.

309. Insurance of pledge. Where personal property has been mortgaged for its full value and the mortgage-debt becomes due, the legal interest is in the mortgagee; and the mortgagor is not a necessary party to a bill by the mortgagee to recover insurance-moneys on a loss of the property which amount to less than the debt. *Chancery*, 1837, *Rogers v. Traders' Ins. Co.*, 6 *Paige*, 588.

310. Interpleader. An indorsee of a bill or note who is suing upon it for the benefit of another party, is a proper party to a bill of interpleader in respect thereto. *Chancery*, 1848, *Bell v. Hunt*, 8 *Barb. Ch.*, 391.

311. Waste. Where a purchaser of the interest of one of two who held the fee as tenants in common, has performed his contract for the purchase, but has not received a deed, he is a necessary party to their bill against a tenant, to stay waste, and for an account of waste subsequent to the contract. His vendor holds the legal title in trust, and is a proper party, but the *cestui que trust* must also be joined. *Supreme Ct., Sp. T.*, 1849, *Kidd v. Dennison*, 6 *Barb.*, 9.

B. Creditors' Suits.

312. One creditor may file his bill in behalf of himself and all other creditors. Where it does not appear that there are others in the like situation, he may sue for himself alone. *Chancery*, 1817, *Hendricks v. Robinson*,* 2

Johns. Ch., 288. Compare *McDermutt v. Strong*, 4 *Id.*, 687.

313. Other judgment-creditors are not necessary parties,—at least where it does not appear that they have sued out prior executions. *Oyer & T.*, 1827, *Weed v. Pierce*, 9 *Cov.*, 722; and see *Edmeston v. Lyde*, 1 *Paige*, 687.

314. A creditor whose execution has been returned unsatisfied, may bring a creditor's suit for his own benefit, or unite with others in the same situation in a joint suit, or sue for the benefit of all who choose to come in under the decree. *Chancery*, 1829, *Edmeston v. Lyde*, 1 *Paige*, 687.

315. So far as respects property on which no creditor has obtained a lien by his judgment or execution at law, a creditor whose remedy at law has been exhausted may file a bill for his own benefit only, and without making other creditors standing in the same situation parties. [1 *Paige*, 687.] *Chancery*, 1832, *Wakeman v. Grover*,* 4 *Paige*, 28.

316. Joining. Creditors having several judgments, may file a bill for their common benefit. [6 *Johns. Ch.*, 189.] *Ct. of Errors*, 1831, *Bailey v. Burton*, 8 *Wend.*, 389. *Chancery*, 1842, *Dix v. Briggs*, 9 *Paige*, 595; *Sizer v. Miller, Id.*, 605. *V. Chan. Ct.*, 1838, *Lentillon v. Moffat*, 1 *Edw.*, 451.

317. A creditor by decree, and a creditor by judgment, may join in a bill for relief to remove an obstruction to the liens of both. The fact that one of the complainants, whose execution has been actually returned unsatisfied, may be entitled to still further relief against one of the defendants, forms no objection to a joinder of both complainants for the purpose of obtaining the relief to which they are both entitled, as against both defendants. *Chancery*, 1832, *Clarkson v. De Peyster*, 3 *Paige*, 820.

318. That the holder of several judgments against the maker and indorser of a note, may file a joint bill upon both, or proceed by separate bills. *Chancery*, 1838, *Austin v. Figueira*, 7 *Paige*, 56.

319. If the complainant is an assignee of part of the judgment only, or only of the obligations which the judgment secured, the original judgment-creditor, or other owner of the

* Affirmed, *sub nom.* *Hendricks v. Walden (Ct. of Errors, 1819)*, 17 *Johns.*, 438, but no opinion reported.

* Affirmed, without passing on this point, *Ct. of Errors, 1838*, 11 *Wend.*, 187.

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residue, must be made a party. *Chancery*, 1847, *Strange v. Longley*, 3 *Barb. Ch.*, 650.

320. Several joint-debtors are all proper parties, and if some of the defendants are primarily and others secondarily liable for the debt, the latter may insist that the former may be joined, but it is not necessary to join those who the bill distinctly avers have no property whatever. *Chancery*, 1835, *Van Cleef v. Sickles*, 5 *Paige*, 505. Compare *Child v. Brace*, 4 *Id.*, 809.

321. That a defendant in the judgment who was not served with process, may be joined as a defendant, to enable the others to claim contribution. *Chancery*, 1838, *Anstin v. Figueira*, 7 *Paige*, 56; S. P., 1835, *Van Cleef v. Sickles*, 5 *Id.*, 505.

322. If one defendant dies, the complainant cannot proceed against the survivor only, except on leave granted, on his showing that the decedent left no property subject to the lien of the bill. *Chancery*, 1845, *Penniman v. Norton*, 1 *Barb. Ch.*, 246.

323. Fraudulent assignee. In a creditor's suit to reach property fraudulently assigned, the assignee is a necessary party; but otherwise, if it seek satisfaction only from a legal or residuary interest in the debtor. *Chancery*, 1829, *Edmeston v. Lyde*, 1 *Paige*, 687; and see *Green v. Hicks*, 1 *Barb. Ch.*, 309.

324. Administrator pending suit. Where the defendant in a creditor's suit was entitled as next of kin to a share of an estate, but no administrator was appointed until after answer,—*Held*, that a supplemental bill making the administrator a party was not improper, though it was hardly necessary. *V. Chan. Ct.*, 1844, *Hope v. Brinckerhoff*, 4 *Edw.*, 848.

325. A receiver, appointed in the suit of an execution-creditor against B., filed a bill to reach a debt due to B. from his former partner T., deceased. T. had assigned all his property to M., who still held a large amount, and had transferred other portions to his sons, on considerations held to be invalid as against T.'s creditors. M. had also conveyed other portions to the heirs of T. on a compromise. B. was executor of the will of T., and was the husband of one of his heirs. *Held*, 1. That the receiver could maintain a bill to enforce T.'s debt to B. 2. That M. and his sons, and B. and the heirs of T., were all necessary parties to the suit of the receiver. 3. That the suit was properly brought against the heirs,

with the executor; the personal assets of T. being insufficient to pay his debts, and the executor standing in so many conflicting interests. 4. If the realty were deemed converted, the heirs (who were also next of kin) were proper parties as beneficiaries, their trustee having an adverse interest. *A. V. Chan. Ct.*, 1846, *Iddings v. Bruen*, 4 *Sandf. Ch.*, 228.

As to the joinder of **Separate grantees** of the debtor, see *supra*, 184–189.

C. Discovery.

326. Individual members of a corporation may be called upon to answer to a bill of discovery under oath; but in that case they must be named as defendants. *Chancery*, 1815, *Brunly v. Westchester County Manufacturing Society*, 1 *Johns. Ch.*, 366.

327. An officer or agent of a corporation may be made a party to a bill, for the purpose of enabling the complainant to obtain a knowledge of facts which could not be ascertained by the corporate answer; but as against such officer it is a bill of discovery merely. *Chancery*, 1828, *Vermilyea v. Fulton Bank*, 1 *Paige*, 87.

328. Where a witness was made plaintiff in a suit on a note, for the purpose of depriving defendant of his testimony,—*Held*, that his objection that the real plaintiff was not a party to the bill of discovery and relief, should be overruled. *Chancery*, 1832, *Brockway v. Copp*, 3 *Paige*, 589.

D. Foreclosure.

a. The Mortgagor and Mortgagee, and the Assignor.

329. A mortgagor, whose equity has been sold on execution, since he has a right to redeem within a year, is meanwhile a necessary party to a bill to foreclose the mortgage. *Chancery*, 1820, *Hallock v. Smith*, 4 *Johns. Ch.*, 649.

330. After statute-foreclosure. That the original mortgagor, or any other person whose equitable claim is already barred, is not a necessary party to a bill of strict foreclosure, filed by one who purchased under a statute-foreclosure. *Chancery*, 1833, *Benedict v. Gilman*, 4 *Paige*, 58.

331. A mortgagor who has conveyed the premises (without warranty against the mortgage), though he remains personally liable for the debt, is not a necessary party to a bill of foreclosure against his grantee; and although

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a defendant who stands in the relation of surety for the debt may object that the mortgagor is not made a party, yet if it appears by the bill that the mortgagor is an absentee and resident of another State, this is a sufficient excuse for not making him a party. *Chancery*, 1837, *Bigelow v. Bush*, 6 *Paige*, 343.

332. Mortgage executed by persons without authority. Where the defendants, claiming to be the officers of a corporation, executed under its seal a mortgage with their own collateral bond, and pending a suit commenced by other persons who claimed to be, and were therein adjudged to be, the rightful officers, a foreclosure-suit was brought against the former persons, to which the latter were not made parties, and a decree of foreclosure was obtained,—*Held*, that the decree was irregular and must be set aside, and the bill dismissed without costs, and without prejudice to the mortgagee's rights to proceed thereafter, at law or in equity, for the recovery of his debt. *Chancery*, 1845, *Brindernagle v. German Reformed Church*, 1 *Barb. Ch.*, 15.

333. Heirs. As the personal representative of a deceased mortgagee fully represents his rights, his heirs ought not to be made parties to a bill to foreclose a prior mortgage. *Chancery*, 1846, *Shaw v. McNish*, 1 *Barb. Ch.*, 326.

334. Where a mortgage is assigned as security for a debt, the assignor is a necessary party to the assignee's bill of foreclosure; for he is entitled either to redeem the mortgage on paying his debt, or to show that he has paid his debt, and is therefore entitled to a reassignment. *Ch. of Errors*, 1802, *Johnson v. Hart*, 3 *Johns. Cas.*, 822. To the same effect [citing 2 *P. Wms.*, 642], *Chancery*, 1823, *Whitney v. McKinney*, 7 *Johns. Ch.*, 144. *A. V. Chan. Ct.*, 1848, *Kittle v. Van Dyck*, 1 *Sandf. Ch.*, 76; *S. C.*, 8 *N. Y. Leg. Obs.*, 126.

335. — or for benefit of creditors. So where the assignor after the transfer assigns all his property, including his interest in the mortgage, to trustees for the benefit of all his creditors, such trustees are necessary parties to a bill filed by the first assignees to foreclose the mortgage. *Ch. of Appeals*, 1855, *Bard v. Poole*, 12 *N. Y. (2 Kern.)*, 495.

336. Where an assignment of a mortgage is in trust for creditors, the assignor is not a necessary party; for his interest is only contingent, and especially it is unnecessary to join him where it appears that the trust will absorb

the whole proceeds of the mortgage. *Chancery*, 1845, *Christie v. Herrick*, 1 *Barb. Ch.*, 254.

337. It seems that the *cestuis que trust* need not, under such a trust, be made parties. *Id.*

338. A mortgagee who has assigned the mortgage absolutely is not a necessary party to a bill by the mortgagor to redeem. A person who has no interest in the suit, and is a mere witness, against whom there could be no relief, ought not to be a party. [7 *Ves.*, 287.] *Chancery*, 1823, *Whitney v. McKinney*, 7 *Johns. Ch.*, 144.

339. The fact that the mortgagee had possession and took the rents and profits of the premises up to the time of the assignment, does not alter the case. *Id.*

340. Guarantor. The assignor of a mortgage who guaranties its payment, is a proper party to the assignee's bill of foreclosure, under the Revised Statutes. *V. Chan. Ct.*, 1837, *Bristol v. Morgan*, 3 *Edw.*, 142. Compare *Lockwood v. Benedict*, *Id.*, 472.

341. But he is not a necessary party. *V. Chan. Ct.*, 1841, *Western Reserve Bank v. Potter, Clarke*, 432.

342. — his representatives. Since, under 2 *Rev. Stat.*, 191, § 154, an assignee of a bond and mortgage may make the assignor, who guarantied their collection, a party, in order to obtain a decree over against him for a deficiency, in case it cannot be collected by an execution against the mortgagor, the personal representatives of a mortgagor or guarantor may be made parties for the purpose of a decree for a deficiency, to be paid in the due course of administration. *Chancery*, 1841, *Leonard v. Morris*, 9 *Paige*, 90.

343. But the heirs or devisees, who have no interest in the mortgaged premises, cannot be made parties for the purpose of charging them in respect to the real estate descended or devised. *Id.*

D. Owner of Equity of Redemption.

344. When a mortgagor has assigned the equity of redemption to the mortgagee and another, and the survivor of them, in trust for creditors, the co-trustee is a necessary party to a foreclosure by the mortgagee. *Chancery*, 1837, *Paton v. Murray*, 6 *Paige*, 474.

345. If the mortgagor's grantee of the premises is not made a party to the bill of fore-

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closure, the decree and sale are void as to him, and the purchaser cannot protect his possession against the grantee, for he is not an assignee of the mortgage. *Supreme Ct.*, 1838, *Watson v. Spence*, 20 *Wend.*, 260.

346. In general all persons having an interest in the equity of redemption, though as *cestuis que trust*, must be made parties to a bill of foreclosure. Where infants having an equitable vested remainder in fee, liable to be defeated by their dying in the lifetime of the equitable tenant for life, were not made parties,—*Held*, that they were not bound by the decree. *A. V. Chan. Ct.*, 1845, *Williamson v. Field*, 2 *Sandf. Ch.*, 533.

347. In general it is sufficient to make the first person in being who has a vested estate of inheritance, and those who claim the prior interests, parties, omitting those who may claim in remainder or reversion after such vested estate, for they will be bound by, and may appeal from, a decree against the person having the prior estate. [1 *Sch. & Lef.*, 886.] But there must be a clear tenancy in tail to dispense with the necessity of a remainder-man being a party to a bill of foreclosure. *V. Chan. Ct.*, 1833, *Eagle Fire Ins. Co. v. Cammet*, 2 *Edw.*, 127.

348. Where there are several future and contingent interests in real estate,—*s. g.*, in an equity of redemption in the case of a mortgage foreclosure,—the person who has the first vested estate of inheritance, and all other persons having prior rights or interests in the premises, must be made parties; though every person having a future or contingent interest is not a necessary party. [*Stor. Eq. Pl.*, 140, § 144; 182, § 198; 1 *West*, 619; *Ambl.*, 564; 1 *Dow*, 81.] *Chancery*, 1839, *Nodine v. Greenfield*, 7 *Paige*, 544.

349. A purchaser of the premises at sheriff's sale, before the filing of a bill of foreclosure, is a necessary party to the bill, though he did not obtain a deed from the sheriff until after the bill and notice of *lis pendens* was filed. *V. Chan. Ct.*, 1840, *N. Y. Life Ins. & Trust Co. v. Bailey*, 3 *Edw.*, 416.

350. One who purchases the equity of redemption, and covenants with the mortgagor to pay the mortgage-debt, and thereafter conveys the land, is not a proper party to the bill of foreclosure, for he is not liable in such suit for a deficiency. *V. Chan. Ct.*, 1841, *Lockwood v. Benedict*, 3 *Edw.*, 472.

351. The owner of the equity of redemption is a necessary party to a foreclosure-suit. *Chancery*, 1843, *Reed v. Marble*, 10 *Paige*, 400.

a. Incumbrancers.

352. Subsequent. On a bill to foreclose a mortgage, all subsequent incumbrancers existing at the commencement of the suit, must be made parties. *Chancery*, 1818, *Haines v. Beach*, 3 *Johns. Ch.*, 459; 1820, *Ensworth v. Lambert*, 4 *Id.*, 605.

353. Prior. On a bill of foreclosure, where a sale is sought, and not a mere strict foreclosure, prior incumbrances—*s. g.*, legacies charged upon the land—ought to be set forth in the pleadings, and the legatees should be made parties; for all who have an interest in the subject-matter of the suit should be before the court. *Chancery*, 1822, *McGown v. Yerks*, 6 *Johns. Ch.*, 450.

354. In general, a prior incumbrancer is not a necessary party to a foreclosure. *V. Chan. Ct.*, 1841, *Western Reserve Bank v. Potter*, *Clarke*, 432.

355. Liens pending suit. Purchasers and creditors obtaining liens *pendente lite*, should make themselves parties by bill, according to the practice before the act of 1840. *Chancery*, 1843, *People's Bank v. Hamilton Manufacturing Co.*, 10 *Paige*, 481; *Loomis v. Stuyvesant*, *Id.*, 490.

356. In general, an incumbrancer *pendente lite* is not entitled to redeem, and need not be made a party to a bill of foreclosure [11 *Ves.*, 194]; but prior notice of his claim upon the surplus moneys, may operate to give him a right to redeem from the purchaser equally as if his incumbrance existed prior to the commencement of the suit upon the mortgage. *Chancery*, 1821, *Cook v. Mancius*, 5 *Johns. Ch.*, 89.

357. Act of 1840. One who claims under a judgment obtained after the commencement of a foreclosure-suit, is not entitled to apply, under the act of 1840 (2 *Rev. Stat.*, 3 ed., 254, § 200), to be made a party, and to interpose a defence. The act only applies to those who previously must have been made parties in order to bar their rights of redemption. *Chancery*, 1843, *People's Bank v. Hamilton Manufacturing Co.*, 10 *Paige*, 481.

358. So of one who purchases a lien during the pendency of the suit. *Chancery*, 1843, *Loomis v. Stuyvesant*, 10 *Paige*, 490.

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359. The provision of the Laws of 1844, § 5, amending the act of 1840, and again making it necessary to make judgment-creditors parties in foreclosure, does not apply to foreclosure-suits previously commenced. *Chancery*, 1845, *Wood v. Oakley*, 11 *Paige*, 400; affirming S. C., 4 *Edw.*, 562.

360. Under the act of 1840, as amended in 1844, subsequent incumbrancers by judgment or decree must be parties in order to bar their rights. *Chancery*, 1846, *Wheeler v. Van Kuren*, 1 *Barb. Ch.*, 490.

d. Other Persons.

361. A person claiming adversely to the mortgagor and mortgagee, by a title which, if valid, is paramount, is not a proper party to a bill to foreclose the mortgage. *Chancery*, 1837, *Eagle Fire Co. v. Lent*, 6 *Paige*, 635; 1848, *Banks v. Walker*, 8 *Barb. Ch.*, 438; affirming S. C., 2 *Sandf. Ch.*, 844; 8 *N. Y. Leg. Obs.*, 840. To similar effect, *Supreme Ct., Sp. T.*, 1847, *Holcomb v. Holcomb*, 2 *Barb.*, 20. *Ct. of Appeals*, 1851, *Corning v. Smith*, 6 *N. Y. (3 Seld.)*, 82.

362. And where one who is made a defendant as a subsequent purchaser or incumbrancer, sets up in his answer a claim adverse to the title of the mortgagor, and anterior to the mortgage, the plaintiff should dismiss the bill as to him, unless he is prepared to prove that such claim in fact arose subsequent to the mortgage. *Ct. of Appeals*, 1851, *Corning v. Smith*, 6 *N. Y. (3 Seld.)*, 82.

363. That one applying after decree to be made a party, must show a probable defence on his part. *Chancery*, 1848, *People's Bank v. Hamilton Manufacturing Co.*, 10 *Paige*, 481.

364. Prior purchaser. Where the owner of land has sold it, agreeing to convey on its being paid for in instalments, a subsequent mortgagee with notice cannot make the purchaser a party to his bill of foreclosure, on the false allegation that he claims an interest subsequent to the mortgage. The mortgagee, in such a case, should give the purchaser notice not to pay the purchase-money to the vendor, and then foreclose as against the latter, so as to vest his title in the purchaser under the decree, subject to the contract of sale. *Chancery*, 1848, *Bank of Orleans v. Flagg*, 8 *Barb. Ch.*, 816.

365. The wife's inchoate right of dower

makes her a necessary party to a bill filed while her husband is living, to foreclose a mortgage executed by her husband and herself. *Supreme Ct., Sp. T.*, 1850, *Denton v. Nanny*,* 8 *Barb.*, 618.

366. Simultaneous purchase-money mortgages. Where the heirs and widow jointly conveyed land, and the purchaser gave at the same time a purchase-money mortgage to each for their proportionate interests,—*Held*, that one of the heirs could not maintain an ordinary foreclosure-suit upon his mortgage, making the co-heirs and widows defendants, as he would thereby gain an inequitable preference. He should ask them to join as complainants; and if they refused, he might make them defendants, and set forth the facts specially, so that the court might protect the rights of all. *V. Chan. Ct.*, 1839, *Potter v. Orandall, Clarke*, 119.

E. Fraud. Undue Influence, &c.

367. A mortgagee who has assigned his whole interest in the bond and mortgage, is not a proper party to the bill of the mortgagor to set them aside, especially after judgment has been had by the assignee upon the bond, in the name of the assignor. *A. V. Chan. Ct.*, 1840, *Topping v. Van Pelt, Hoffm.*, 545.

368. One who is charged with fraudulently procuring the execution of a will, is a proper party to a bill filed for the purpose of setting it aside, although he has no interest. He may be charged with costs. [1 *Sch. & Lef.*, 227; *Stor. Eq.*, § 232.] *Ct. of Appeals*, 1848, *Brady v. McCosker*, 1 *N. Y. (1 Comst.)*, 214; affirming S. C., 1 *Barb. Ch.*, 329.

369. Persons who combined to procure, by fraud, the obtaining of a judgment, are proper though not necessary parties in a suit against the judgment-creditor to set it aside, if particular acts of fraud are alleged in the bill. *Supreme Ct., Sp. T.*, 1848, *Huggins v. King*, 8 *Barb.*, 616; S. P., 1855, *Hammond v. Hudson River Iron & Machine Co.*, 20 *Id.*, 378.

370. Void trust. In a suit to set aside a conveyance obtained by fraud or undue influence, all persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties, if within the jurisdiction of the court; but a *cestui que trust*, under the

* Approved, *Supreme Ct.*, 1854, *Vartie v. Underwood*, 18 *Barb.*, 561.

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deed, who could not enforce the trust because it was void for not being manifested in writing, is not a necessary party. *Ct. of Errors*, 1824, *Whelan v. Whelan*, 8 *Cow.*, 587, 580.

371. Second grantee. If the bill seek to set aside a conveyance as fraudulent, and the grantee had conveyed before suit brought, to one who for aught that appears was an innocent purchaser, the latter is an indispensable party. *V. Chan. Ct.*, 1840, *Winchester v. Crandall, Clarke*, 371.

372. Where several directors of a corporation united in fraudulent acts and representations, giving credit to bonds of the company offered in market, in reliance upon which the complainant bought some of them;—*Held*, that he could maintain an action in equity against any of them to annul the purchase and for repayment. Each of several wrongdoers is liable for all the wrongful acts in which he participated, both at law and in equity. [1 *Cr. & P.*, 1.] *N. Y. Superior Ct.*, 1850, *Mayne v. Griswold*, 8 *Sandf.*, 468; *S. O.*, 9 *N. Y. Leg. Obs.*, 25.

F. Injunction-suits.

373. To stay proceedings at law. The assignee of a chose in action may sue at law in the name of the assignor; and in such cases, the assignee must be made a party to a bill for an injunction to stay the suit at law, or the court will permit him to proceed in the name of the assignor. *Chancery*, 1828, *Chase v. Chase*, 1 *Paige*, 198.

374. A. & B. being sued at law on a joint debt, A. filed a bill alleging that B. had assumed the debt, and that it had been wholly or partly paid, and that B. had made an assignment to secure the balance alleged to be due upon it; and prayed a discovery from the plaintiff at law, and also that the proceeds of the assigned property might be applied, and prayed also a decree over against B. *Held*, that B. was a necessary party. [2 *Atk.*, 515; 8 *Litt.*, 5.] *Chancery*, 1830, *Bailey v. Inglee*, 2 *Paige*, 278.

375. An agent who was employed to compromise his employer's debts, bought them up, and then transferred them after due, for their nominal amount. *Held*, that he was a proper party to the employer's bill against the holder to restrain suits at law thereon. *Chancery*, 1836, *Reed v. Warner*, 5 *Paige*, 650.

376. The assignee of a judgment is a neces-

sary party to a suit for a perpetual injunction thereon. *Chancery*, 1845, *Mumford v. Sprague*, 11 *Paige*, 438.

377. Highway, &c. Where a public square in a village has been dedicated as such, a bill to protect the public enjoyment of the square may be filed by the corporation, or by a grantee of land who holds a special covenant for the maintenance of the square as public. *It seems*, that a grantee and the corporation may join in one suit. *Chancery*, 1884, *Trustees of Watertown v. Cowen*, 4 *Paige*, 510.

378. Where the complainant seeks to restrain the closing of a street, the municipal corporation who were about to authorize the act are the proper parties defendant, not the adjoining owners who might take advantage of such act. *Supreme Ct., Sp. T.*, 1848, *Lawrence v. Mayor, &c.*, of *N. Y.*, 2 *Barb.*, 577.

379. In a suit brought to reach stock in a corporation, which was bought by one defendant with moneys fraudulently obtained from the complainant, the corporation is a necessary party, for the purpose of preventing a transfer pending suit, and having a decree for a transfer on its books. [6 *Ves.*, 771.] *V. Chan. Ct.*, 1848, *Bank of America v. Pollock*, 4 *Ellis*, 215.

380. Debtor. To determine the question, in a suit between a mortgagee and a judgment-creditor, whether an execution was issued for too much, or whether an assignment of the judgment was in violation of a statute and void, the judgment-debtor is a necessary party. *Chancery*, 1847, *Warner v. Paine*, 3 *Barb. Ct.*, 680.

G. Redemption.

381. The assignees of the mortgagee of a lease, being in possession, are necessary parties to the mortgagor's bill to redeem. If it is claimed that the assignment was fraudulent and void, the decision of this question must immediately affect their rights. *Ct. of Errors*, 1802, *Hickock v. Scribner*, 3 *Johns. Cas.*, 311.

382. Lessor. Where a mortgagee in possession gives an absolute lease of the premises, reserving rent, he or his assigns must be made parties to a bill for redemption against the lessee; so that the lessee may be discharged from his covenants, and may have a decree for his proportion of the redemption-money. *Chancery*, 1833, *Dias v. Merle*, 4 *Paige*, 259.

383. Where a mortgagee was in reality an agent, and assigned his mortgage to his

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principal; and the mortgagor, claiming to offset against the mortgage demands against the agent, made both parties to his bill to redeem;—*Held*, that though, under the circumstances, he was not entitled to the offset, the agent was a proper party. *F. Chan. Ct.*, 1833, *Wolcott v. Sullivan*, 1 *Edm.*, 399; affirmed, *Chancery*, 1836, 6 *Paige*, 117.

384. Where a creditor bought a mortgage executed by his debtor, agreeing with him that it should be held as security for the creditor's demand as well as the mortgage-debt, which was less than the amount the mortgage purported to secure, and thereupon delivered up the evidence of his demand,—*Held*, that the assignor was not a necessary party to a bill for redemption filed by a purchaser at sheriff's sale of the debtor's equity of redemption; but the debtor was a necessary party. *A. V. Chan. Ct.*, 1845, *Yelverton v. Shelden*, 2 *Sandf. Ch.*, 481.

H. Revivor.

385. A bill filed by the defendant in a foreclosure-suit, against the complainant, for relief against the mortgage, and also against a judgment and execution, is in the nature of an original bill, and may be revived by his heirs and administrator. *Chancery*, 1821, *Woolsey v. Livingston*, 5 *Johns. Ch.*, 265.

386. A suit to redeem land, and for a reconveyance, cannot be revived by the personal representatives of the defendant, without making the heirs, or other holders of the legal title, parties; and the objection that they have not been brought in, may be taken, *ore tenus*. *Chancery*, 1842, *Souillard v. Dias*, 9 *Paige*, 898.

387. Where a supplemental bill, in the nature of a bill of revivor, is filed for the sole purpose of reviving and continuing the proceedings in the original suit, which had become abated by the death of one defendant, against his assignees, who had become such *pendente lite*, and upon the case made upon the original bill merely, and not upon any new facts, the other defendants are not necessary parties. [8 *Atk.*, 217.] *Chancery*, 1842, *Farmers' Loan & Trust Co. v. Seymour*, 9 *Paige*, 588.

388. Question of the proper parties to a bill to revive, discussed. *Id.*

389. Wife. Where the complainant dies, the bill being to set aside a conveyance by

him, one of his heirs, who is the wife of a defendant, may be joined with him as a defendant in the bill of revivor, without averring that she refused to be a complainant. *Chancery*, 1885, *Randolph v. Dickerson*, 5 *Paige*, 517.

I. Specific Performance.

390. Infant heirs. In a suit for specific performance, against a vendor who contracted to sell the premises in one parcel, brought by one claiming a part of the premises as assignee of an heir of the purchaser,—*Held*, that the other heirs, being infants and married women, were necessary parties. *Chancery*, 1832, *Miller v. Bear*, 3 *Paige*, 466.

391. Joinder of several purchasers. One who held land as a purchaser under the defendant, agreed severally with the complainants to convey to them respectively parcels of the tract, but the whole tract defendant had previously agreed to convey to a third person; and the defendant finally refused to convey to the complainants, except subject to that prior agreement, and one of the complainants thereupon brought in that agreement for the protection of all the complainants. *Held*, that they all had a common interest in enforcing it against the defendant, which would justify their uniting together in a bill for specific performance [see *Stor. Eq. Pl.*, 238, § 285; 2 *Sim. & Stu.*, 87], but that the immediate vendor of the complainants was a necessary party. *A. V. Chan. Ct.*, 1844, *Wood v. Perry*, 2 *Sandf. Ch.*, 7.

392. But the allegation that the purchase was made for the benefit of all, not being sustained by any proof,—*Held*, that the complainants were improperly joined. The mere fact that the act of one may prove beneficial to others, does not authorize joining them. *Supreme Ct.*, 1847, *Wood v. Perry*, 1 *Barb.*, 114.

393. Assignee's bill. Where the objection that the purchaser is not made a party to his assignee's bill for performance, is taken for the first time at the hearing, it may be disregarded on his filing a stipulation to abide the decree. *A. V. Chan. Ct.*, 1846, *Voorhees v. De Myer*,* 3 *Sandf. Ch.*, 614.

394. The liability of a grantor with warranty, upon his covenant, is a sufficient inter-

* *S. C.*, 2 *Barb.*, 87, and there affirmed, *Supreme Ct.*, 1847.

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est to enable him to maintain a bill for specific performance of an agreement with him to release an incumbrance upon the premises. *Ct. of Appeals*, 1850, *Malins v. Brown*, 4 *N. Y.* (4 *Comst.*), 408.

III. IN CIVIL ACTIONS (UNDER THE CODE OF PROCEDURE).*

1. In General.

395. Meaning of the word "party," as used in the Code. *Giraud v. Stagg*, 4 *E. D. Smith*, 27.

396. Two capacities. A plaintiff may in one action sue in two different capacities,—*e. g.*, as executor and as devisee,—where the causes of action are such as may be joined. *Supreme Ct., Sp. T.*, 1857, *Armstrong v. Hall*, 17 *How. Pr.*, 76. Compare *Pugsley v. Aikin*, 11 *N. Y.* (1 *Kern.*), 494; reversing *S. O.*, 14 *Barb.*, 114.

397. A fictitious name for defendant can be used only when plaintiff is ignorant of the true name. [Code, § 175.] *Supreme Ct., Sp. T.*, 1852, *Orandall v. Beach*, 7 *How. Pr.*, 271.

398. The true name should be substituted when it is discovered. *N. Y. Com. Pl.*, 1853, *McCabe v. Doe*, 2 *E. D. Smith*, 64.

399. Objections as to parties. If a party is properly sued, he may insist that another ought to be sued with him. In this he may have an interest. But he has no right to object that another, who is sued with him, is improperly made a defendant. A party who ought not to have been sued may demur, on the ground that no sufficient cause of action is stated as against him, but not for defect of parties. *Supreme Ct., Sp. T.*, 1852, *Brownson v. Gifford*, 8 *How. Pr.*, 889.

400. The objection that the plaintiff has not legal capacity to sue, is waived unless taken by demurrer or answer. *N. Y. Com. Pl.*,

1851, *Hastings v. McKinley*,* 1 *E. D. Smith*, 273.

401. The test. That the relief demanded furnishes the usual test to determine the necessity of making a particular individual a party. *Supreme Ct.*, 1856, *Hubbard v. Eames*, 22 *Barb.*, 597.

2. The Real Party in Interest to Sue.

402. In general. Upon a contract, not under seal, the party for whose benefit it was made may maintain an action. When the action is founded, not upon the contract itself, but only upon an implied promise, the party from whom the consideration proceeded from which such promise is implied by law, may sue in his own name. It makes no difference in such cases, whether the contract is written or verbal, nor whether the contract was an original promise or a suretyship. [Reviewing many cases.] Thus where the defendant procured goods to be delivered by third persons on his written orders to them, in some of which orders he promised that he would pay for them,—*Held*, that the real owner of the goods might maintain an action in his own name, and that parol evidence was admissible to show that such third persons to whom the orders were addressed, were merely plaintiff's agents. *N. Y. Com. Pl.*, 1852, *Union India-rubber Co. v. Tomlinson*, 1 *E. D. Smith*, 364.

403. Trust. Under a trust instrument, directing the interest of a fund to be paid during life to the creator of the trust, and the principal to be given to third persons, an action after his death to recover interest accumulated in the hands of the trustee cannot be maintained by them, but must be brought by the personal representatives of the creator of the trust. *N. Y. Com. Pl.*, 1854, *Clarkson v. Mitchell*, 3 *E. D. Smith*, 269.

404. Specific legatee. Where a legacy is given of specific securities, the legatee may sue in his own name to recover them, on obtaining the assent of the executor; and such assent, where no debts remain unpaid, may be compelled. [*Jac. L. Dic.*, tit. *Exec.*; *Dayt. Surr.*, 1 *Barb.*, 280.] *Supreme Ct., Sp. T.*, 1857, *Seré v. Coit*, 5 *Abbotts' Pr.*, 481.

405. Promise for benefit of third party. A debtor delivered property to the defendants

* There has been much diversity of opinion as to whether the provisions of the Code, drawn from the equity practice, are applicable solely to actions for equitable relief, or to all actions. The former view has been taken in *Habicht v. Pemberton*, 4 *Sandf.*, 657; *Merchants' Mutual Ins. Co. v. Eaton*, 11 *N. Y. Leg. Obs.*, 140; *Spencer v. Wheelock*, *Id.*, 329; *Van Horne v. Everson*, 18 *Barb.*, 526; *Voorhis v. Childs*, 17 *N. Y.*, 854. The latter view, in *Loomis v. Brown*, 16 *Barb.*, 325; *Grinnell v. Schmidt*, 2 *Sandf.*, 706; *S. C.*, 8 *Code R.*, 19; 8 *N. Y. Leg. Obs.*, 197; *Waldorff v. Bortle*, 4 *How. Pr.*, 358; *Kirk v. Young*, 2 *Abbotts' Pr.*, 453; *Cole v. Reynolds*, 18 *N. Y.*, 74.

* Affirmed, *Ct. of Appeals*, 1858, *Seld. Notes*, No. 4, 19.

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on condition that they should make certain advances to him, transport and sell the property and reimburse themselves, and pay out of the residue his indebtedness to the plaintiff. *Held*, that the plaintiff, though not cognizant of the arrangement at the time, could maintain an action against the defendants for payment of the amount which they had undertaken with the debtor to pay him. [H. & D. Supp., 209; 3 Barb., 209; 2 Den., 45; 4 Cow., 432; 4 Den., 97.] No assignment to the plaintiff was necessary to enable him to maintain the action. *Supreme Ct.*, 1858, *Hale v. Boardman*, 27 Barb., 82. S. P., *N. Y. Superior Ct.*, 1855, *General Mutual Ins. Co. v. Benson*, 5 Duer, 168.

406. Auction fees. Where a purchaser at auction signs a memorandum of a sale, and by it agrees to pay the auctioneer's fees, whether this is a stipulation with the owner, or with the auctioneer himself, in either case the latter may sue for the fees in his own name. *N. Y. Superior Ct.*, 1857, *Muller v. Maxwell*, 2 Bosw., 355. To the same effect, *N. Y. Com. Pl.*, 1853, *Bleecker v. Franklin*, 2 E. D. Smith, 93.

407. That brokers, having negotiated a sale and delivered the property, they having advanced the price to the owner, can sue in their own name to recover from the purchasers. *N. Y. Com. Pl.*, 1852, *White v. Choteau*, 1 E. D. Smith, 493.

408. Freight. The master of a vessel, who sails it under a contract to find the crew and provisions, and pay half expenses, and receive one half the net freight, is the proper party to bring an action for freight on an agreement made by him through his agent. *Supreme Ct.*, 1853, *Clendaniel v. Tuckerman*, 17 Barb., 184.

409. A purchaser in possession of land, is deemed the equitable owner of the premises, and may maintain an action for damages for an injury thereto. Title is not necessary. [2 Barb., 165.] *Supreme Ct.*, 1854, *Rood v. N. Y. & Erie R. R. Co.*, 18 Barb., 80.

410. The non-joinder, as plaintiff, of a third person who has an interest, is waived when not set up by answer or demurrer, where the plaintiff shows a legal title. *N. Y. Superior Ct.*, 1857, *Purchase v. Mattison*, 6 Duer, 587. S. P., *N. Y. Com. Pl.*, 1851, *Belshaw v. Colie*, 1 E. D. Smith, 213.

411. Misjoinder. That where a suit is brought by several as partners, and one of

them proves not to have been a partner and not a proper party, a verdict for all cannot be sustained. *Supreme Ct.*, 1853, *Travis v. Tobias*, 8 How. Pr., 338.

412. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in § 113 (q. v., *infra*, 457); but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision. *Code of Pro.*, § 111.

413. Special statute. The provisions of section 111 of the Code of Pro.,—requiring actions to be prosecuted in the name of the real party in interest,—are inapplicable to a suit on a bond which by special statute is to be prosecuted by them in the name of the People, or of a specified officer. *Supreme Ct.*, *Sp. T.*, 1853, *Hoogland v. Hudson*, 8 How. Pr., 343.

414. Insurance payable to third party. On an insurance policy, containing a provision that the loss is payable to a third party, a recovery cannot be had by the insured. The cause of action is in the third party, to whom the loss is payable.* *Supreme Ct.*, 1859, *Ripley v. Astor Ins. Co.*, 17 How. Pr., 444; S. C., *sub nom.* *Ripley v. Aetna Ins. Co.*, 29 Barb., 552.

415. — agent. Insurance was effected upon A.'s property by B. as his agent, the policy providing that the loss, if any, should be paid to B. only. *Held*, that A. being the real party in interest, might maintain an action on such policy in his own name. Neither the agent nor the insurer have any right to insert such a clause. *Supreme Ct.*, *Sp. T.*, 1849, *Lane v. Columbus Ins. Co.*, 2 Code R., 65.

416. Mortgagees. Where by indorsement on a policy the loss is made payable to mortgagees, after the mortgage has been fully paid an action for a loss need not be brought by the

* The case of *Burgher v. Columbian Ins. Co.*, 17 Barb., 274,—in which it is stated to have been held that proof of insurance in the name of A., and of a joint loss, under a complaint averring an insurance to A. and B. and a joint loss, was a fatal variance,—is misreported. The opinion of Edmonds, J., was a dissenting opinion. The judgment was, in fact, affirmed.

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mortgagees. *N. Y. Superior Ct., Trial T.*, 1859, *Beach v. Bowery Fire Ins. Co.*, 8 *Abbotts' Pr.*, 261, *note*; and see *Bradford v. Greenwich Ins. Co.*, *Id.*, 261.

417. Assignment. The insured, who assigns, retaining an interest, may, under the Code, join with his assignee in an action upon the policy. *Supreme Ct., Sp. T.*, 1853, *Boyn-ton v. Clinton & Essex Mutual Ins. Co.*, 16 *Barb.*, 254.

418. Since the Code, an assignee of the policy may sue in his own name. *Supreme Ct.*, 1856, *Fowler v. N. Y. Indemnity Ins. Co.*, 23 *Barb.*, 143.

419. Insurers who have paid to the insured a loss occasioned by a collision, cannot maintain an action in their own name against the proprietor of the colliding boat to recover the amount. The action against the wrongdoer must be in the name of the owner of the insured. The chief object of section 111 of the Code was to authorize legal actions in the name of the assignee of a chose in action. It does not authorize an action by parties merely equitably interested; nor where the demand arises from a wrong. *Supreme Ct., Sp. T.*, 1853, *Merchants' Mutual Ins. Co. v. Eaton*, 11 *N. Y. Leg. Obs.*, 140.

420. Equitable title. Whether the title of an assignee of a chose in action be legal or equitable, if he has the whole interest he may sue in his own name. *N. Y. Com. Pl.*, 1851, *Hastings v. McKinley*,* 1 *E. D. Smith*, 273.

421. Agent's contract. Under the Code, on a contract in writing made by an agent, for the sole benefit of his principal, the principal may sue whether the agency was disclosed or not at the time. *Supreme Ct.*, 1852, *Erickson v. Compton*, 6 *How. Pr.*, 471.

422. If there has been a performance on the part of such principal, accepted by the other, the principal may sue for a specific performance. *Supreme Ct., Sp. T.*, 1855, *St. John v. Griffith*, 2 *Abbotts' Pr.*, 198.

423. Bond. The old rule, that a bond must be sued in the name of the obligee, is abrogated by the Code; the suit must now be in the name of the real party in interest. And where an administration-bond is assigned to a creditor of the estate to be prosecuted, such creditor is the real and only party in in-

terest, and may sue in his own name. It would be useless to sue in the name of the People on the relation of such creditor. *N. Y. Superior Ct.*, 1853, *Baggott v. Boulger*, 2 *Duer*, 160.

424. Otherwise of bonds such as are not assigned before suit. *Supreme Ct.*, 1857, *People v. Laws*, 4 *Abbotts' Pr.*, 292. Compare *infra*, 464.

425. On negotiable paper payable to the order of a cashier, and alleged to have been delivered to him for the bank of which he is cashier, an action is well brought in the name of the bank, for that is the real party in interest. *Supreme Ct., Sp. T.*, 1849, *Oamden Bank v. Rodgers*, 4 *How. Pr.*, 63; *S. C.*, 2 *Code R.*, 45.

426. E. assigned a note for value, agreeing to put it in judgment. *Held*, that not he, but the assignee, was the proper party to bring suit. *Supreme Ct.*, 1850, *Combs v. Bateman*, 10 *Barb.*, 573.

427. An assignee by delivery, without indorsement, of a negotiable note payable to order, is the real party in interest, and under the Code may sue in his own name. *Supreme Ct.*, 1852, *Billings v. Jane*, 11 *Barb.*, 620.

428. The mere holder of a promissory note, who has no interest in it, cannot now maintain an action upon it. Such action can only be prosecuted in the name of the owner, or the real party in interest. *Supreme Ct., Sp. T.*, 1854, *Parker v. Totten*, 10 *How. Pr.*, 233.

429. Indorsees who received a note for a special purpose which wholly failed, who paid no value for the note, did not retain its possession, and do not direct a suit to be commenced, are not to be regarded as *bona-fide* holders, nor the real party in interest; under the Code the action cannot be maintained in their names. *N. Y. Superior Ct.*, 1857, *Prall v. Hinchman*, 6 *Duer*, 351.

430. The assignee of a note not negotiable may, since the Code, sue the maker in his own name. *Supreme Ct., Sp. T.*, 1849, *White v. Low*, 7 *Barb.*, 204.

431. Dormant partner. Since the Code, even a dormant partner is a necessary party as a plaintiff in an action for the recovery of a debt due the partnership, for he is a party in interest, whether the relief sought be legal or equitable, at least if there is no contract in writing, constituting one or more of the part-

* Affirmed, *Ct. of Appeals*, 1853, *Sold. Notes*, No. 4, 19.

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ners trustee of an express trust, so as to bring the case within section 118. *N. Y. Superior Ct.*, 1855, *Secor v. Keller*, 4 *Duer*, 416. Compare *Belshaw v. Colie*, 1 *E. D. Smith*, 218.

432. Assignment of payments. A. contracted to render services to B., to be paid for by him from time to time, and A. assigned the payments due and to become due to O., who gave notice thereof to B., and A. fulfilled his contract;—*Held*, that O. could maintain an action in his own name for the payments, for as assignee he was the real party in interest. *N. Y. Superior Ct.*, 1849, *Sharp v. Edgar*, 3 *Sandf.*, 379.

433. Assignment as pledge. In an action by one who claimed as assignee, the complaint alleged that the original creditor agreed to transfer the claim to the plaintiff as security for advances made by him towards the transaction out of which the claim in suit arose, and that subsequently he assigned to him all the demand he had against the defendant. *Held*, that even if this imported only a transfer by way of pledge, the assignee was the real party in interest, unless the defendant showed that the advances had been repaid. *N. Y. Superior Ct.*, 1857, *Sheldon v. Wood*, 2 *Bow.*, 267.

434. Assignee of guaranty. Although, before the Code, a special guaranty was not negotiable, and an assignment would not authorize a suit in the name of the assignee [5 *Wend.*, 307], yet an assignment would always pass the equitable title, and the guaranty could be enforced for the benefit of the assignee; and under the Code the action in such case may be maintained by the assignee, as he is the real party in interest. *N. Y. Superior Ct.*, 1857, *Small v. Sloan*, 1 *Bow.*, 352.

435. In an action for taking personal property from the plaintiff's possession, when he claimed to be owner, evidence that the title was in a third party is not to be received merely for the purpose of showing that the plaintiff is not the real party in interest. Section 111 of the Code has not changed the rule that possession is sufficient to maintain the action. *Supreme Ct.*, 1858, *Paddock v. Wing*, 16 *How. Pr.*, 547.

436. If property held by a firm, under pledge, is taken from the manual possession of one partner, he alone cannot replevy it. The action must be in the name of the firm.

N. Y. Superior Ct., 1854, *Sanl v. Kruger*, 9 *How. Pr.*, 569.

437. Penalty for bringing suits without authority in the name of another. 2 *Rev. Stat.*, 550, § 1.

¶

8. Assignors and Assignees.

438. One who has transferred a cause of action by an assignment absolute in form, need not be made a party to an action on it; and is bound, except as between himself and his assignee, by the judgment, though he is not made a party. *N. Y. Superior Ct.*, 1857, *Sheldon v. Wood*, 2 *Bow.*, 267.

439. That a contemporaneous parol agreement that the assignor and assignee are to share whatever the latter can collect on the claim, cannot avail to make the former a necessary party to the suit, where the assignment was a written one, and absolute on its face. *Ct. of Appeals*, 1856, *Durgin v. Ireland*, 14 *N. Y. (4 Kern.)*, 322.

440. But where it was shown without objection that another person besides the assignee, was to share in the proceeds,—*Held*, that the assignee could not maintain the action. The complaint alleging only an individual claim, plaintiff could not recover as the trustee of an express trust. *N. Y. Com. Pl.*, 1856, *Lewando v. Dunham*, 1 *Hill.*, 114.

441. Nominal plaintiff. Where A. took from B. a transfer of a note, giving therefor his own note for the amount due, payable at a future day, upon an understanding that he should prosecute the note transferred to him, and that if he should not succeed in the collection thereof, he was not to pay the note given by him, but that it was then to be returned; and B. attended to the service of summons, notices, and a subpoena in the action; and it did not appear that A., the plaintiff, took any part except to attend on the trial, where he was examined as witness,—*Held*, that A. was not the real party in interest, and could not maintain the action. [Code, § 111.] *Supreme Ct.*, 1857, *Killmore v. Culver*, 24 *Barb.*, 656.

442. Consideration. The mere fact that the assignment of a chose in action sued upon was made without consideration, apart from circumstances tending to show that it was colorably made, is not material to the issue; and judgment for the assignee ought not to be reversed for the refusal of the court below to

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allow the want of consideration to be shown. *N. Y. Com. Pl.*, 1855, *Burnett v. Gwynne*, 2 *Abbotts' Pr.*, 79.

443. Defendants agreed with the plaintiff and two others to convey to them certain real property, and to construct a road therefrom, within a fixed time. They conveyed, but failed to construct the road. After the breach, the other grantees transferred to the plaintiff the premises, and all the privileges and rights which they purchased, with the appurtenances, &c.

Held, that the plaintiff could not alone maintain an action for the breach. 1. The contract was not a continuing one, but the breach was single and indivisible, and the cause of action was complete, and entire damages recoverable at the expiration of the time fixed, and only one action could be maintained. [19 *Wend.*, 207; *Sedgw. on D.*, 224; 8 *Barb.*, 420, 412; 1 *Hill*, 580; 6 *Id.*, 54; 7 *Id.*, 61; 14 *Verm.*, 311; 11 *Paige*, 414.] 2. The transfer of the premises, &c., to the plaintiff, did not operate as an assignment to him of the cause of action, and therefore his grantors were necessary co-plaintiffs with him. *Supreme Ct.*, 1858, *Atwood v. Norton*, 27 *Barb.*, 638; affirmed, *Ct. of Appeals*, 1858, *Id.*, 651.

444. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due. *Code of Pro.*, § 112.

As to **What causes of action** are assignable, see **ASSIGNMENT**.

445. In case of an assignment in parts, to several persons, of an entire demand, an assignee of one of the parts may maintain an equitable suit, under the Code, to recover his part, notwithstanding that another assignee has collected his part of the demand by judgment. Although it would not be necessary to join such assignee, yet, all the other assignees or persons interested should be joined. *Supreme Ct., Sp. T.*, 1852, *Cook v. Genesee Mutual Ins. Co.*, 8 *Hov. Pr.*, 514.

446. The master of a vessel who signs a charter-party, payable to himself, may assign the charter moneys and claims for demurrage, &c., in his own name, and the assignee may maintain an action therefor. *N. Y. Com. Pl.*, 1855, *Rupp v. Lobach*, 4 *E. D. Smith*, 69.

4. *Trustees and Agents.*

447. The committee of a lunatic may bring actions on promissory notes he received as such committee, in his own name. *Supreme Ct.*, 1856, *Davis v. Carpenter*, 12 *Hov. Pr.*, 287.

448. An action to cancel a judgment, which is a lien on real property that the defendant in the judgment has assigned for the benefit of creditors, is properly brought by such defendant and his assignees jointly. The debtor himself might bring it, he being interested in having the judgment cancelled; and his assignees might bring it, as representing the assigned property, on the title to which the judgment was a cloud, and generally as representing the rights of other creditors in the fund assigned. *Supreme Ct.*, 1857, *Monroe v. Delavan*, 26 *Barb.*, 16.

449. An administrator may bring trespass, for unlawfully taking goods of the intestate after his death, and before administration granted. He may also maintain an action for trespass committed on the real estate, or for taking and carrying away the goods of the intestate in his lifetime. *Supreme Ct.*, 1854, *Rockwell v. Saunders*, 19 *Barb.*, 478.

450. An action lies by an administrator in his own name and without declaring in his representative capacity, for the goods of his intestate converted after his death, even though the conversion was before the granting of administration. But for conversion of such property during the lifetime of the intestate, he can maintain an action in his representative capacity only. [9 *Wend.*, 302.] *Supreme Ct.*, 1855, *Sheldon v. Hoy*, 11 *Hov. Pr.*, 11.

451. An executor who, for a consideration proceeding from the estate of the testator, takes a note payable to him as executor, may maintain an action thereon, in his representative capacity. [6 *N. Y.*, 168.] *Supreme Ct.*, 1858, *Eagle v. Fox*, 28 *Barb.*, 473; *S. C.*, 8 *Abbotts' Pr.*, 40; and see *Bright v. Currie*, 5 *Sandf.*, 433; *S. C.*, 10 *N. Y. Leg. Obs.*, 104.

452. Executors of deceased trustee. Where a residuary legacy was given to a daughter, and, if she died without issue, then a bequest out of it to a corporation, and the guardian or trustee of the daughter died, and the funds passed into the hands of his executors,—**Held**, that those executors were proper parties defendant in an action by the

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corporation against the administrators of the daughter, to recover the bequest. *Supreme Ct.*, 1854, *Theological Seminary v. Cole*, 18 *Barb.*, 860.

453. Legal title. Where an action is brought by a trustee, in whom the legal title is vested, it is not necessary that the *cestui que trust* should be made parties, unless the action involves the determination of their respective rights and interests under the instrument creating the trust. *Ct. of Appeals*, 1858, *Mellen v. Hamilton Fire Ins. Co.*, 17 *N. Y.* (8 *Smith*), 609.

454. That the trustees of a religious corporation have possession and custody of the temporalities of the church, whether real or personal estate, and are the proper parties to bring an action for any injury to either. [9 *Wend.*, 414; 8 *Johns.*, 864; 9 *Id.*, 147.] *Supreme Ct.*, 1858, *Methodist Episcopal Church v. Stewart*, 27 *Barb.*, 558.

455. President of bank. A banking association formed under the General Banking Act, though authorized by the act to sue in the name of its president, possesses enough of a corporate character to warrant it in suing in its corporate name instead. *N. Y. Com. Pl., Sp. T.*, 1854, *East River Bank v. Judah*, 10 *How. Pr.*, 135.

456. That the general agent of an incorporated association can sue in his own name for the benefit of the association. *N. Y. Superior Ct.*, 1851, *Habicht v. Pemberton*, 4 *Sandf.*, 657; and see *Myers v. Machado*, 6 *Abbotts' Pr.*, 198.

457. Trust. Statute authority. An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. *Code of Pro.*, § 113.

458. Mercantile factors or agents doing business for others, but in their own names, without disclosing that of their principal, are "trustees of an express trust," within section 113 of the Code. *So held*, as against an application after judgment for such plaintiffs, to set aside the judgment to allow the defendant to interpose the defence that they were not the real party in interest. *N. Y. Superior Ct.*, 1850, *Grinnell v. Schmidt*, 2 *Sandf.*, 706; *S. C.*, 3 *Code R.*, 19; 8 *N. Y. Leg. Obs.*, 197.

459. A person who, as agent, executes a contract which does not disclose the name of his principal,—e. g., a lease signed "A., as agent for the owner,"—is a trustee of an express trust, within the meaning of section 113 of the Code, and may maintain an action on the contract in his own name. The Code gives an election, in such cases, to sue in the name of the party contracting, or the party in interest. [6 *How. Pr.*, 471.] *Supreme Ct.*, 1858, *Morgan v. Reid*, 7 *Abbotts' Pr.*, 215. Compare *Considerant v. Brisbane*, 22 *N. Y.*, 889; reversing *S. C.*, 2 *Bosw.*, 471.

460. Committee. The agreement on which the action was brought showed that the plaintiff assumed to act on the behalf of J. and others not named, and to bind himself personally to accomplish certain results beneficial to the defendants, in consideration of their agreement to pay him, for the benefit of those for whom he acted, certain moneys and notes. *Held*, that he was a trustee of an express trust, within section 113 of the Code; and that those for whom he assumed to act were not necessary parties to an action in his name on the contract. *N. Y. Superior Ct.*, 1857, *Rowland v. Phalen*, 1 *Bosw.*, 48.

461. An auctioneer who in his own name sells goods for a third person, is the trustee of an express trust within the meaning of section 113 of the Code, and as such may sue upon the contract of sale without an assignment of the claim. *N. Y. Com. Pl.*, 1852, *Bogart v. O'Regan*, 1 *E. D. Smith*, 590. Compare *Minturn v. Main*, 7 *N. Y.* (8 *Seld.*), 220; affirming *S. C.*, *sub nom.* *Minturn v. Allen*, 8 *Sandf.*, 50.

462. An individual banker who is the nominal proprietor of his bank, though others are interested with him, is, as respects such others, trustee of an express trust, and may sue in his own name a security taken in the course of the business. *Supreme Ct.*, 1858, *Burbank v. Beach*, 15 *Barb.*, 326.

463. The committee of a lunatic may bring, in his own name, an action to set aside an act or deed of the lunatic; for although he is not the real party in interest (*Code*, § 111), nor a person expressly authorized by statute (§ 113), he is a trustee of an express trust within section 113. *Supreme Ct., Sp. T.*, 1852 *Person v. Warren*, 14 *Barb.*, 488.

464. Official bond. Where a bond of a trustee and his surety is given to the people of the State, for the benefit of the persons in-

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interested in the trust-estate, an action upon the bond may properly be brought in the name of the People. In such case the People are "trustees of an express trust" within the meaning of section 118 of the Code.* *Ct. of Appeals*, 1858, *People v. Norton*, 9 *N. Y.* (5 *Seld.*), 176. *Supreme Ct., Sp. T.*, 1849, *Bos v. Seaman*, 2 *Code R.*, 1. *S. P., N. Y. Com. Pl., Sp. T.*, 1856, *Mayor, &c., of N. Y. v. Doody*, 4 *Abbotts' Pr.*, 127; and see *BANKING*, 156.

Compare, however, *supra*, 418, 428.

465. That the person immediately interested in the recovery should be joined as relator, *People v. Laws*, 4 *Abbotts' Pr.*, 292.

466. Bond of indemnity. A deputy sheriff having levied an execution, took a bond to the sheriff to indemnify him, and "every person aiding him in the premises." The deputy having sold under the execution, was sued by a third party, who recovered judgment against him. *Held*, that the sheriff was trustee of an express trust; the obligation was executed to him for the benefit of his deputy; and suit thereon was properly brought in the name of the sheriff, without any assignment of the cause of action to him. [Code, § 118.] *Ct. of Appeals*, 1858, *Stillwell v. Hurlbert*, 18 *N. Y.* (4 *Smith*), 374.

467. The assignee of a life policy in trust for the wife of the insured, may, upon the death of the latter, sue in his own name, as trustee of an express trust, for the sum insured. Neither the wife nor the personal representatives of the insured are necessary parties. *Ct. of Appeals*, 1855, *St. John v. American Mutual Life Ins. Co.*, 18 *N. Y.* (3 *Kern.*), 31; affirming *S. C.*, 2 *Duer*, 419; and 12 *N. Y. Leg. Obs.*, 265.

468. *Cestuis que trust*. That under section 118 of the Code, when a trustee of an express trust is sued, the *cestuis que trust* are deemed before the court by representation. *Supreme Ct., Sp. T.*, 1857, *Mead v. Mitchell*,† 5 *Abbotts' Pr.*, 92.

469. Assignee for creditors. An assignee of a demand in trust to pay certain creditors of the assignor, and the balance to the assignor himself, may bring an action in his own name

without joining the *cestuis que trust* as plaintiffs. *N. Y. Com. Pl., Sp. T.*, 1857, *Lewis v. Graham*, 4 *Abbotts' Pr.*, 106.

470. An officer of a foreign corporation or company may maintain an action here in his own name on behalf of his company, if his complaint states facts showing his authority to sue on their behalf; for in such case he may be regarded as the trustee of an express trust. *N. Y. Superior Ct., Sp. T.*, 1857, *Myers v. Machado*, 6 *Abbotts' Pr.*, 198.

5. Bailors, Bailees, &c.

471. Bailee may sue. An action in the nature of an action on the case for negligently injuring property intrusted to defendant's care, by a bailee having a special interest in the property, may be brought in the name of the latter, especially where such person has made himself responsible to the real owner for the property. *N. Y. Com. Pl.*, 1855, *Harrison v. Marshall*, 4 *E. D. Smith*, 271.

472. Innkeeper's liability. Two partners, only one of whom is a guest at an inn, can maintain an action *sounding in tort* against an innkeeper, as such, for the loss of goods which are the property of the firm. [19 *Wend.*, 544; 21 *Id.*, 282.] *N. Y. Com. Pl.*, 1850, *Needles v. Howard*, 1 *E. D. Smith*, 54.

473. Carriers. One who at his own expense and on his own business sends his son on a journey, and places in his possession baggage for the purposes of the journey, may recover against a carrier for the loss of the baggage, if his action is in tort, not on contract. *N. Y. Com. Pl.*, 1850, *Grant v. Newton*, 1 *E. D. Smith*, 95.

474. Consignee. That though a mere consignee, having no interest, cannot maintain an action against the owners for an injury to the goods, yet where goods are delivered to the carrier, on behalf of the consignee, and are placed at his sole disposal, he may be presumed to be the owner. *N. Y. Com. Pl.*, 1854, *Ogden v. Coddington*, 2 *E. D. Smith*, 317.

475. Factor. An action for conversion will lie at suit of a factor who has stored property consigned to him, with a third party, from whose possession it has been taken by a wrongdoer. The right of action does not depend upon the fact of possession; it grows out of the right to the possession. *N. Y. Com. Pl., Sp. T.*, 1855, *Gorum v. Carey*, 1 *Abbotts' Pr.*, 285.

* In *People v. Cram*, 8 *How. Pr.*, 151, the same practice was sustained, on the ground that the People were the party to the bond.

† Affirmed, *Ct. of Appeals*, 1858, 17 *N. Y.* (3 *Smith*), 210.

In Civil Actions (under the Code of Procedure):—Governments and Officers:—Husband and Wife.

6. Governments and Officers.

476. A foreign republic may maintain an action in the courts of this State, in the name by which it is known as a State. *N. Y. Superior Ct.*, 1856, Republic of Mexico v. De Arangoiz, 5 *Duer*, 634; affirming S. C., 11 *How. Pr.*, 1.

477. Although a sovereign State cannot be sued in the courts of this State, a complaint is not demurrable because such a State is joined as defendant in an action seeking to enforce a demand against other defendants. The joinder may amount to nothing more than an invitation to appear, and it may be left to the option of the State to determine whether they will, not for the purpose of submitting themselves to the coercive power of the court, but to enable it to arrive at a correct and satisfactory determination. The objection to such joinder, if taken by demurrer, is premature. *Supreme Ct., Sp. T.*, 1857, Manning v. State of Nicaragua, 14 *How. Pr.*, 517.

478. Officers and board distinguished. Where a county is sought to be made liable, the action should be against "The board of supervisors of the county of," &c. [1 *Rev. Stat.*, 364, § 8], and not against them in their individual names, adding the name of office. Such has been the uniform practice. [See 7 *Wend.*, 530; 19 *Id.*, 102; 10 *Id.*, 368; 9 *Id.*, 182; 26 *Id.*, 66; 19 *Johns.*, 272; 8 *Barb.*, 332; 4 *Id.*, 64; 5 *Den.*, 517.] The provision of 2 *Rev. Stat.*, 474,—requiring that actions against the officers mentioned in section 92 (among which are supervisors) shall be brought against them individually, specifying their names of office,—does not apply to actions against counties. [§ 95.] *Supreme Ct., Sp. T.*, 1854, Wild v. Supervisors of Columbia, 9 *How. Pr.*, 315. To similar effect, see opinion of ALLEN, J., in Hill v. Supervisors of Livingston, 12 *N. Y. (2 Kern.)*, 52.

479. But where an action was brought in the names of several officers, instead of that of a board which they composed, an amendment was allowed. *Pomroy v. Sperry*, 16 *How. Pr.*, 211.

480. On the bond of a town superintendent of common schools, an action must, under the statutes, be brought in the name of the supervisor, or his successor in office. *Supreme Ct.*, 1852, Fuller v. Fullerton, 14 *Barb.*, 59.

481. Under the provision of the License

Law of 1857,—that penalties imposed by the act should be recovered in the name of the Board of Commissioners of Excise,—an action under a section declaring that whoever shall sell, &c., "shall forfeit fifty dollars," is properly brought in the name of the Board. *Saratoga County Ct.*, 1857, Commissioners of Saratoga v. Doherty, 16 *How. Pr.*, 46.

7. Husband and Wife.

482. Tort. In an action for a tortious injury to personal property, committed by a wife, it is proper to join both husband and wife as defendants, although the injury was committed by the sole act of the wife and without the husband's knowledge. *N. Y. Com. Pl.*, 1858, Matthews v. Fiestel, 2 *E. D. Smith*, 90.

483. Curtesy. An action to recover real property, of which the husband is seized as tenant by the curtesy initiate, is properly brought in the name of the husband and wife united. *Supreme Ct.*, 1851, Ingraham v. Baldwin,* 12 *Barb.*, 9; but compare Aukley v. Tarbox, 29 *Id.*, 512.

484. The husband is not a necessary party to an action for the partition of lands in which his wife has an estate, held as her separate property, acquired by her under the acts of 1848 and 1849. Tenancy by the curtesy is abrogated by those acts. *Supreme Ct.*, 1859, Billings v. Baker, 28 *Barb.*, 343; S. C., at *Sp. T.*, 15 *How. Pr.*, 525; but compare HUSBAND AND WIFE; and CURTESY, 16, 17.

485. Service of wife. In an action against husband and wife, service of process on the wife is only necessary where the proceeding is against her in respect to her separate estate, in which case the husband is only a nominal party. In other cases, the husband on being served is bound to enter a joint appearance, and put in a joint answer for himself and wife. [1 *Paige*, 421; 3 *Chitt. Gen. Pr.*, 263.] And where the only interest of the wife in the premises affected by the judgment is her inchoate right of dower, it will be presumed, upon a motion to let the wife in to defend separately, that the husband has put in a suitable defence in due season. *Supreme Ct., Sp. T.*, 1855, Eckerson v. Vollmer, 11 *How. Pr.*, 42.

486. That the husband may sue alone or with his wife, for her services, where the con-

* Affirmed, *Ct. of Appeals*, 1853, 9 *N. Y. (5 Seld.)*, 45.

In Civil Actions (under the Code of Procedure):—Husband and Wife.

tract was made with her; but when they sue together he cannot join a claim of his own. *N. Y. Com. Pl.*, 1855, *Avogadro v. Bull*, 4 *E. D. Smith*, 384.

487. Separate estate. The husband is not a necessary party to the wife's action to recover her separate estate, unless he claims an interest in the subject of the action, or a complete determination of the matter cannot be made without him. The mere fact that he is the husband is not a sufficient ground for requiring him to be made a defendant. *Supreme Ct.*, 1856, *Hillman v. Hillman*, 14 *How. Pr.*, 456.

488. Mortgage by both on purchase by wife. Where a husband and wife united in executing a bond and mortgage to secure the purchase-money of land conveyed to the wife subsequent to the Married Woman's Act of 1848,—*Held*, that both were proper parties to an action to foreclose, nor was there a misjoinder of causes of action, although the wife was not liable on the bond in case of a deficiency on sale. The bond was void as to the wife, but good as to the husband. The wife was a necessary party because the legal estate was in her, and the husband was a proper party because of his liability on the bond in case there should be a deficiency on the sale. *Supreme Ct.*, 1849, *Conde v. Shepard*, 4 *How. Pr.*, 75.

489. When a married woman is a party, her husband must be joined with her; except that, 1. When the action concerns her separate property she may sue alone.* 2. When the action is between herself and her husband, she may sue or be sued alone. And in no case need she prosecute or defend by a guardian or next friend.† *Code of Pro.*, § 114.

490. Infant wife. In a suit to recover lands of a married woman who is an infant, if

* And see *Willis v. Underhill*, 6 *How. Pr.*, 396. By the act of 1860 (*Laws of 1860*, 158, ch. 90, § 7; amended, *Laws of 1862*, 344), she may sue or be sued alone respecting her separate property as if she were sole.

† Before this provision was added by the amendment of 1857 (ch. 723, § 2), it was held that a wife could not sue her husband without a next friend, except in the single case of a suit for an absolute divorce. [8 *Wend.*, 857.] *Supreme Ct.*, *I. Dist.*, 1850, *Coit v. Coit*, 6 *How. Pr.*, 53; affirming *S. C.*, 4 *Id.*, 282; 2 *Code R.*, 94. Followed, *Sp. T.*, 1851, *Willis v. Underhill*, 6 *How. Pr.*, 396; *Forrest v. Forrest*, 8 *Code R.*, 254; and see *Henderson v. Easton*, 8 *How. Pr.*, 201.

But the contrary was held in *N. Y. Superior Ct.*, 1850, *Shore v. Shore*, 2 *Sandf.*, 715; *S. C.*, 8 *N. Y. Leg. Obs.*, 166; *sub nom.* Anonymous, 3 *Code R.*, 18;

they are not her separate property her husband should sue, and she should be joined, especially if she has the fee, and was ousted before coverture, or if neither of them during coverture have had actual or constructive possession. [Plowd., 418; 1 *Chitt. Pl.*, 63, n.; 4 *Vin.*, 77, 78; 1 *Bac. Abr.*, Bar. & Feme, K.; 2 *Co.*, 61, b.; 8 *Id.*, 21, b.; 2 *Kent*, 181; 1 *Bl.*, 443, n. 44; *Bing. on Cov.*, 248; *Reeve's Dom. Rel.*, 27; 13 *Wend.*, 271.] In case they sue together, no guardian or *prochein ami* is necessary, though she be an infant. The husband appoints an attorney for both. [Code, § 114; 2 *Saund.*, 218; *Bing. on Inf.* 128; and see 4 *How. Pr.*, 93.] If they are her separate property she must have a next friend, whether she claims a legal or equitable estate. [Code, § 114; 9 *Paige*, 255; 10 *Id.*, 201; 2 *Barb.*, 498; 2 *Keene*, 59; 1 *Beav.*, 96; 6 *How. Pr.*, 53.] *Supreme Ct.*, *Sp. T.*, 1851, *Cook v. Rawdon*, 6 *How. Pr.*, 283.

491. In actions concerning separate estate. Husband and wife, as plaintiffs, brought two actions against the same defendant, one on a contract with the wife to pay for board in a boarding-house kept by her, and claiming that the amount due the wife was her separate property; the other for a tort, alleging that the defendant broke and entered a close in the possession of and occupied by the wife, and also broke and entered the dwelling-house occupied by the wife, and forced open the doors, whereby the wife was, &c. *Held*, That these causes of action were vested in the husband alone. The allegation that the demand on contract was the wife's separate property was inconsistent with the legal conclusion from the facts stated, and in the second case the legal injury was to the husband alone. *Supreme Ct.*, *Sp. T.*, 1853, *Dunderdale v. Grymes*, 16 *How. Pr.*, 195.

492. Husband must be a party. In all cases in which a wife sues, or is sued by a stranger, in respect to her separate property,

Supreme Ct., *VI. Dist.*, *Sp. T.*, 1850, *Tippel v. Tippel*, 4 *How. Pr.*, 346; *S. C.*, 3 *Code R.*, 40; *VIII. Dist.*, *Newman v. Newman*, 8 *Id.*, 188.

The amendment of 1851 required her to appear by next friend in all cases where her husband could not be joined with her. *Laws of 1851*; *Code*, § 114; *Heller v. Heller*, 6 *How. Pr.*, 194; *Meldora v. Meldora*, 4 *Sandf.*, 721; *Henderson v. Easton*, 8 *How. Pr.*, 201; *Thomas v. Thomas*, 18 *Barb.*, 149; *S. C.*, 12 *N. Y. Leg. Obs.*, 274.

In Civil Actions (under the Code of Procedure);—Husband and Wife.

her husband should be a party, plaintiff or defendant, but it seems that the non-joinder may be waived. *Supreme Ct., Sp. T.*, 1853, *Howland v. Fort Edward Paper Mill Co.*, 8 *How. Pr.*, 505.

493. Where a wife is sued, although the object of the action is to charge her separate estate, her husband is a proper party defendant. *N. Y. Com. Pl., Sp. T.*, 1859, *Francis v. Ross*, 17 *How. Pr.*, 561.

494. — **may join as plaintiff.** When the action concerns the separate property of the wife, she may sue alone; but where there is no adverse interest, he may join, if she verifies the complaint, thus signifying not only her knowledge but her consent that the action should be commenced. She is then the principal actor in the suit, and the mere circumstance that her husband is a co-plaintiff, cannot exempt her from being bound by the judgment, and hence no next friend is necessary. *Supreme Ct., Sp. T.*, 1855, *Woods v. Thompson*, 11 *How. Pr.*, 184.

495. — **cannot join.** Section 114 of the Code (1852) should be construed thus: When a married woman is a party, the husband must be joined in the action, except that if the action concern her separate property, the husband cannot be joined with her, but she must sue by a next friend; and when the action is between herself and her husband, she shall prosecute or defend by her next friend. The last clause is unmeaning, unless "may" in the preceding clauses is to be read "must." On clear authority before the Code [2 S. & St., 464; 7 Sim., 239; 1 Keene, 7; 2 Id., 59; 1 Beav., 96; 10 Paige, 201; 9 Id., 257; 3 Barb., 397; 6 Id., 414; 1 S. & St., 185], and upon a true interpretation of the Code, a complaint concerning the wife's separate property cannot be filed by her and her husband, but she must appear by next friend, and her husband cannot be such. *N. Y. Superior Ct., Sp. T.*, 1854, *Smith v. Kearney*, 9 *How. Pr.*, 466.

To the contrary is *Rusher v. Morris** (*Supreme Ct., Sp. T.*, 1854), 9 *How. Pr.*, 266; affirmed, *Gen. T., Id.*, 282, *note*; which held that the husband might be co-plaintiff.

496. The complaint in an action by husband and wife for foreclosure of a mortgage which belonged to the wife, asked that the

money be paid to both. *Held*, that a demurrer should be overruled, and that the judgment should direct that the money be paid to the wife, unless she gave a written consent duly acknowledged, that it be paid to her husband or other person. *N. Y. Superior Ct., Sp. T.*, 1854, *Smith v. Kearney*, 9 *How. Pr.*, 466.

497. In an action by a married woman to determine the rights of parties interested in an estate, of whom she is one, her interest being her separate property, her husband should not be joined. The Code has not altered the rule in this respect. *Supreme Ct., Sp. T.*, 1852, *Brownson v. Gifford*, 8 *How. Pr.*, 389.

498. — **need not join.** A married woman may maintain an action, without joining her husband with her, to recover upon a promissory note given to her during coverture, for a loan of money which was her separate property. *Supreme Ct.*, 1857, *Smart v. Comstock*, 24 *Barb.*, 411.

499. — **made defendant.** A wife may maintain an action against copartners, one of whom is her husband, to recover moneys belonging to her separate estate, which she loaned to them. *Supreme Ct., Sp. T.*, 1859, *Devin v. Devin*, 17 *How. Pr.*, 514. To the same effect, 1858, is *Power v. Lester, Id.*, 418.

500. **When a married woman of another State, sues in this State, respecting her personal property alleged to be her separate estate, she is to be deemed as being capable of holding such separate property until the contrary is shown.** Her husband need not be joined with her in such action. [Code, § 114.] *N. Y. Superior Ct., Sp. T.*, 1856, *Spies v. Accessory Transit Co.*, 5 *Duer*, 662.

501. **Rent due husband and wife.** Where a lease is executed by husband and wife, of land in which the wife has an estate for life, and the lessee covenants in terms to pay rent to both, both may join in an action for the rent; notwithstanding the wife did not acknowledge the execution of the lease, and therefore was not bound by it. *Supreme Ct.*, 1855, *Jacques v. Short*, 20 *Barb.*, 269.

502. **Lease to wife.** A lease for years is a grant of an interest in real property within the meaning of the acts of 1848 and 1849, and such lease to a wife is valid, and enables her to maintain an action to recover possession, even without joining her husband. *So held*, where the lease reserved rent but contained no covenant on her part for its payment. *Ct.*

* See this case in table of CASES CRITICIZED, Vol. I., *Ante*.

In Civil Actions (under the Code of Procedure);—Who may be Plaintiff.

of Appeals, 1857, *Darby v. Callaghan*, 16 *N. Y. (2 Smith)*, 71.

503. Wife sued. When a married woman is proceeded against in respect to her separate estate, she must be treated and may act as a *feme sole*, although her husband is united with her in defence of the action; and her separate demurrer put in without his leave may be sustained. *Supreme Ct., Sp. T.*, 1858, *Arnold v. Ringold*, 16 *How. Pr.*, 158.

504. — may be sole defendant. In reference to the property of a married woman held by her under the acts of 1848 and 1849,—*s. g.*, where the claim is for damages for her breach of an agreement to repair premises forming her separate estate, and leased by her to the plaintiff,—she may be sued alone, and a personal judgment may be rendered against her, as if she were sole. *N. Y. Com. Pl.*, 1856, *Walker v. Swayzee*, 8 *Abbotts' Pr.*, 186.

505. Election. Where a wife who has a separate estate, contracts a debt during marriage, with the consent and approbation of her husband, the creditor has the election of suing both, or one—both, if he wishes to reach the wife's property; one, the husband alone, if it is desired to bind him personally. *Supreme Ct., Sp. T.*, 1856, *Smith v. Scribner*, 12 *How. Pr.*, 501.

506. Injury to wife. The rule that in an action to recover damages for slanderous words spoken of a married woman, if the words are actionable *per se*, the husband is a necessary party as plaintiff, but if actionable only by reason of special damages, the husband must sue alone [2 Hill, 809], has not been changed by the Code.* *N. Y. Superior Ct., Sp. T.*, 1858, *Klein v. Hentz*, 2 *Duer*, 688.

507. Of the proper mode in which a married woman, sued as a *feme sole*, should appear and answer where she desires to set up her coverture. *Phillips v. Burr*, 4 *Duer*, 118.

7. Who may be Plaintiffs.

508. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title. *Code of Pro.*, § 117.

509. Relator. Where an action is brought by the attorney-general, the person on whose relation or information he proceeds, need not

be joined with the People as plaintiff, unless the action is substantially for his benefit. *Supreme Ct., Chambers*, 1852, *People v. Metropolitan Bank*, 7 *How. Pr.*, 144; and see *Code*, § 434.

510. In an action by the People against a person for unlawfully intruding into office, the claimant of the office may properly be joined as plaintiff, if the complaint states facts showing him entitled to the office. *Ct. of Appeals*, 1855, *People v. Ryder*, 12 *N. Y. (2 Kern.)*, 433; affirming *S. C.*, 16 *Barb.*, 870; and see *Code*, § 440.

511. In an action upon an undertaking given to secure to the defendants in an injunction-suit the damages caused thereby, all the defendants to whom it was given may join, although their damages are distinct and several. The rule of equity allowing all persons having an interest in the subject and the relief, to join, is by section 117 applied to all actions. *Supreme Ct.*, 1858, *Loomis v. Brown*, 16 *Barb.*, 325.

512. In an action brought upon an undertaking given upon a requisition in an action of claim and delivery, by assignees of only a portion of the original promisees, there is a defect of parties. All the promisees should be represented. But the objection to such defect is taken too late if raised for the first time upon appeal from a judgment upon a verdict for plaintiffs. *N. Y. Superior Ct.*, 1856, *Bowdoin v. Colman*, 6 *Duer*, 188; *S. C.*, 8 *Abbotts' Pr.*, 431.

513. Negligent trustee for creditors. An action in the nature of an action at law cannot be maintained by a creditor against his debtor and assignee for the benefit of creditors, to recover a debt due to the plaintiff, on the ground that the assignee has neglected to apply the assets. The remedy in such a case, now as well as before the Code, is by a suit in the names, or for the benefit, of all the parties beneficially interested, and in which the trustee may be compelled to account and execute the trust; or may be replaced by a new trustee or a receiver, and may be personally charged if guilty of neglect. *N. Y. Com. Pl.*, 1852, *Bishop v. Houghton*, 1 *E. D. Smith*, 566.

514. The parent of a married infant is not a proper party to an action of divorce against such infant, and has no right, either on the ground of relationship or of an interest in the litigation, to intervene in such action

* By the Laws of 1860, 158, ch. 90, § 7; 1862, 844, she may sue for in her own name, and recover to her own use, damages to her person or character.

In Civil Actions (under the Code of Procedure);—Who should be Defendants.

Supreme Ct., 1858, E. B. v. E. C. B., 28 *Barb.*, 299; S. C., 8 *Abbotts' Pr.*, 44.

515. Partners may sue for damages in an action for libel, to recover for injury done to the business or credit of the firm. *N. Y. Com. Pl.*, 1851, Taylor v. Church,* 1 *E. D. Smith*, 279.

516. Associations. In the case of an unincorporated association, persons become members of the association by originally subscribing to the articles, and whether certificates of stock were issued to them or not, they are proper parties plaintiff in an action for redress against any persons who have committed a breach of trust, or who have fraudulently concealed the property of the association, or injured or destroyed it, by negligence or intentional fraud. *Supreme Ct.*, 1854, Dennis v. Kennedy, 19 *Barb.*, 517.

517. The statutes of 1849 (ch. 258) and 1851 (ch. 455)—authorizing joint-stock and other companies and associations of seven or more persons to sue or be sued in the name of their president or treasurer—confer upon those officers no right to sue, except in cases where the shareholders or associates could before have prosecuted. The separate owners of demands, or of separate rights of action, cannot voluntarily associate and elect a president, and, under these acts, recover in the name of such president in one suit the separate demands. *Supreme Ct.*, 1856, Corning v. Greene, 28 *Barb.*, 33.

518. Those statutes do not apply to fire companies, which hold their engines, &c., merely as agents of a municipal corporation. *N. Y. Com. Pl., Sp. T.*, 1856, Masterson v. Botts, 4 *Abbotts' Pr.*, 180; and see Austin v. Searing, 16 *N. Y. (2 Smith)*, 112, 125.

519. Nor to incorporations. *N. Y. Superior Ct.*, 1855, N. Y. Marbled Iron Works v. Smith, 4 *Duer*, 862.

520. Tenants in common may properly join in an action for use and occupation, without having a joint demise. [Broom on Parties, 27, § 82; 18 Johns., 286; 6 Id., 108; 8 Id., 151; 15 Id., 482; 8 Cow., 808; 5 Hill, 56; 6 Id., 638.] *Supreme Ct.*, 1853, Porter v. Bleiler, 17 *Barb.*, 149.

9. Who should be Defendants.

521. Mere witness. The master of a ves-

sel having an unsettled account with her owner for disbursements for his wages (a part of which had been paid by his receipts from the earnings of the vessel), assigned his claim to a third person, who brought an action; and it appeared on the trial that there was a balance due from the defendant. *Held*, that, under the Code, the defendant could not require the master to be made party to the action for the purpose of enforcing an accounting. He was a competent witness for either party, and upon his examination the defendant could have every benefit from his testimony and from the production of books and papers which he could obtain from his accounting as a party. *Ct. of Appeals*, 1857, Allen v. Smith, 16 *N. Y. (2 Smith)*, 415.

522. Infant debtor. When several parties or copartners, one of whom is an infant, have entered into a contract, an action for breach of the contract cannot be maintained against the parties who were of full age. The infant must be joined. [3 Esp., 76; 5 Id., 47; 5 Johns., 160; 4 Taunt., 468; 2 Rand., 478.] *Supreme Ct.*, 1852, Slocum v. Hooker, 18 *Barb.*, 536; reversing S. C., 12 Id., 563; 6 *How. Pr.*, 167; and 10 *N. Y. Leg. Obs.*, 49.

523. Receiver or assignee of defendant. The plaintiff in an action against a corporation, seeking merely a judgment for a money-demand, joined as a party defendant the receiver of the corporation, alleging that the corporation was insolvent, but demanded no affirmative relief against the receiver. *Held*, that as against the receiver the complaint should be dismissed. If necessary to sue the receiver with or instead of the corporation, the complainant should demand relief against him. The mere fact that A. is the assignee or receiver of B., whether these be natural or artificial persons, will not justify a creditor of B. in bringing A. as a party into every suit against B., or where the rights and the remedies of the plaintiff, so far as appears, end with B., and the assignee or receiver is not to be affected by the suit, nor to be adjudged or compelled to do any thing for the relief of the plaintiff. *Supreme Ct.*, 1857, Arnold v. Suffolk Bank, 27 *Barb.*, 424.

524. Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. *Code of Pro.*, § 118.

* Reversed without discussing this point, *Ct. of Appeals*, 1858, 8 *N. Y. (4 Seld.)*, 452.

In Civil Actions (under the Code of Procedure);—Who should be Defendants.

525. Several liability. The only exception to the rule that persons only severally liable cannot be joined in the same action as defendants, is that created by section 120, relating to persons severally liable upon the same obligation or instrument. Therefore a principal debtor and his guarantor, sought to be held upon a collateral undertaking, cannot be sued together. *N. Y. Superior Ct., Sp. T.*, 1858, *Le Roy v. Shaw*, 2 *Duer*, 626. To the same effect, *N. Y. Com. Pl.*, 1855 [citing, also, 10 Barb., 638; 2 N. Y., 553], *Phalen v. Dingee*, 4 *E. D. Smith*, 379. *Supreme Ct.*, 1858, *Spencer v. Wheelock*, 11 *N. Y. Leg. Obs.*, 829.

526. Fraudulent sale by co-tenants. In an action by some of the joint-owners of a vessel, to recover for her hire, the complaint averred that the defendants had, with intent to defraud the plaintiffs, purchased the shares of the other joint-owners. *Held*, that the suggestion of fraud was immaterial, since, as respected the plaintiffs, the defendants had a right to purchase those shares; and that the averment of the sale of those shares did not constitute any reason for not making the former owners of them parties plaintiff, although it was a reason for proceeding in equity. *N. Y. Superior Ct.*, 1856, *Coster v. N. Y. & Erie R. R. Co.*, 6 *Duer*, 48; *S. C.*, 8 *Abbotts' Pr.*, 832.

527. When a vendor of real estate conveys it by a full covenant warranty deed, and a prior outstanding mortgage unsatisfied of record is discovered, which the holder of it declares to be valid, and that money is due upon it, and the grantor insists nothing to be due or owing upon it, the grantee may bring an action to have it satisfied of record, on paying what may be found due. He may make his grantor a defendant in the same action, and demand judgment that on such payment the grantor shall refund the amount to him, so that a complete determination of the controversy may be had in one action. To that end, the grantor is not only a proper but a necessary party, and a complaint stating such facts, and seeking such relief, does not improperly unite several causes of action. *N. Y. Superior Ct., Sp. T.*, 1856, *Wandle v. Turney*, 5 *Duer*, 661.

528. Surety against principal and his grantees. By agreement between F., the assignor, and D., the assignee, of leases and other personal property, the latter held the same,

subject to a debt due the former. The latter afterwards conveyed to T., subject to the conditions of the agreement, and, as a part of the consideration, covenanted to pay the debt. T. transferred to W., and W. to T. and J., with notice respectively. *Held*, 1. That the assignor might maintain an action against all the other parties, to have the debt declared a lien on the property, and satisfied by a sale of it, and for personal judgment for deficiency against D. and T. [9 Paige, 446; 10 Id., 465; 2 Kern., 74.] 2. That the judgment should direct, in the first instance, a sale of the property, by a receiver to be appointed; and that for any deficiency, execution should issue first against T., and on the return thereof unsatisfied in whole or in part, then against D. *N. Y. Superior Ct.*, 1857, *Ford v. David*, 1 *Bow.*, 569.

529. Dormant partner. In an action against partners, a dormant partner unknown to the plaintiff at the time of the making of the contract need not be joined as defendant, although he was known to the plaintiff before commencement of the action. [19 Wend., 535; 4 Id., 628; 8 Cow., 84; 2 Har. & Gill, 159, 171.] *N. Y. Superior Ct.*, 1857, *Hurlbut v. Post*, 1 *Bow.*, 28.

530. Action to set aside judgment. If a new action by the defendants in a judgment can be maintained to declare void the judgment [4 How. Pr., 350; 8 Id., 416], it cannot be without joining, as plaintiffs or defendants, all the defendants in the judgment. *Supreme Ct., Sp. T.*, 1858, *Bowers v. Tallmadge*, 16 *How. Pr.*, 325.

531. — to cancel mortgage. The assignee of a mortgage may be made a defendant in an action to set aside the mortgage as usurious. [Code, §§ 118, 122, 274.] *Supreme Ct., Sp. T.*, 1849, *Niles v. Randall*, 2 *Code R.*, 81.

532. Several transferees of plaintiff's property. One having deposited securities with agents who, in violation of their trust, disposed of them by various transactions and to separate persons, cannot join the agents and all the transferees of all the securities, as defendants, in one and the same action; seeking such final relief against each transferee as is appropriate to the transaction by which he held. There is no community of interest between the holder of one lot of securities and the holder of another. There should be separate actions brought against each transferee

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of the securities, in which the agents may be joined, at the plaintiff's option. *Supreme Ct., Sp. T.*, 1857, *Lexington & Big Sandy R. R. Co. v. Goodman*, 15 *How. Pr.*, 85; *S. C.*, 5 *Abbotts' Pr.*, 498; but compare *Reed v. Stryker*, 12 *Abbotts' Pr.*, 47; reversing *S. C.*, 6 *Id.*, 109.

533. Over-issue of stock. Where there had been a fraudulent over-issue of the certificates of stock of a corporation beyond the amount allowed by its charter, by the act of its transfer agent, and a part of such certificates was held by parties who took with knowledge of the fraud, and a part had passed into the hands of innocent purchasers, for value, and without notice; and for a part of the certificates, which had been returned by the holders, new certificates, representing in part spurious and in part genuine stock, had been issued;—*Held*, that the corporation could maintain an action against all persons who claimed stock under the spurious issue, to have the certificates representing such issue declared void; and the complaint of the corporation, joining all such parties as defendants, was not multifarious. *Ct. of Appeals*, 1858, *N. Y. & N. H. R. R. Co. v. Schuyler*, 7 *Abbotts' Pr.*, 41; *S. C.*, less fully reported, 17 *N. Y. (3 Smith)*, 592.

534. The holders of genuine stock are not necessary parties to such action. *Supreme Ct., Sp. T.*, 1859, *N. Y. & N. H. R. R. Co. v. Schuyler*, 8 *Abbotts' Pr.*, 289.

535. Stolen scrip. A stockholder whose scrip has been stolen may maintain against the corporation and a person who holds the stolen scrip, an action to establish his right to it. *N. Y. Superior Ct., Sp. T.*, 1858, *Wells v. Smith*, 7 *Abbotts' Pr.*, 261.

536. Where the plaintiff, as stockholder in a corporation, sues officers of the corporation for fraudulent mismanagement of its affairs; since the alleged acts of the defendants affect all the stockholders, there should be but one recovery, and the plaintiff should sue for himself and the others. *Supreme Ct., Sp. T.*, 1855, *Wells v. Jewett*, 11 *How. Pr.*, 242.

To the contrary, *Supreme Ct.*, 1857, *Oazeau v. Mali*, 25 *Barb.*, 578; *S. C.*, *sub nom.* *Mead v. Mali*, 15 *How. Pr.*, 347.

537. In an action by one claiming to be a stockholder, for redress against mismanagement on the part of its officers, the corporation is a necessary party. [3 *Paige*, 222.] *Id.*

538. The officers of a corporation are not

proper parties to an action against it to recover a mere money-demand. The corporation is the only proper party. *N. Y. Superior Ct., Sp. T.*, 1855, *Brahe v. Pythagoras Association*, 11 *How. Pr.*, 44.

539. Judgment between co-defendants.

The provision of section 274—that the judgment may determine the rights of the parties on each side between themselves—is to be taken in connection with that of section 118, as to what persons may be made a defendant. It is only in those cases, and in the manner, in which the conflicting claims of co-defendants could be settled in the action, according to the practice of the Court of Chancery, that they can be settled under the Code. *N. Y. Superior Ct., Sp. T.*, 1858, *Wells v. Smith*, 7 *Abbotts' Pr.*, 261.

540. In what cases this can be done, considered. *Id.*

541. Same person plaintiff and defendant.

An action does not lie in the name of the trustees of a corporation against one of their own number. A plaintiff cannot be also a defendant. [1 *N. H.*, 129.] An action at law cannot be maintained where the same person is one of the trustees, who are plaintiffs, and also sole defendant or one of several defendants. A party can have no right of action against himself, either as debtor or tortfeasor. *Supreme Ct.*, 1858, *Methodist Episcopal Church v. Stewart*, 27 *Barb.*, 558.

10. Representation. Refusal to join as Plaintiff.

542. Representation. The cases in which one person, made a party, represents others, who therefore need not be joined, discussed. *Hubbard v. Eames*, 22 *Barb.*, 597.

543. A member of a class of the community having a common interest in the subject-matter, cannot maintain an injunction-suit in his own name, or for his individual benefit. Thus, an artisan of a particular calling cannot sue alone to enjoin a violation of the statutes restricting prison labor, on the ground that such violation is prejudicial to his trade. All must join, or he must sue in behalf of himself and all others who are equally interested with him. *Supreme Ct., Sp. T.*, 1851, *Smith v. Lockwood*, 1 *Code R.*, *N. S.*, 819; *S. C.*, 10 *N. Y. Leg. Obs.*, 12; and see a further decision in *S. C.*, 18 *Barb.*, 209; *S. C.*, 10 *N. Y. Leg. Obs.*, 282.

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544. Local assessment. Where one of a number of persons whose real property was assessed for a local improvement, brought an action which he stated to be on behalf of himself and all such others, to restrain the collection of the assessment for irregularity and invalidity,—*Held*, that this was not a case in which one person was entitled to sue on behalf of others, and all allusions to others in the complaint must be disregarded. *Supreme Ct.*, 1858, *Bouton v. City of Brooklyn*, 15 *Barb.*, 875.

545. Creditor's action. The rule that a judgment-creditor may commence an action for his own benefit, or in behalf of himself and all others in the same situation with himself who may choose to come in and contribute to the expenses of the suit, has not been changed by the Code. And this rule is applicable where the action seeks to set aside an assignment made or judgment recovered in fraud of the rights of creditors. In such case, the fraudulent assignee and plaintiff in the judgment are necessary parties to the action. *Supreme Ct.*, 1855, *Hammond v. Hudson River Iron & Machine Co.*, 20 *Barb.*, 878.

546. When a creditor seeks to set aside an assignment made for the benefit of creditors, it is not necessary that all the creditors be made parties. [4 *Paige*, 28; 11 *Wend.*, 187.] *Supreme Ct.*, *Sp. T.*, 1852, *Bank of British North America v. Suydam*, 6 *Hov. Pr.*, 879; *S. C.*, 1 *Code R.*, *N. S.*, 325; *Gen. T.*, 1858, *Wheeler v. Wheeldon*, 9 *Hov. Pr.*, 293.

547. Validity of insurances. All persons holding claims against an insurance company on its policies of a certain class, are necessary parties to a suit to restrain the receiver from enforcing a premium note given on a policy of that class upon the ground that all such policies were unauthorized and void. The receiver does not represent the creditors in respect to such a controversy. *Supreme Ct.*, 1856, *Hubbard v. Eames*, 22 *Barb.*, 597.

548. Co-parties. Representation. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. *Code of Pro.*, § 119.

549. Common interest. Section 119 of the Code allows one or more of several persons having a common or general interest, as distinguished from persons united in interest, to sue or defend for all, although they are not so numerous as to make it impracticable to join all. Thus, now, as heretofore, one of four separate legatees may sue on behalf of himself and the others, for an account, &c., and all may avail themselves of the decree. *Supreme Ct.*, 1851, *McKenzie v. L'Amoureux*, 11 *Barb.*, 516.

550. All the plaintiffs to an action should appear by name, unless they are so numerous that it is impracticable for them to do so. Thirty-five are not too numerous to join. *Supreme Ct.*, *Sp. T.*, 1856, *Kirk v. Young*, 2 *Abbotts' Pr.*, 453.

11. Joint Actions against Several.

551. The indorsee of a note not negotiable cannot have a joint action against the indorser and the maker. *Supreme Ct.*, *Sp. T.*, 1849, *White v. Low*, 7 *Barb.*, 204.

552. Two persons may be jointly liable for services rendered upon employment by both, though they were not partners. *N. Y. Com. Pl.*, 1854, *Beach v. Raymond*, 2 *E. D. Smith*, 496.

553. Master and servant may both be joined as defendants in an action of tort for damages for the negligence of the servant. [2 *Lev.*, 172; *S. C.*, 1 *Vent.*, 295; 19 *Wend.*, 343; 4 *Barn. & C.*, 228.] *N. Y. Com. Pl.*, 1854, *Montfort v. Hughes*, 3 *E. D. Smith*, 591.

554. One action for damages may be brought against several defendants for an injury, single in its nature, caused by their concurrent acts,—*e. g.*, against two railroad companies for injury by a collision between their respective trains,—and a joint-judgment is not improper if both are shown to be liable. *N. Y. Superior Ct.*, 1857, *Colegrove v. N. Y. & Harlem R. R. Co.*,* 6 *Duer*, 382.

555. Where a sheriff is liable for the trespass of his deputy, both may be sued together. The sheriff is not made a defendant in such case in his official character but simply as an individual. [1 *Den.*, 327.] *Ct. of Appeals*, 1854, *Waterbury v. Westervelt*, 9 *N. Y.* (5 *Seld.*), 598; limiting *Moulton v. Norton*, 5 *Barb.*, 286. Followed, *N. Y. Superior Ct.*, 1855, *King v. Orser*, 4 *Duer*, 481.

* Affirmed, *Ct. of Appeals*, 1859, 20 *N. Y.* (6 *Smith*), 492.

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556. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff. *Code of Pro.*, § 120.

557. That this applies only to written obligations. *Supreme Ct.*, 1853, *Spencer v. Wheelock*, 11 *N. Y. Leg. Obs.*, 329; *S. P.*, 1857, *Tibbitts v. Percy*, 24 *Barb.*, 89.

558. It is applicable to bonds as well as bills of exchange and promissory notes. It embraces every agreement or undertaking upon which parties may become liable to an action,—*e. g.*, a bond executed by a principal and his sureties. *Supreme Ct.*, 1855, *Brainard v. Jones*, 11 *How. Pr.*, 569.

559. Principal and surety. S. bound himself by a sealed contract, and P., by a sealed instrument, written thereon, and of the same date, guarantied his performance. *Held*, that the instruments were not one but several contracts, and that a joint action against the two could not be sustained, either at common law, or by § 120 of the Code. *Supreme Ct.*, *Sp. T.*, 1851, *De Ridder v. Schermerhorn*, 10 *Barb.*, 638; *S. P.*, *Allen v. Fosgate*, 11 *How. Pr.*, 218; overruling *Enos v. Thomas*, 4 *Id.*, 48.

560. That an action, under the Code, against parties severally liable upon the same obligation, is, in effect, a several action against each. *Supreme Ct.*, 1852, *Parker v. Jackson*, 16 *Barb.*, 38.

561. The personal representative of a deceased partner cannot be joined as defendant with a surviving partner in an action for a partnership debt of a purely legal nature, where the complaint does not show the plaintiff's inability to collect from the survivor. Such a complaint is bad as against the representative, on his separate demurrer on the ground that it does not state facts sufficient to constitute a cause of action against him. [1 *Wend.*, 148; 2 *Johns. Ch.*, 608; 11 *Paige*, 80; 2 *Den.*, 577; 4 *Day*, 481; 1 *Gall.*, 885; 1 *Conn.*, 509; 8 *Id.*, 584; 1 *Rawle*, 212; 8 *Ham. Ohio*, 287.] *Ct. of Appeals*, 1858, *Voorhis v. Childs*, 17 *N. Y. (3 Smith)*, 354. *Supreme Ct.*, 1854, *Voorhis v. Baxter*, 18 *Barb.*, 592; *S. C.*, 1 *Abbotts' Pr.*, 43. *N. Y. Superior Ct.*, *Sp. T.*, 1858, *Higgins v. Freeman*, 2 *Duer*, 650; overruling *Ricart v. Townsend*, 6 *How. Pr.*, 460.

562. Insolvency of the partnership is not enough. *N. Y. Surr. Ct.*, 1856, *Copcutt v. Merchant*, 4 *Bradf.*, 18.

563. Where there is a joint contract or liability, and one party is dead, the other only should be sued. *N. Y. Superior Ct.*, *Sp. T.*, 1854, *De Agreda v. Mantel*, 1 *Abbotts' Pr.*, 130.

564. Several liability. The executor or the indorser of a promissory note may be sued with the maker of such note, although the maker is solvent, for their liability is not joint but several. But separate judgments must be entered against the defendants in such action. *Supreme Ct.*, 1856, *Churchill v. Trapp*, 8 *Abbotts' Pr.*, 306.

565. Joint and several. Under the Code an action may be maintained against the surviving debtor, and the administrator of the deceased debtor, upon a joint and several obligation, without averring insolvency of the survivor, though it is otherwise of a joint obligation. *Supreme Ct.*, *V. Dist.*, 1852, *Parker v. Jackson*, 16 *Barb.*, 38. *N. Y. Superior Ct.*, *Sp. T.*, 1854, *De Agreda v. Mantel*, 1 *Abbotts' Pr.*, 130; and see *Lawrence v. Leake & Watts Orphan House*, 2 *Den.*, 577. To the contrary, *Supreme Ct.*, *IV. Dist.*, *Sp. T.*, 1853, *Morehouse v. Ballou*, 16 *Barb.*, 28.

12. Rules applicable to Particular Causes of Action.

566. Accounting. A creditor suing an executor and requiring an accounting, must bring it for the benefit of the other creditors, or make them parties. *N. Y. Superior Ct.*, 1852, *Paff v. Kinney*, 5 *Sandf.*, 380.

567. A partner in an insolvent firm assigned certain property to pay partnership debts, and the property assigned included a balance due by his copartner to the firm; and the copartner approved the assignment. *Held*, that in an action by the assignor against the copartner for an accounting, it appearing that there were some creditors protected by the assignment who had not been paid, they must be made parties. *Supreme Ct.*, *Sp. T.*, 1853, *Johnson v. Snyder*, 8 *How. Pr.*, 498.

568. Where several have several interests in a fund, although the proportion of their respective shares is fixed, all must be made parties to an action by any one for his share, if an accounting is necessary to be had to establish the amount of the fund. [2 *Paige*, 19.] Thus where one of eleven harbor-masters was appointed by each of them, as was alleged, to collect certain fees, and he agreed to account and pay to each one, severally, his

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proportion,—*Held*, that he was bound to make but one accounting, and a single action would not lie at the suit of one. *N. Y. Superior Ct.*, 1857, *Dean v. Chamberlin*, 6 *Duer*, 691; *S. P.*, 1856, *Coster v. N. Y. & Erie R. R. Co.*, *Id.*, 48; *S. O.*, 8 *Abbotts' Pr.*, 832.

569. But when the proportionate share of each distributee of such fund has been definitely ascertained, by a proceeding, binding on the trustee, each is entitled to demand the payment of the share belonging to him, and may maintain a separate action for its recovery. The liability of the trustee to each is, then, exactly the same as if the sum ascertained to belong to him, had been the only sum which the trustee had received, and had been directed to pay. *N. Y. Superior Ct.*, 1855, *General Mutual Ins. Co. v. Benson*, 5 *Duer*, 168.

570. **Actions for lands.** A railroad company who construct their road through the streets of a city, and use the same only in the ordinary way, and without any claim of title, the public still using the street as such, without disturbance—cannot be said to “occupy” the street within the provision of the statute requiring ejectment to be brought against the “actual occupant.” *Supreme Ct., Sp. T.*, 1851, *Redfield v. Utica & Syracuse R. R. Co.*, 25 *Barb.*, 54.

For the Statute referred to, and other cases under it, see *supra*, 1.

571. In an action to recover possession of land and the rents and profits, persons who were not in possession when the action was commenced, and have not received any of the rents or profits, are not proper parties defendant. The provisions of sections 110, 122, 274,* of the Code,—allowing parties necessary to a complete determination to be brought in, and judgment to be given for or against one or more of several defendants,—applies only to equitable actions. *Supreme Ct.*, 1852, *Van Horne v. Everson*, 18 *Barb.*, 526.

Whether a proper party or not, such a person is not a necessary party. 1852, *Van Buren v. Cockburn*, 14 *Barb.*, 118.

572. In an action to recover land, in which the complaint charges that the defendants entered, and unlawfully withhold the possession from the plaintiffs, judgment cannot be had against a defendant as to whom there

is no proof that he has entered or withheld the premises, or committed any wrong against the plaintiffs. *Supreme Ct.*, 1853, *Champlain & St. Lawrence R. R. Co. v. Valentine*, 19 *Barb.*, 484.

573. Under the Code, in an action to recover possession of land, all persons claiming title to, or an interest in the property, may be made defendants, as well as the persons in actual possession. *Supreme Ct., Sp. T.*, 1850, *Waldorph v. Bortle*, 4 *How. Pr.*, 358. Compare *Putnam v. Van Buren*, 7 *Id.*, 81; and see *Taylor v. Crane*, 15 *Id.*, 358.

574. **Creditor's suit. Receiver.** Where a creditor recovered a judgment, and docketed it before the appointment of a receiver in supplementary proceedings,—*Held*, that he could maintain an action to set aside a fraudulent mortgage, held by the judgment-debtor, of land on which the judgment was a lien; and that the receiver was a proper defendant. *Supreme Ct.*, 1858, *Gere v. Dibble*, 17 *How. Pr.*, 81.

575. **Foreclosure.** The mortgagor who has conveyed to one who assumed the payment of the mortgage, is not a necessary party to the foreclosure. The mortgagor, in such case, is a mere surety. It is only when the party against whom the mortgagee asks a personal judgment for any deficiency is a mere surety of the mortgagor, that he can insist that the latter should be made a party, and the plaintiff's remedy exhausted against him for any deficiency in the lands, before resorting to his surety. *Supreme Ct.*, 1857, *Drury v. Clark*, 16 *How. Pr.*, 424. To the same effect, 1855, *Van Nest v. Latson*, 19 *Barb.*, 604.

576. The owner of the equity of redemption is a necessary party in foreclosure, and none the less because he holds by a deed unregistered at the commencement of the suit and at the filing the notice of pendency of action. That notice is, under the Code (§ 182), as under 2 Rev. Stat., 174, § 48, constructive notice from the time of its filing, “to purchasers and incumbancers,” which means purchasers subsequent to the notice. The operation of the proceeding is wholly prospective. Unrecorded conveyances are not void in respect to suits commenced, or notices of the pendency of actions filed, subsequent to such conveyances; nor are owners of lands, whose title is not upon record, subjected to the consequence of a suit to which their

* Compare *Parker v. Jackson*, 16 *Barb.*, 83, 42.

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grantors might be parties, but who themselves were not, merely from the plaintiff giving notice, in the manner required by statute, that he had commenced such a suit. The filing of this notice is merely a statute substitute for actual notice to subsequent purchasers and incumbrancers, of the existence of the plaintiff's claim, and that he has commenced an action to enforce it upon these lands. *Supreme Ct.*, 1856, *Hall v. Nelson*, 23 *Barb.*, 88.

577. Nor does the Registry Act afford any better answer to the objection, that such holder of the equity of redemption must be joined. An unregistered deed is not declared void as to a foreclosure of a mortgage commenced after its delivery, but only as to subsequent purchasers of the property in good faith. *Id.*

578. The mortgagor, after he has parted with his equity of redemption, may make the objection that his grantee is not a party to the suit. The want of any necessary party—of any party without whom the matters in litigation cannot be finally determined, or a perfect judgment rendered—is an objection which is expressly given to any party by the Code:—by demurrer where the facts constituting the objection appear in the complaint, or by answer where they do not. And the mortgagor's ultimate liability for the debt makes it highly important to him that the title which will be made by the sale should be perfect against all equities, especially the equity of redemption. *Id.*

579. In a foreclosure-action after the notice of the pendency of action had been filed, but before the summons had been served upon the defendant, who was proceeded against as owner of equity of redemption, his deed to third parties, which was dated and acknowledged before the filing of the notice, was put on record; and he was afterwards served. *Held*, that the grantees were necessary parties to the action, and that they not having been joined, the purchaser at the sale should be discharged. *Supreme Ct.*, *Sp. T.*, 1859, *Farmers' Loan & Trust Co. v. Dickson*, 17 *How. Pr.*, 477; *S. C.*, 9 *Abbotts' Pr.*, 61.

580. That where, upon a sale of land, a purchase-money mortgage is given, the mortgagor and his grantees have each of them such a seizin of the equity of redemption, that their wives would be entitled to dower in the portions conveyed to their respective hus-

bands, subject to the payment of the mortgage; and that the wives of such grantees are therefore necessary parties to a suit for the foreclosure of the mortgage. *Supreme Ct.*, 1856, *Mills v. Van Voorhia*, 23 *Barb.*, 125. To the same effect is the opinion of the *Ct. of Appeals*, 1859, 20 *N. Y. (6 Smith)*, 412, where, however, the judgment was reversed on other grounds.

581. In a foreclosure-action, a party with whom the mortgagor has entered into a written contract for the conveyance of the premises is a proper, though perhaps not a necessary, party defendant, and the court may order him to be brought in before a final determination of the case. *Supreme Ct.*, *Sp. T.*, 1857, *Crooke v. O'Higgins*, 14 *How. Pr.*, 154.

582. Actions for legacies. A residuary legatee, who brings an action for his share of the residue, must join all persons interested in the residue as defendants. *Supreme Ct.*, *Sp. T.*, 1856, *Tonnelle v. Hall*, 3 *Abbotts' Pr.*, 206.

583. Where a legacy is a charge upon real estate, the heir is a necessary party defendant in an action to recover it. [*Mitt. Ch. Pr.*, 164; 9 *Mod.*, 299; *Coop. Eq.*, 38; 3 *Atk.*, 406; 1 *Johns. Ch.*, 487; 1 *Abbotts' Pr.*, 45; 2 *Duer*, 663.] *Id.*

584. In an action by legatees for a legacy, the executor produced a receipt, signed by the mother of the plaintiffs, by which she acknowledged the receipt, on their behalf, of a part-payment. No authority on her part to receive the money was shown. *Held*, that she was not a necessary party defendant. *Supreme Ct.*, 1857, *Gleason v. Thayer*, 24 *Barb.*, 82.

585. — of interpleader. When a judgment of interpleader directs a suit between A. and B. by name, all persons may be made parties who claim an interest in the property in dispute, whose presence is necessary to a complete determination of the controversy. *N. Y. Superior Ct.*, 1854, *Leavitt v. Fisher*, 4 *Duer*, 1.

586. Where a bank holding a fund due to an insolvent bank brings interpleader against the respective claimants, the proper parties to such suit are, the receiver of the insolvent bank, the attaching creditors, and the sheriff who has attached for them; but not the holders of bills or checks of such bank; because they have no lien upon the fund. *Supreme Ct.*, *Sp. T.*, 1855, *Finlay v. American Exchange Bank*, 11 *How. Pr.*, 468.

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As to the cases in which **Interpleading** is proper, see **INTERPLEADER**.

587. — to cancel mortgage. Where land is conveyed subject to a mortgage, it is the primary fund for the payment of the debt; and in a suit by the grantee to have the mortgage alone cancelled and adjudged satisfied,—the bond remaining in the hands of an assignee,—the obligor and mortgagor is a necessary party. *Supreme Ct.*, 1853, *Gilbert v. Averill*, 15 *Barb.*, 20.

588. — to recover rent. In an action for rent, against an assignee of a portion of the demised premises, the owners of the other parts of the lot need not be made parties. After a partition, each owner becomes severally and independently liable for his proportionate share of the rent. *Supreme Ct.*, 1855, *Van Rensselaer v. Bonesteel*, 24 *Barb.*, 365.

589. A covenant to pay the rent reserved in a lease in fee runs with the land; and an action will lie thereon in favor of the assignee of the lessor against an assignee of the lessee. *Supreme Ct., Sp. T.*, 1856, *Main v. Feathers*, 21 *Barb.*, 646.

590. — for specific performance. A purchaser who brings an action to compel specific performance, by a conveyance from his vendor of premises which are a part of a tract which had been mortgaged by the vendor, cannot in such action make the mortgagees parties, in order to establish his equity as to the order of sale on any subsequent foreclosure, or as to the application of the purchase-money to the mortgage. The filing of notice of the pendency of the action against the vendor alone, will charge a subsequent purchaser of any part of the mortgaged premises with notice of all plaintiff's equities arising out of his right to a conveyance, in respect to the order of sale upon foreclosure or otherwise. *Ct. of Appeals*, 1858, *Chapman v. West*, 17 *N. Y.* (3 *Smith*), 125; affirming *S. C.*, *sub nom.* *Chapman v. Draper*, 10 *How. Pr.*, 367.

591. All persons entitled to have a deed executed, must join in a suit to compel the execution, and in the offer to perform the contract on their part. *Supreme Ct., Sp. T.*, 1854, *Spier v. Robinson*, 9 *How. Pr.*, 325.

592. A devisee claiming specific performance of a contract to convey to his devisor, need not join the heirs-at-law as plaintiffs. Nor need he make them defendants, unless the validity of the will is to be questioned. *Ib.*

593. The right to rents and profits accrued before the devisor's death, vests in his personal representatives; but they cannot unite with the devisee as plaintiffs. *Ib.*

594. — by claimant of goods attached. The provision of 2 *Rev. Stat.*, 281, § 83,—which provides that if any person shall claim any goods or chattels attached by a constable, he may execute a bond to the plaintiff, conditioned that if a suit be brought on such bond the claimant will establish that he was the owner of the goods seized at the time of such seizure; and in case of his failure to do so, that he will pay the value of the goods claimed, with interest,—was designed for the benefit of the general owner of the goods attached; and, to satisfy the condition of the bond, the claimant must show that he was the general owner of the goods seized, at the time of the seizure. A sheriff who has levied upon the goods by virtue of an execution, is not the owner within the meaning of the statute. He has merely a special property. *Supreme Ct.*, 1857, *Pierce v. Kingsmill*, 25 *Barb.*, 631.

595. — on constable's bond. An action on a bond given by a constable of the city of New York, to the Mayor, &c., of the city (pursuant to 2 *Rev. Laws* of 1813, 397, § 147), is properly brought in the name of the Mayor, &c., and not in that of the party aggrieved. *N. Y. Com. Pl., Sp. T.*, 1856, *Mayor, &c., of N. Y. v. Doody*, 4 *Abbotts' Pr.*, 127.

596. — pilotage penalty. An action to recover the penalty for unlicensed piloting in the East River, must, upon a just construction of the successive pilot laws, be brought in the name of the master warden of the port of New York. *N. Y. Com. Pl.*, 1857, *People v. Deming*, 1 *Hilt.*, 271; *S. C.*, 18 *How. Pr.*, 441.

597. — to enforce trust. One of many charitable societies who may by possibility become the recipients of funds given in trust for charitable use, is not entitled to sue to enforce the trust. If there are no certain *cestuis que trust*, the suit must be by the attorney-general. [*Calv. on Part. in Eq.*, 809; *Shelf. on Mortm.*, 414, 420; citing *Vin. Abr.*, tit. *Char. Uses*, H, pl. 11, and 1 *Sim.*, 8.] *Supreme Ct., Sp. T.*, 1854, *Female Association v. Beekman*, 21 *Barb.*, 565.

598. — to redress public wrongs. Suits for the redress & prevention of public wrongs can be brought only in the name of the People; and when individuals sue as such, they

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must show that their private rights are concerned. *Supreme Ct.*, 1856, *Wetmore v. Story*, 22 *Barb.*, 414; S. C., 3 *Abbotts' Pr.*, 262; S. P., *Getty v. Hudson River R. R. Co.*, 21 *Barb.*, 617.

599. The attorney-general is a necessary party to a suit which seeks relief against an act of a municipal corporation which works a public injury to the whole community over which the corporate jurisdiction extends; and with his consent he may be made a party by amendment, even after the evidence has been taken. *N. Y. Superior Ct.*, 1854, *Davis v. Mayor, &c.*, of N. Y., 3 *Duer*, 119; affirming S. C., 2 *Id.*, 663; but see *The same v. The same*, 14 *N. Y. (4 Kern.)*, 506.

600. A corporator or taxpayer, individually, or on behalf of himself and all others, cannot sue for an injury to, or a misapplication of, the corporate property or franchises, except in case of fraud, corruption, or violation of law on the part of the functionaries intrusted with the corporate powers and duties. *Supreme Ct., Sp. T.*, 1856, *Arkenburgh v. Wood*, 23 *Barb.*, 360.

601. Taxpayers and corporators of a city cannot maintain an action against an incorporated company, to restrain them from exercising a privilege under their charter, on the ground that the privilege was a valuable one, belonging to and vested in the city; and that other interests of the city at large would be affected by the use of such privilege. The city itself, not the individual taxpayers, is the proper party to represent those interests of the city. *Supreme Ct., Sp. T.*, 1855, *Smith v. Metropolitan Gas-light Co.*, 12 *Hov. Pr.*, 187.

602. An injunction should not be issued in an action by individual taxpayers, to which the supervisors are not parties, to restrain payment from the treasury of the county of orders given by the supervisors under a contract which it is alleged the supervisors had no power to make. The remedy, if the allowance of the claim is void, is by certiorari. [6 *Johns. Ch.*, 28; 26 *Wend.*, 132; 4 *Barb.*, 10; *Id.*, 17; 2 *Den.*, 26.] *Supreme Ct.*, 1856, *Gillespie v. Broas*, 23 *Barb.*, 370.

603. An individual resident and taxpayer of a municipal corporation, or creditor holding their stock, payment of which is not yet due, cannot maintain an action against the corporation and their grantee to avoid an illegal or improvident transfer of real property. One person cannot sustain a civil action for an

injury of a public nature, when the damage he sustains is no greater than that sustained by every other member of the community. *Supreme Ct.*, 1858, *Roosevelt v. Draper*, 7 *Abbotts' Pr.*, 108; S. C., 16 *Hov. Pr.*, 187; reversing S. C., *sub nom.* *Roosevelt v. Varnum*, 12 *Id.*, 469. Followed, *Sp. T.*, 1858, *Korff v. Green*, 7 *Abbotts' Pr.*, 108, *note*; S. C., 16 *Hov. Pr.*, 140. S. P., *N. Y. Superior Ct., Sp. T.*, 1858, *Davis v. Mayor, &c.*, of N. Y., 2 *Duer*, 663. *Ct. of Appeals*, 1858, *Doolittle v. Supervisors of Broome*, 18 *N. Y. (4 Smith)*, 155. *Supreme Ct.*, 1856, *Wetmore v. Story*, 22 *Barb.*, 414; S. C., 3 *Abbotts' Pr.*, 262; and see *Ketchum v. City of Buffalo*, 14 *N. Y. (4 Kern.)*, 356.

604. The only action sustainable in such case is one by the attorney-general. *Supreme Ct.*, 1858, *Roosevelt v. Draper*, 7 *Abbotts' Pr.*, 108; S. C., 16 *Hov. Pr.*, 187.

605. Special injury. Where a nuisance occasional, or is likely to occasion, a special injury to an individual, which cannot be compensated in damages, it may be enjoined, at the suit of such individual. [14 *N. Y.*, 506.] *Supreme Ct.*, 1858, *Milbau v. Sharp*, 23 *Barb.*, 228; S. C., 7 *Abbotts' Pr.*, 220.

606. Where there is no municipal corporation to assert the general right of the public, an individual proprietor of land to be injured by the perversion of a green from its public uses, may maintain an action, in behalf of himself and others similarly interested, to prevent such perversion. *Ct. of Appeals*, 1859, *Cady v. Conger*, 19 *N. Y. (5 Smith)*, 256.

13. Transfers of Interest. New Parties.

607. Continuing. To entitle a person to continue an action, as representative or successor in interest of a deceased plaintiff under section 121 of the Code (*q. v.*, **ABATEMENT AND REVIVAL**, 66), it is necessary to show that he has succeeded to his title. Where the petition asked that the infant son and the devisee in trust of the deceased plaintiff be substituted as plaintiffs, or, if that could not be done, that the court would decide which of the two was the legal successor, and substitute him, and it appeared that the son was an alien, and the devisee in trust took only a power in trust, not the legal estate,—*Held*, that neither one nor both could be substituted; for neither was the successor in interest. *Supreme Ct.*, 1854, *St. John v. Croel*, 10 *Hov. Pr.*, 258.

In Civil Actions (under the Code of Procedure);—Transfers of Interest. New Parties.

608. The provision of the Code authorizing a suit to be revived against the executor of a deceased party, applies as well to the defendant in a cross-bill as to the original suit. *Supreme Ct.*, 1849, *Hatfield v. Bloodgood*, 1 *Code R.*, *N. S.*, 212.

609. Widow. Where the plaintiff in an action to recover real property dies, and his heir applies for leave to continue the suit, it is not necessary that the widow should join in the petition, or be made a party to the subsequent proceeding; for until the assignment of dower, the widow has no estate in the lands, but a right in action merely. *Supreme Ct.*, *Sp. T.*, 1856, *Ash v. Cook*, 8 *Abbotts' Pr.*, 389.

610. The several modes by which the representatives of a deceased party to a suit may be, when necessary, made parties to the suit, pointed out. *De Agreda v. Mantel*, 1 *Abbotts' Pr.*, 180.

611. If a sole defendant die pending an action, after issue joined therein, and before trial, his personal representatives have no right to an order requiring the plaintiff to continue the action against them, as the defendants therein. In such a case, the plaintiff, at his election, may require it to be discontinued. [9 *Paige*, 893.] *N. Y. Superior Ct.*, *Sp. T.*, 1858, *Keene v. La Farge*, 1 *Bow.*, 671; *S. C.*, 16 *How. Pr.*, 377.

612. When, pending an action, the whole interest of the plaintiff in the cause of action has been transferred to a third person, the court, on the application of such third person, may allow him to be substituted as plaintiff. *N. Y. Superior Ct.*, 1858, *Banks v. Maher*, 2 *Bow.*, 690.

613. Although the original plaintiff sued as receiver of a bank, and his appointment as receiver is put in issue by the defendant's answer, the court, on a motion to substitute, as plaintiff, a person to whom the receiver's interest has been transferred, will not investigate and determine such issue. Such issue can only be tried and determined on the trial of the action. *Id.*

614. The court has power to permit an assignee of a cause of action or an interest therein, who has become such *pendente lite*, to be made a party to the suit, upon his own application. [See *Code of Pro.*, § 121.] But he comes in subject to the consequences resulting from the filing of the notice of *lis pendens*. He is simply permitted to defend in his own name, and prevent, if possessed of just

grounds therefor, a decree, which, if the permission were not given, might conclude him as a purchaser *pendente lite*. *N. Y. Com. Pl.*, 1850, *McGown v. Leavenworth*, 2 *E. D. Smith*, 24.

615. When the cause of action is assigned pending suit, the assignee is the proper party to move for his substitution as plaintiff in place of original plaintiff. The substitution will not be ordered on the motion of the original plaintiff and without notice to the assignee. It will only be granted on such terms as will protect the defendant from injury. *N. Y. Superior Ct.*, *Chambers*, 1855, *Howard v. Taylor*, 5 *Duer*, 604; *S. C.*, 11 *How. Pr.*, 380.

616. Where the object of the substitution is to make the original plaintiff a witness, the substitution will not be allowed except on condition that the original plaintiff shall not be called as a witness. *Supreme Ct.*, *Sp. T.*, 1851, *Harris v. Bennett*, 6 *How. Pr.*, 220; *S. C.*, 1 *Code R.*, *N. S.*, 203.

617. After judgment. When two persons are named as defendants, in a summons and complaint, and only one is served, and judgment is thereupon perfected against him, there is then no action pending against the other, until he is served with the summons. And if, after judgment, but before a subsequent service on him, the title to the cause of action becomes vested in a third person, the latter cannot, under section 121 of the Code, be substituted as plaintiff in the action, against the defendant afterwards served. *N. Y. Superior Ct.*, *Sp. T.*, 1857, *East River Bank v. Cutting*, 1 *Bow.*, 686.

618. Assignee for creditors. Pending an action, the plaintiff assigned his claim for benefit of creditors, and moved that the assignee be substituted; the defendants opposed the motion, and it was denied. On the trial, the defendants proved the assignment, and also proved an order in supplementary proceedings, appointing a receiver of plaintiff's property; and thereupon moved to dismiss the complaint, on the ground that plaintiff was not the real party in interest. *Held*, that the motion was properly denied. 1. The transfers did not abate the action. [*Code*, § 121.] 2. By acquiescing in the order refusing to substitute the assignee, without taking an appeal, all parties were concluded. *N. Y. Superior Ct.*, 1857, *Ford v. David*, 1 *Bow.*, 569.

619. — in bankruptcy. The validity of a

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decree and sale in foreclosure is not affected by the fact, that pending the suit one of the parties defendant became bankrupt, and had an assignee appointed under the act of 1841, who was not brought in as defendant. Persons acquiring new interests in the subject of the action, after its commencement, must assert their interest themselves, or forfeit it. *Supreme Ct.*, 1858, *Cleveland v. Boerum*, 27 *Barb.*, 352; affirming S. C., 23 *Id.*, 201; 3 *Abbotts' Pr.*, 294.

620. New parties. The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment. *Code of Pro.*, § 122.

621. That clause of § 122 of the Code, which provides that "in an action for the recovery of real or personal property," third persons interested in the subject of the action, may be brought in as parties on their application, does not apply to an action on an express or implied contract for the recovery of money,—*e. g.*, a claim to surplus moneys in foreclosure. It is confined to actions for the recovery of specific real or personal property. *Supreme Ct.*, *Sp. T.*, 1852, *Judd v. Young*, 7 *How. Pr.*, 79; 1854, *Tallman v. Hollister*, 9 *Id.*, 508. Compare *Osborne v. Betts*, 8 *Id.*, 81.

622. It is the duty of the court, when a complete determination cannot be had without the presence of other parties, to cause them to be brought in. [2 *Duer*, 668.] *Supreme Ct.*, *Sp. T.*, 1856, *Tonnelle v. Hall*, 3 *Abbotts' Pr.*, 205; *Waring v. Waring*, *Id.*, 246.

623. The fact that persons who are necessary parties to a determination of the matters in controversy, are not within the jurisdiction of the court, is not a reason for denying a motion to compel the plaintiff to amend his complaint by joining them as parties to the action. *N. Y. Superior Ct.*, *Sp. T.*, 1859, *Sturtevant v. Brewer*, 17 *How. Pr.*, 571.

624. Creditors of debtor in attachment. Where one creditor has levied on the defendant's property an attachment issued under the Code, the other creditors of the defendant

may be made co-defendants on their application. A complete determination of the controversy in respect to the fund which is in court, by virtue of the attachment, cannot be had without the presence of the subsequent creditors. *Supreme Ct.*, *Sp. T.*, 1851, *Fraser v. Greenhill*, 8 *Code R.*, 172.

625. Levy of execution. In an action for the recovery of personal property seized on an execution against a third person, the plaintiff in the execution is entitled, on application, to be made a defendant, under section 122 of the Code. *N. Y. Superior Ct.*, *Chambers*, 1854, *Conklin v. Bishop*, 8 *Duer*, 646.

626. Persons who ought to have been joined as parties, but were not (in an action of an equitable nature), may apply to come in, and if there has been no laches on their part, an application at any time before final judgment may be granted. *Supreme Ct.*, 1856, *Hubbard v. Eames*, 22 *Barb.*, 597.

As to the Right to appear, see **APPEARANCE**, 5-9.

PARTITION.

I. IN GENERAL.

II. PROCEEDINGS FOR PARTITION OF REAL PROPERTY.

1. Before the Revised Statutes.

A. At law.

B. In equity.

2. Under the Revised Statutes.

A. In general.

B. By petition at law.

C. In suits in equity.

D. In civil actions (under the Code of Procedure).

I. IN GENERAL.

1. Partition of personal property held in common was always a matter of absolute right, both by the civil and the common law, and might be called for by either tenant, at any time. [*Bac. Abr.*, tit. Joint T., I., 7; *Dom.* 1498.] Where property is severable in its nature, one tenant in common may take his portion, and this should be deemed a severance of his own part merely. *Supreme Ct.*, 1853, *Tripp v. Riley*, 15 *Barb.*, 384; and see *Fobes v. Shattuck*, 22 *Id.*, 568.

2. An action of an equitable nature may

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be sustained for the partition of personal property. A court of equity is competent to give relief in such cases, by decreeing a partition, or a sale thereof where partition is impracticable, and a division of the proceeds. The powers of a court of equity were conferred, and exist, to meet just such cases, where no adequate remedy exists at common law. [4 Rand., 95; 4 Bibb, 441; 15 Barb., 886.] *Supreme Ct.*, 1858, *Tinney v. Stebbins*, 28 Barb., 290.

3. Real property. The history of the law of England and of the State of New York respecting the partition of lands,—reviewed. *Mead v. Mitchell*,* 5 Abbotts' Pr., 92.

4. Right. In this State, partition between tenants in common of real property, is a matter of right, by the common law as well as by statute, where both parties cannot, or either of them will not, consent to hold and use the property in common. [1 Ves. & B., 554; Amb., 286; 3 Fairf., 146; Alln. on Part., 4, 78, 87; 8 Ves., 148.] *Chancery*, 1848, *Smith v. Smith*, 10 Paige, 470. *Supreme Ct.*, *Sp. T.*, 1848, *Van Arsdale v. Drake*, 2 Barb., 599; *Gen. T.*, 1848, *Haywood v. Judson*, 4 Id., 228.

5. Alluvium. Of the rule of partition for lands formed by alluvium. *O'Donnell v. Kelsey*, 10 N. Y. (6 Seld.), 412.

6. A mortgage executed by a tenant in common of lands, pending a suit for their partition, becomes a lien on his interest. *A. V. Chan. Ct.*, 1844, *Westervelt v. Haff*, 2 Sandf. Ch., 98; S. P., 1846, *Church v. Church*, 3 Id., 434.

7. Fee. That if two tenants in common make partition and execute releases in fee, and one of them had only a life-estate, but after the division the fee descends to him, and he subsequently sells and conveys in fee the part allotted to him in partition, it confirms the partition. *Ct. of Appeals*, 1850, *Baker v. Lorillard*, 4 N. Y. (4 Comst.), 257.

8. Voluntary partition. A parol partition of real property, by tenants in common, followed up by possession, is valid, and sufficient to sever the possession. *Supreme Ct.*, 1804, *Jackson v. Bradt*, 2 Cai., 169; 1809, *Jackson v. Harder*, 4 Johns., 202; 1831, *Jackson v. Livingston*, 7 Wend., 186; 1841, *Ryers v. Wheeler*, 25 Id., 484; 1855, *Mount v. Morton*, 20 Barb., 128; and see *Jackson v. Vedder*, 3

Johns., 8; *Jackson v. Richtmyer*, 18 Id., 387; *Corbin v. Jackson*, 14 Wend., 619.

9. Where, upon the trial of an action, the whole right and title of the party setting up such tenancy in common is denied, or the source from which he derived his title is abandoned, a parol partition cannot be relied on to show a transfer of title. *Supreme Ct.*, 1812, *Jackson v. Vosburgh*, 9 Johns., 270.

10. Directory statute. Partition valid, though not made by filing map, as provided, for purposes of evidence, by the act of 1762. *Jackson v. Bradt*, 2 Cai., 169.

11. Effect. A voluntary partition of the interests of several persons in lands, without warranty, will, as between such persons, only give to each one the rights and interest, either vested or contingent, which he and the others then have in the lands set off in severalty; and though one should convey away his part in fee, with warranty, a further interest in the part set off to others, which he afterwards acquires as the heir-at-law of some of his children who had a remainder in fee in the premises, not being either a vested or a contingent interest in him, at the time of the partition, does not inure to the benefit of the grantees. *Chancery*, 1847, *Carpenter v. Schermerhorn*, 2 Barb. Ch., 814.

12. That an extra-judicial partition does not prejudice third parties. *Supreme Ct.*, 1805, *Brandt v. Ogden*, 3 Cai., 6.

13. Consideration. The fact that a father paid the whole purchase-money of land, conveyed at his request to one of his sons, forms a good moral consideration for a parol agreement, subsequently made and executed between the father and the grantee, and another son, for the division of the land between the two sons. *Supreme Ct.*, 1849, *Proseus v. McIntyre*, 5 Barb., 424.

14. In the case of partition of mills, grants or reservations of water-power, expressed to be for the use of a certain existing mill or machinery, are to be taken as limited to the quantity, rather than as to the use of the particular purpose. There is no reason for implying a restriction of the right of either to apply the water to machinery which may, by competition, be injurious to the other. *Supreme Ct.*, 1849, *Fisk v. Wilber*, 7 Barb., 395.

15. Indians may make partition. The lands not to be subject to any lien. *Laws of 1849*, 578, ch. 420, § 10,

* Affirmed, *Ct. of Appeals*, 1858, 17 N. Y. (8 Smith), 210.

Proceedings for Partition of Real Property;—Before the Revised Statutes;—At Law.

II. PROCEEDINGS FOR PARTITION OF REAL PROPERTY.

1. Before the Revised Statutes.

A. At Law.

16. All the parties must be tenants in common of all the lands intended to be divided, in partition, under 1 Greenl. L., 170, § 15; otherwise the partition is void. *Supreme Ct.*, 1817, *Jackson v. Myers*, 14 *Johns.*, 854.

17. Tenants for life. A devise to two, the land "to be equally divided between them, share and share alike, and to be to them for their natural life, and after their death to be to their and each of their children, and to be divided between them share and share alike," makes the first takers tenants in common for life; and their children take as tenants in common, *per stirpes*. Though the first takers have power to make partition, it will not bind their children, and will be valid only for their joint lives. *Supreme Ct.*, 1825, *Jackson v. Luquere*, 5 *Cow.*, 221; 1837, *Boal v. Mix*, 17 *Wend.*, 119.

18. Widow. When the husband is seized of lands in severalty, his widow cannot proceed in partition to have her dower set off; though it is otherwise where the object is to sell the real estate. *Supreme Ct.*, 1818, *Coles v. Coles*, 15 *Johns.*, 819. Followed, under the Revised Statutes, *Sp. T.*, 1847, *Tanner v. Niles*, 1 *Barb.*, 560.

19. Infant petitioners. Where one of the parties applying to make a partition under the act of 1785, § 15, is an adult, the proceedings are valid, though the others are infants. *Supreme Ct.*, 1814, *Jackson v. Woolsey*, 11 *Johns.*, 446; and see *Sears v. Hyer*, 1 *Paige*, 488.

20. Outstanding estate. A tenant in common of the inheritance may maintain partition, notwithstanding a particular estate is outstanding. Thus where, before dower had been demanded, the heirs made partition, excepting from each portion one-third thereof, as the dower;—*Held*, valid. *Ct. of Errors*, 1811, *Bradshaw v. Callaghan*, 8 *Johns.*, 558.

21. Adverse possession. Partition cannot be maintained under 1 Rev. L. of 1813, 507, where the possession is adversely held, or there is a disseizin. An allegation of seizin is necessary. *Ct. of Errors*, 1827, *Clapp v. Bromagham*, 9 *Cow.*, 580; reversing S. C., 5 *Id.*, 295.

22. Petition. Under the provision that the petition must set forth the rights and titles of all the parties, it is sufficient to state, in general terms, that each tenant was seized of his part or share in fee, or, as the case may be, whether such seizin be acquired by descent or purchase. *Ct. of Errors*, 1811, *Bradshaw v. Callaghan*, 8 *Johns.*, 558.

23. If the petition state a party to be seized, a fee is intended. *Supreme Ct.*, 1805, *Lucet v. Beekman*, 2 *Cai.*, 885; S. C., *Col. & C. Cas.*, 428.

24. If the interests of the parties are incorrectly stated, the court may disregard the variance. *Supreme Ct.*, 1819, *Ferris v. Smith*, 17 *Johns.*, 221; 1836, *Thompson v. Wheeler*, 15 *Wend.*, 840; and see *Clapp v. Bromagham*, 9 *Cow.*, 580, 566.

25. Notice of presenting. The place of holding terms of the court being fixed by a public law, of which every one must take notice at his peril, the addition of a wrong place, by mistake, is mere surplusage. *Supreme Ct.*, 1826, *Willard v. Brown*, 5 *Cow.*, 281.

26. For infants, a special guardian must be appointed in the proceedings. *Supreme Ct.*, 1806, *Matter of Stratton*, 1 *Johns.*, 509.

27. It is not sufficient that the testamentary or other general guardian is made a party. *Supreme Ct.*, 1813, *Sharp v. Pell*, 10 *Johns.*, 486.

28. Service. The court cannot dispense with the statute requirement that the petition be served on all parties concerned; and if the plaintiff, in ignorance that one of the co-tenants has aliened his share, serves him and not the grantee, the partition is void. *Supreme Ct.*, 1808, *Jackson v. Brown*, 8 *Johns.*, 459.

29. The rule to appear and answer is not a rule of course. *Supreme Ct.*, 1808, *Seaman v. Davenport*, 1 *Cai.*, 7; S. C., *Col. & C. Cas.*, 148.

30. Plea. A special plea of sole seizin, or the general issue of *non tenent in simul*, to a petition for partition under the act, equally with similar pleas to a count in partition at common law, is supported by proof of a disseizin of the petitioners, or an adverse possession against them for twenty years. *Ct. of Errors*, 1827, *Clapp v. Bromagham*, 9 *Cow.*, 580; reversing S. C., 5 *Id.*, 295. *Supreme Ct.*, 1838, *Brownell v. Brownell*, 19 *Wend.*, 367.

31. Where defendants do not appear, the court, on motion, will order partition. Form

Proceedings for Partition of Real Property;—Before the Revised Statutes;—At Law.

of the order. *Supreme Ct.*, 1808, Neilson v. Cox, 1 *Cai.*, 121.

32. Commissioners named by the party, if approved, are appointed. *Ib.*

33. If there is no opposition, the notice and affidavit of service only need be read, as in other causes. *Supreme Ct.*, 1805, Codd v. Harison, 3 *Cai.*, 82; S. C., *Col. & C. Cas.*, 431; 1808, Bell v. Rhinelander, 1 *Cai.*, 20.

34. A judgment in partition only affects the rights of a joint-tenant, tenant in common, or in coparcenary. The dower of the ancestor of the tenants in common is not a proper party, nor bound by the judgment. *Ct. of Errors*, 1811, Bradshaw v. Callaghan, 8 *Johns.*, 558; and S. C. below, 5 *Id.*, 80; and see Coles v. Coles, 15 *Id.*, 319.

35. Judgment ordered upon the pleadings after demurrer to replication in a peculiar case. *Murray v. Fitzsimmons*, 2 *Johns.*, 482.

36. A partition under 1 Rev. L. of 1813, 507, does not prevent the unknown owners from controverting the title of the parties, but they cannot break up the partition so far as they admit the title. If a part has been set off to A., in severalty, and a part to B., and they admit A.'s title but deny B.'s, they can sue only for the part set off to B. *Supreme Ct.*, 1836, Sharp v. Pratt, 15 *Wend.*, 610.

37. A partition had in 1817, against unknown owners,—*Held*, conclusive as to the plaintiff's seizin, in a collateral action. *Supreme Ct.*, 1842, Cole v. Hall, 2 *Hill*, 625.

38. Security to refund, not required where sums awarded to unknown owners were small, and the owners appearing were men of large fortune. *Green v. Beekman*, 2 *Cow.*, 577.

39. One who united in a partition, and afterwards made a subdivision of the lot drawn by him, with another proprietor,—*Held*, concluded from questioning the original title. *Ct. of Errors*, 1819, Jackson v. Rightmyre, 16 *Johns.*, 314; affirming S. C., 13 *Id.*, 367.

40. That possession is not awarded. *Bromagham v. Olapp*, 5 *Cow.*, 295; and 9 *Id.*, 530, 569.

41. The guardian ad litem may purchase at the sale. *Supreme Ct.*, 1814, Jackson v. Woolsey, 11 *Johns.*, 446.

Denied, *Ct. of Errors*, 1826, Gallatian v. Cunningham, 8 *Cow.*, 361, 379. See *infra*, 81.

42. The deed given by the commissioners is conclusive only upon all the owners named

in the proceedings, or who have received the notice required (1 Rev. L. of 1813, 510, § 5), and claimants under them. But as against a stranger to such proceedings, by whom the premises were held adversely at the time of the sale, the commissioners' deed passes no title. *Supreme Ct.*, 1816, Jackson v. Vrooman, 13 *Johns.*, 488.

43. Commissioners' fees fixed at \$3 per day. *Anonymous*, 8 *Cow.*, 115; *Anonymous*, 2 *Wend.*, 621.

44. Since 1 Rev. L. of 1813, 512, directs that the compensation of the commissioners be fixed by the court, and allowed as the costs in the cause—until taxation no action can be maintained for them. *Supreme Ct.*, 1825, Smyth v. Bradstreet, 5 *Cow.*, 218.

45. Improvements. A tenant entering under a person claiming the whole premises, in severalty, is not entitled to the value of his improvements from persons recovering as cotenants. The statutes (1785, 1791) look to a partition, and the uncertainty where the shares will fall. In such cases, good faith requires indemnity for improvements, but not so where the improvements have been made in defiance of, and adversely to the claims of everybody else. *Supreme Ct.*, 1805, Jackson v. Bradt, 2 *Cai.*, 303.

46. Where plaintiff's lessor in ejectment claims under a partition made under the act of 1801, when the defendant, or those from whom he derives title, were in actual possession, the defendant is not entitled to compensation for improvements. *Supreme Ct.*, 1815, Jackson v. Trusdell, 12 *Johns.*, 246.

47. The person to whose share land falls on a partition, under the acts of 1793, 1785, and 1792, cannot maintain ejectment for it, without first tendering to the tenant the value of the improvements made since the partition, as well as of those made before it, deducting for the use and occupation of the land. *Supreme Ct.*, 1816, Jackson v. Oreal, 13 *Johns.*, 116.

48. Of proceedings under the colonial act, passed January 8, 1762. *Munro v. Merchant*, 26 *Barb.*, 383.

49. Under the act of March, 1785, partition could be had only between existing owners of equal shares. A partition setting off a portion to the representatives of A., another to those of B., and so on, is void. *Supreme Ct.*, 1828, Jackson v. Tibbitts, 9 *Cow.*, 241.

50. — and 1783. A partition had, upon

Proceedings for Partition of Real Property:—Before the Revised Statutes;—In Equity.

the application of tenant by the curtesy initiate, under the act of 1785, or that of 1788, does not bind the wife, she not being a party to the proceedings. If the tenant for life can be deemed "an owner or proprietor," it is only his estate that is bound. *Supreme Ct.*, 1838, *Zimmermann v. Rapp*, 20 *Wend.*, 100.

51. It seems that the act of 1801 does not apply where all the parties are infants, and that proceedings to sell are void, unless proof was given that the lands could not be partitioned without great prejudice. *Ct. of Errors*, 1826, *Gallatin v. Cunningham*, 8 *Cow.*, 361.

52. A partition under the act of 1801 will not bar a wife's right to dower, where she is not a party. *V. Chan. Ct.*, 1836, *Van Gelder v. Post*, 2 *Edw.*, 577.

53. Under the act of 1813, the appointment of a guardian for an infant was not a necessary preliminary to the acquisition of jurisdiction by the court; and the infant's appearing by attorney, instead of by guardian, could not be fatal to the judgment in a collateral proceeding. *N. Y. Superior Ct.*, 1849, *Fowler v. Griffin*, 3 *Sandf.*, 385. Compare *Croghan v. Livingston*, 17 *N. Y.* (8 *Smith*), 218; *S. C.*, 6 *Abbotts' Pr.*, 350; affirming *S. C.*, 25 *Barb.*, 336.

54. In a proceeding among heirs for a partition, under the act of 1813, the widow was made a party, and dower was assigned;—*Held*, that though the assignment was unauthorized as a judicial proceeding, it became obligatory when the heirs ratified the acts of the commissioners in making partition subject to the assignment. *N. Y. Superior Ct.*, 1849, *Fowler v. Griffin*, 3 *Sandf.*, 385.

55. If some consent to keep their shares together, the shares of the others may be set off. In such case a joint-judgment may be rendered against the former for their proportion of the costs. *So held*, under the act of 1813. *Supreme Ct.*, 1829, *McWhorter v. Gibson*, 2 *Wend.*, 443.

B. In Equity.

56. An adult husband may file a bill for the partition of his infant wife's estate. He has an interest in the premises, and may join with her in the bill. [2 *P. Wms.*, 518.] But her share of the proceeds should not be paid to her husband before she is of age to consent thereto, but must be paid into court for her

benefit. *Chancery*, 1829, *Sears v. Hyer*, 1 *Paige*, 483.

57. Mortgage and judgment creditors cannot be joined. A suit for a partition does not embrace the object of adjusting adverse titles and incumbrances. *Ct. of Errors*, 1827, *Sebring v. Mersereau*, 9 *Cow.*, 344; affirming *S. C.*, *Hopk.*, 501. *Chancery*, 1828, *Wotten v. Copeland*,* 7 *Johns. Ch.*, 140; 1829, *Harwood v. Kirby*, 1 *Paige*, 469.

Otherwise by the act of 1830, 2 *Rev. Stat.*, 318.

58. Where there is an incumbrance upon an undivided share, the purchaser, in case of sale, takes subject to the lien; and in case of partition, it is restricted to the part set off to the owner of such undivided share. *Chancery*, 1829, *Harwood v. Kirby*, 1 *Paige*, 469.

59. Doubtful title. Where, on a bill for partition, the legal title is disputed and doubtful, the course is to send the party to a court of law, to have his title established before proceeding with a bill. *Chancery*, 1814, *Wilkin v. Wilkin*, 1 *Johns. Ch.*, 111; 1818, *Phelps v. Green*, 3 *Id.*, 302; and see *Clapp v. Bromagham*, 9 *Cow.*, 580.

60. But where the question arises upon an equitable title set up by the defendants, this court must decide it. *Chancery*, 1820, *Coxe v. Smith*, 4 *Johns. Ch.*, 271.

61. Partial partition. A reference as to the extent of the undivided rights and interests of the parties, is not proper where the title is litigated. Where the plaintiff's right to a moiety was admitted by all the defendants claiming the other moiety, the title to which, or parts of which, was disputed,—*Held*, that there should be a partition into two moieties, one to be assigned to the plaintiff, and the further partition of the other moiety left to be decreed after the rights of the defendants were ascertained at law. *Chancery*, 1818, *Phelps v. Green*, 3 *Johns. Ch.*, 302.

62. Necessity of sale. Sale. On a bill for a partition under 1 *Rev. L.* of 1818, 514, the court may decide upon the necessity of a sale, upon the report of a master, as well as on that of commissioners; but where the master reports that a sale is necessary, commissioners will be appointed in pursuance of the

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

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statute, to sell and convey. *Chancery*, 1822, *Thompson v. Hardman*, 6 *Johns. Ch.*, 436.

63. Releases. On an actual partition in chancery, under the act of Sess. 86, ch. 100, § 17,—which declares that partitions in chancery shall be effectual, &c., and the decree, conclusive, &c.,—mutual releases of the parties are unnecessary. *Chancery*, 1818, *Young v. Cooper*, 3 *Johns. Ch.*, 295.

64. The costs of the suit are charged upon the parties respectively, in proportion to the value of their respective rights. *Chancery*, 1818, *Phelps v. Green*, 3 *Johns. Ch.*, 302.

2. Under the Revised Statutes.

A. In General.

65. Proceedings for partition of lands are regulated, in great detail, by provisions of the Revised Statutes, which are made applicable to actions under the Code of Procedure, as they were to suits in equity and petitions at common law, before the Code; and should be consulted in connection with the cases collected in this title. 3 *Rev. Stat.*, 5 ed., 602-620.

66. Jurisdiction of chancery to make partition, now confined to the statute. *Postley v. Kain*, 4 *Sandf. Ch.*, 508; and see *Wood v. Clute*, 1 *Id.*, 199. Compare, however, *Croghan v. Livingston*, 17 *N. Y. (8 Smith)*, 218; S. C., 6 *Abbotts' Pr.*, 350; affirming S. C., 25 *Barb.*, 336; *Mead v. Mitchell*, 17 *N. Y. (8 Smith)*, 210; affirming S. C., 5 *Abbotts' Pr.*, 92.

67. Dower rights, and other vested future or contingent estates, in lands partitioned, how protected. *Laws of 1840*, 128, ch. 177; amended, *Id.*, 821, ch. 379.

68. Attorney-general may proceed for the State, when authorized by the commissioners of the land-office. 1 *Rev. Stat.*, 207, § 65.

69. Partition of town lands may be adjudged. 1 *Rev. Stat.*, 357, § 7.

B. By Petition at Law.

70. Upon default, the court will require proof of title, such as would, *prima facie*, entitle to a verdict in ejectment. A reference will be ordered to the clerk. *Supreme Ct.*, 1880, *Griggs v. Peckham*, 3 *Wend.*, 436.

71. Possession. The statute does not require a *pedis possessio* to entitle a party to institute proceedings in partition. But a remainder-man cannot proceed for a partition, as he has neither actual nor constructive possession. *Supreme Ct.*, 1838, *Brownell v. Brownell*, 19 *Wend.*, 367.

72. To maintain partition the petitioner must have possession, actual or constructive. *It seems*, that one who becomes tenant in common, by the breach of a condition subsequent defeating an intermediate estate, cannot do so, but must bring ejectment. *Supreme Ct.*, 1848, *O'Dougherty v. Aldrich*, 5 *Den.*, 385.

73. Unknown owners. The statute gives the court no jurisdiction to take any step against unknown owners, until notice has been published according to the statute; and, if the record do not show that it had been made to appear to the court, by affidavit, that the owners were unknown to the plaintiff, and that the notice had been given, the judgment is void. *Supreme Ct.*, 1834, *Denning v. Corwin*,* 11 *Wend.*, 647. Compare *Cole v. Hall*, 2 *Hill*, 625.

74. The non-residence of a defendant is not proved by an affidavit stating the fact, but the title of which omitted the name of one of the defendants, and in which the non-resident was designated as Hannah, when her true and usual name was Mary Hannah; and a judgment founded on such service is void for want of jurisdiction. *Supreme Ct.*, 1844, *Oastle v. Matthews*, *Hill & D. Supp.*, 438; but compare *Varian v. Stevens*, 2 *Duer*, 635.

75. Reference as to liens, &c. Under 2 *Rev. Stat.*, 324, as amended by the Laws of 1880, 396, § 42, a reference to the clerk to ascertain liens and incumbrances, is not an essential preliminary to an order of sale, unless asked for by a party. *Supreme Ct.*, 1834, *Gardiner v. Luke*, 12 *Wend.*, 269. To the contrary, *Chancery*, 1834, *Wilde v. Jenkins*, 4 *Paige*, 481, where it is said to be indispensable in all cases; and see *Dunham v. Minard*, *Id.*, 441.

76. The court will not order a sale upon the commissioners' opinion, but they must report the facts and circumstances to enable the court to judge. [2 *Rev. Stat.*, 323, § 38.] *Supreme Ct.*, 1838, *Tucker v. Tucker*, 19 *Wend.*, 226.

77. A judgment in partition setting off mills, one to each party, with the water rights and privileges belonging to them respectively, gives the right of keeping the respective dams

* See, however, as to the presumption in favor of regularity, *Foot v. Stevens*, 17 *Wend.*, 438; *Hart v. Seixas*, 21 *Id.*, 40; *Castle v. Matthews*, *Hill & D. Supp.*, 438.

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as they then were. *Supreme Ct.*, 1885, *Hills v. Dey*, 14 *Wend.*, 204.

78. A partition does not enlarge the estate, but merely severs the tenancy or possession during its continuance. *Supreme Ct.*, 1880, *Jackson v. Christman*, 4 *Wend.*, 277.

79. Judgment limited by the petition. A suit in partition is a proceeding *in rem*, and the jurisdiction of the court is confined to the subject-matter set forth and described in the partition. Where the defendants by *cognovit* consent that partition shall be made of the land therein described, the judgment is founded upon the confession and cannot go beyond it; and if the commissioners partition, not the tract described, but land consisting partly of a portion of such tract, and partly of other property, they exceed their jurisdiction, and the court exceeds its jurisdiction in confirming the report, and the judgment is void. *Supreme Ct.*, *Sp. T.*, 1855, *Corwith v. Griffing*, 21 *Barb.*, 9.

80. Notice of sale. The provision of 2 Rev. Stat., 376, § 40,—that the omission of the sheriff to give notice of sale under an execution shall not affect the validity of any sale made to a purchaser in good faith, and without notice of any such omission,—applies to sales under a judgment in partition. The provision of section 56,—that the notice of sale of lands in partition shall be for the same time and in the same manner as is required on sales by sheriffs on execution,—necessarily implies that in every case where an omission to give notice of sale, or where an irregular notice will not invalidate a sale by a sheriff on execution, a like omission to give notice of sale, or a like irregular notice, will not affect the validity of a sale of lands in partition. *Supreme Ct.*, *Sp. T.*, 1856, *Lefevre v. Laraway*, 22 *Barb.*, 167.

81. Guardian cannot buy. Under 2 Rev. Stat., 326, § 62, the guardian *ad litem* of infant parties to a partition suit, cannot purchase the lands sought to be partitioned, except for the benefit or in behalf of such infants. He cannot purchase as agent for other persons. *Ib.*

C. In Suits in Equity.

82. Jurisdiction. By the Revised Statutes chancery has concurrent jurisdiction with courts of law in the partition of legal estates. *Chancery*, 1832, *Jenkins v. Van Schaack*, 8 *Paige*, 242.

83. An application by the general guardian of an infant tenant in common, for authority to sell his ward's estate to his co-tenants, is not proper under the provisions of 2 Rev. Stat., 380, relative to the partition of lands. He should apply under 2 Rev. Stat., 193, relative to the sale, &c., of infants' estates. *Chancery*, 1881, *Matter of Congdon*, 2 *Paige*, 566.

84. A suit in equity for partition may be commenced by bill, or by petition; and, if any of the defendants are infants, guardians must be appointed and give bond. *Chancery*, 1830, *Larkin v. Mann*, 2 *Paige*, 27.

85. The practice stated. *Ib.*

86. A person entitled to a contingent estate in an undivided portion of the premises, cannot maintain a suit for partition, and *it seems*, an absolute reversioner cannot, without the concurrence of the owners of the present interest. *Chancery*, 1881, *Striker v. Mott*, 2 *Paige*, 387.

87. Landlord. Though where a tenant acquires a moiety of the rent and reversion, the rent is merged *pro tanto*; he is not such a tenant in common that the landlord can sustain a suit for partition. *Chancery*, 1834, *Lansing v. Pine*, 4 *Paige*, 639.

88. Where lands leased are owned by several as tenants in common both of the rents and of the reversion, a bill for partition may be sustained; but a sale must be made subject to the right of the lessees. *Chancery*, 1835, *Woodworth v. Campbell*, 5 *Paige*, 518.

89. Married woman. That the objection that the complainant was a feme covert, and that her husband was not a party to the suit, is fatal to the title of the purchasers under the decree; and cannot be obviated by bringing that share of the purchase-money into court to abide the result of a contest between the complainant and her supposed husband. *Chancery*, 1839, *Spring v. Sandford*, 7 *Paige*, 550.

90. Trustee. A tenant in common may sue for partition, although he is also trustee of a part for others. *V. Chan. Ct.*, 1833, *Cheesman v. Thorne*, 1 *Edw.*, 629.

91. One cestui que trust,—Held, entitled to maintain a bill for partition against the trustee who had purchased the interest of the other *cestuis que trust*. *Supreme Ct.*, *Sp. T.*, 1850, *Sterrick v. Dickinson*, 9 *Barb.*, 516.

92. A tenant by the courtesy initiate may file a bill for partition. *V. Chan. Ct.*, 1846, *Riker v. Darke*, 4 *Edw.*, 668.

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93. A dowress cannot file a bill for partition, nor be made a sole defendant. Before dower assigned she has but a right of action, and its assignment does not make her a tenant in common, or joint-tenant. Such claimants may be made parties, but there must be a suit between tenants in common. *A. V. Chan. Ct.*, 1848, *Wood v. Clute*, 1 *Sandf. Ch.*, 199.

94. Infants. Under the Revised Statutes, partition cannot be had unless all the complainants are of full age. [2 Rev. Stat., 317, § 1; 329, § 79; 2 Hoffm. Ch. Pr., 161.] *V. Chan. Ct.*, 1847, *Postley v. Kain*, 4 *Sandf. Ch.*, 508.

95. Salt-spring lands. The heirs of one to whom lands had been set apart by the commissioners of the land-office, pursuant to 1 Rev. Stat., 267, § 98, for salt works, take no estate or interest in the premises by descent, and cannot have partition thereof. *Ct. of Appeals*, 1855, *Newcomb v. Newcomb*, 12 *N. Y.* (2 *Kern.*), 603.

96. Wife's dower. That where a sale of the premises will probably be necessary, the wife ought to be joined, so as to give title free from dower; but if a partition is to be had, her inchoate right of dower will attach to the part set off to her husband. *Chancery*, 1832, *Wilkinson v. Parish*, 3 *Paige*, 653; but compare *Matthews v. Matthews*, 1 *Edw.*, 565.

97. The wife of a tenant in common is not a necessary party to a suit for partition. *V. Chan. Ct.*, 1833, *Matthews v. Matthews*, 1 *Edw.*, 565. See *Act of 1840*, ch. 177; same stat., 2 *Rev. Stat.*, 5 ed., 614.

98. A widow entitled to dower in an undivided portion of the premises, is a necessary party in partition, to enable the court, in case a sale is decreed, to give the purchaser a perfect title to the premises. [1 *Paige*, 469; 3 *Id.*, 658; 7 *Id.*, 410; 2 *Rev. Stat.*, 318, §§ 5, 6; *Id.*, 329, §§ 79, 80.] *Supreme Ct., Sp. T.*, 1847, *Green v. Putnam*, 1 *Barb.*, 500.

99. Where a widow is entitled to dower in the whole premises, she is a necessary party only where a sale is necessary; but where she is entitled to dower in an undivided share, it is proper to make her a party, as in that case the judgment will limit her interest to such share when set apart. *Supreme Ct., Sp. T.*, 1847, *Tanner v. Niles*, 1 *Barb.*, 560.

100. Future estates, &c. The Revised Statutes contemplate giving the purchaser on a sale in partition a perfect title; and all future estates in the land, whether vested or

contingent, must be sold. Where the statute has not provided specifically the mode of ascertaining and securing the value of such estates, the Court of Chancery, on a bill for partition, will do it. *Chancery*, 1839, *Jackson v. Edwards*,* 7 *Paige*, 886.

101. Non-resident infant. Under 2 Rev. Stat., 317, the court may, in a partition suit, where an infant resides out of the State, so that notice of the application cannot be given to him or to his general guardian, appoint the register, or a clerk of the court, guardian *ad litem* for the infant, and dispense with the giving of security. *Chancery*, 1839, *Minor v. Betts*, 7 *Paige*, 596.

102. When a clerk or register, appointed as guardian *ad litem* in a partition-suit, leaves office, the statute constitutes his successor in the office guardian *ad litem* in his place. *Chancery*, 1845, *Wilkes v. Wilkes*, 1 *Barb. Ch.*, 72.

103. Omission to appoint guardian, &c. In partition, an infant was made one of the defendants, but no guardian *ad litem* was appointed, nor was his appearance entered in any way, nor the bill taken as confessed by him, but a decree was entered and a sale had. *Held*, that the decree was incapable of enrolment, and the purchaser was discharged, notwithstanding the infant had come of age, and his release was tendered. *V. Chan. Ct.*, 1838, *Kohler v. Kohler*, 2 *Edw.*, 69.

104. All the tenants in common must be made parties, or a partition cannot be decreed. *Chancery*, 1847, *Burbans v. Burbans*, 2 *Barb. Ch.*, 898. To the same effect, 1832, *Teal v. Woodworth*, 3 *Paige*, 470.

105. That those who have conveyed their interest are not proper parties to a partition. *Supreme Ct., Sp. T.*, 1849, *Vanderwerker v. Vanderwerker*, 7 *Barb.*, 221.

106. Creditors. When a tenant for life has assigned his interest for the benefit of creditors, the creditors are not necessary parties to a bill for partition. *Supreme Ct., Sp. T.*, 1848, *Van Arsdale v. Drake*, 2 *Barb.*, 599.

107. If there has been an ouster of the complainant, or the premises are held ad-

* Affirmed on other points, *Ct. of Errors*, 1839, 22 *Wend.*, 498, the opinions being conflicting as to the joinder of parties; and in consequence, the act of 1840, ch. 177, was passed, which authorized the court to determine and protect the interests of persons having vested or contingent interests.

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versely, that defence should be set up by plea, or answer, unless it appears in the bill. *Chancery*, 1832, *Jenkins v. Van Shaack*, 3 *Paige*, 242; 1847, *Burhans v. Burhans*, 2 *Barb. Ch.*, 398. Followed, *Supreme Ct., Sp. T.*, 1850, *Sterrick v. Dickinson*, 9 *Barb.*, 516.

108. Possession necessary. A person applying for a partition must not only have a present estate, but be in the actual or constructive possession of an undivided share or interest in the premises. An adverse possession is a bar to the proceeding, both in equity and at law. If the bill states an adverse possession, it should be dismissed without prejudice to a new suit after possession obtained at law. *Chancery*, 1847, *Burhans v. Burhans*, 2 *Barb. Ch.*, 398. To similar effect, *A. V. Chan. Ct.*, 1840, *Matthewson v. Johnson*, *Hoffm.*, 560; and see *Bradstreet v. Schuyler*, 3 *Barb. Ch.*, 608.

109. Adverse possession of a co-tenant who is made a party,—Held, no objection. *A. V. Chan. Ct.*, 1839, *Hitchcock v. Skinner*, *Hoffm.*, 21.

110. Where the intestate was seized and possessed of lands which descend to tenants in common, one of them, though not in possession, can sustain proceedings under the statute for partition, there being no adverse possession. If one party had taken possession, it would be for the benefit of his co-tenants. *Ct. of Appeals*, 1856, *Beebe v. Griffing*, 14 *N. Y. (4 Kern.)*, 285.

111. As a general rule, the fact that the land is held adversely is a sufficient ground for denying a partition; but when the plaintiff claims and establishes an equitable title, he may have a decree for a partition. *Supreme Ct., Sp. T.*, 1848, *Hosford v. Merwin*, 5 *Barb.*, 51; 1850, *Sterrick v. Dickinson*, 9 *Id.*, 516.

112. Equitable defence. A defendant in partition may set up in his answer, as a defence to the suit, an equitable title in himself to the whole premises. But he must proceed by cross-bill, if, in addition to the denial of a decree for partition and a dismissal of the bill, he seeks a transfer to him of the legal title; or if a discovery is necessary to establish his equitable defence. [Mitf. Pl., 81.] *Chancery*, 1837, *German v. Machin*, 6 *Paige*, 288.

113. Outstanding trust. Where the trustees of an estate were dead, and there was a question whether the legal estate had descended in trust,—*Held*, that a decree of sale in

partition might declare that any persons to whom the trust descended be removed, and appoint a master, as such, and also as trustee, to execute the conveyance. *Chancery*, 1834, *Cushney v. Henry*, 4 *Paige*, 345.

114. Unsettled estate. It is no objection to the title, on a sale in a partition between the heirs-at-law of one who died seized, that the bill was filed before the expiration of the four years allowed by law, after the death of the decedent, to prove a will of real estate, there being no reason to suppose that he left a will; nor that the bill was filed within the time allowed to creditors to apply for a sale of the real estate, if it appears that the personal estate is abundant; nor that the interest of one of the parties has been sold, under execution, *pendente lite*, for the purchaser at the sheriff's sale was only substituted in the place of the judgment-creditor. *Chancery*, 1839, *Spring v. Sandford*, 7 *Paige*, 550.

115. Where it appears that the personal estate is insufficient for the payment of the debts, the court may grant actual partition among the heirs of the decedent, but should not order a sale. *V. Chan. Ct.*, 1838, *Matthews v. Matthews*, 1 *Edw.*, 565.

116. Reference as to title. Where, in a partition suit, the parties admit their several titles, and one of them dies, and the suit is revived against his heirs on their default, a reference as to the title, and proof of title by the complainant, are not necessary. *Chancery*, 1834, *Wilde v. Jenkins*, 4 *Paige*, 481.

117. In general, the master, on a reference as to title, should require complainant to produce abstracts and trace his title as tenant in common to the common source; and should, in his report, give, as far as practicable, an abstract of all conveyances of the undivided interests. *Chancery*, 1837, *Hamilton v. Morris*, 7 *Paige*, 89.

118. — as to rights of parties. Where a partition suit abated by the death of a party, —*Held*, that a new reference must be ordered, to ascertain the rights of the new parties, before sale. *Chancery*, 1835, *Reynolds v. Reynolds*, 5 *Paige*, 161.

119. Lienor's exception to report. If the report made on reference to ascertain general liens is against a claim, the claimant, if he had notice under the statute, must except to the report in due season, to preserve his lien upon the fund. *Chancery*, 1834, *Dunham v. Minard*,

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4 *Paige*, 441. Followed, *Supreme Ct., Sp. T.*, 1848, *Scott v. Howard*, 3 *Barb.*, 319.

120. Necessity of sale. Where the master has reported that partition can be made, a sale will not be ordered upon a report of the commissioners. If the rights of parties or the situation of the premises have changed, a new reference should be asked. *Chancery*, 1835, *Reynolds v. Reynolds*, 5 *Paige*, 161.

121. In determining whether a sale should be had, the true question is, whether the aggregate value of the several parts, after partition, would be materially less than the value of the whole as one parcel; not whether a fund would be better than the land, for infant parties. *Chancery*, 1837, *Clason v. Clason*,* 6 *Paige*, 541.

122. The statute refers to comparative prejudice to the owners, between an actual partition and a sale of the property. If either a partition or a sale will be greatly prejudicial to the owners, compared with the use of the property in common, still an actual partition must be made, unless the injury to the interests of the owners collectively, in reference to the rights of each in the common property, will be much greater by an actual partition than by a sale. *Chancery*, 1848, *Smith v. Smith*, 10 *Paige*, 470. Followed, *Supreme Ct., Sp. T.*, 1848, *Van Arsdale v. Drake*, 2 *Barb.*, 599.

123. Advantage to a part only of the owners, not a reason for ordering a sale. *Van Arsdale v. Drake*, 2 *Barb.*, 599.

124. Partial sale. A court of equity may, in partition, set off one of the co-tenant's shares, and decree a sale of the residue for the benefit of the other tenants, where this will be most beneficial; and may provide for compensation in case of inequality of partition. *Supreme Ct.*, 1848, *Haywood v. Judson*, 4 *Barb.*, 228.

125. Reserved right. Where a right of maintenance from, and of residence upon, the premises, is outstanding, a sale may be had excepting this right; or one may be made without reservation, and so much of the proceeds as will yield the annual value of the right be invested for the benefit of those entitled. *Supreme Ct.*, 1848, *Maynard v. Maynard*, 4 *Edw.*, 711.

* Affirmed on other points, *Ct. of Errors*, 1837, 18 *Wend.*, 869.

126. Servitudes. A partition of a mill-pond and water-power may be made, and one part charged with a servitude for the benefit of the other. The commissioners may divide the dam and the lands under the water, and may make such provisions for keeping the different portions of the dam and the water-gates and flumes in repair, and such regulations for the use of the water-power as the parties might make by a partition deed between themselves. [14 *Wend.*, 204; 5 *N. H.*, 134; 2 *Bl. Amb.*, 589.] *Chancery*, 1848, *Smith v. Smith*, 10 *Paige*, 470.

127. One party may be decreed to make compensation to another for inequality of partition. *Id.*; 1830, *Larkin v. Mann*, 2 *Paige*, 27.

128. Improvements, &c. Where one believes himself to be sole owner, and he or his grantee make permanent improvements, they are entitled, on a subsequent partition with one who proves to be a co-tenant, to have the improvements set off on their share, or to have an allowance for the value. *V. Chan. Ct.*, 1839, *St. Felix v. Rankin*, 3 *Edw.*, 328. *A. V. Chan. Ct.*, 1845, *Conklin v. Conklin*, 3 *Sandf. Ch.*, 64. To the same effect, *Chancery*, 1832 [citing 1 *Johns. Ch.*, 354], *Town v. Needham*, 8 *Paige*, 545.

129. Reasonable expenses in defending the common title, and substantial improvements made by the defendant in possession [8 *Price*, 518; 5 *Munf.*, 106], may be taken into account on an equitable partition, and he may be charged with an occupation rent. [8 *Ves.*, 145.] *A. V. Chan. Ct.*, 1839, *Hitchcock v. Skinner*, *Hoffm.*, 21.

130. Rents and profits accruing during an adverse possession, are not recoverable upon a bill for a partition. *Chancery*, 1847, *Burhans v. Burhans*, 2 *Barb. Ch.*, 398.

131. The report of the commissioners must be signed and acknowledged by all, or state why it is not. In the latter case it must show that all met and consulted. *Chancery*, 1845, *Underhill v. Jackson*, 1 *Barb. Ch.*, 78.

132. The report will be disturbed by the court, only upon grounds which would at least warrant setting aside a verdict. [19 *Wend.*, 651.] *V. Chan. Ct.*, 1844, *Livingston v. Clarkson*, 4 *Edw.*, 596. Followed, *Washington County Ct.* (1853?), *Doubleday v. Newton*, 9 *How. Pr.*, 71.

133. Wife's proceeds. The proceeds of a

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partition sale belonging to a wife should not be paid to the husband, except upon a master's certificate of her absolute or conditional consent, upon a private examination, after a full explanation of her rights. A certificate of a commissioner of deeds is not enough. *Chancery*, 1880, *Hallenbeck v. Bradt*, 2 *Paige*, 816.

134. When, in partition, a sale is had and a provision is made for the satisfaction of an inchoate right of dower, under the act of 1840 (2 *Rev. Stat.*, 8 ed., 420, § 57), by paying into court a gross sum fixed by the master as its present value; such sum is the wife's personal property, and goes, upon her death, to her husband. *V. Chan. Ct.*, 1846, *Bartlett v. Van Zandt*, 4 *Sandf. Ch.*, 396.

135. Where absentees, infants, or persons unknown are defendants in partition, the court, before making a decree, will examine the proceedings and see that all proper persons are before it, so as to make a decree effectual. *Chancery*, 1840, *Braker v. Devqreaux*, 8 *Paige*, 518; and see *Fleet v. Dorland*, 11 *How. Pr.*, 489.

136. Prayer for relief. A decree for sale in a partition suit is not void because the petition or bill prayed for actual partition, and alleged that a sale would be unnecessary. A sale in such case had, with the concurrence of the petitioner, is good, under the general prayer for relief. *Supreme Ct.*, *Sp. T.*, 1854, *Biddy v. Cadwallader*, 2 *Liv. Law Mag.*, 768.

137. Where the decree directs that the principal of a sum invested to pay interest during life, be upon death divided among the other parties, naming them, and some of the other parties die, their shares are to be paid to their personal representatives. Where the decree directed the share of an heir, who was a married woman, to be paid to her husband in her right, and he subsequently died,—*Held*, that it must be paid to her. Where one of the female heirs, after the decree, married,—*Held*, that her share ought, in view of the statutes relating to the property of married women, to be paid to her instead of to her husband. *Supreme Ct.*, 1858, *Robinson v. McGregor*, 16 *Barb.*, 581.

138. Investing. The commissioners in partition are bound to invest the fund in permanent securities at interest. Where the commissioners loan to one of their own number, he is liable for interest, and his executors can-

not be heard to interpose the non-performance of duty as a defence. *Id.*

138 a. Infants' moneys how paid: liabilities of guardians, &c. *Cook v. Lee*, 6 *Paige*, 158.

D. In Civil Actions (under the Code of Pro.)

139. Under the Code, partition may be by action. *Supreme Ct.*, *Sp. T.*, 1848, *Watson v. Brigham*, 3 *How. Pr.*, 290; *S. C.*, 1 *Code R.*, 67; *Backus v. Stilwell*, 8 *How. Pr.*, 318; *S. C.*, 1 *Code R.*, 70.

140. Proceedings for partition under the Revised Statutes may be instituted by petition as before the Code. *Supreme Ct.*, *Sp. T.*, 1848, *Traver v. Traver*, 8 *How. Pr.*, 351; *S. C.*, 1 *Code R.*, 112; affirmed, *Gen. T.*, 1849, 8 *How. Pr.*, 368, *note*; but see, to the contrary, *Oroghan v. Livingston*, 17 *N. Y.* (8 *Smith*), 218; *S. C.*, 6 *Abbotts' Pr.*, 350; affirming *S. C.*, 25 *Barb.*, 386; *Matter of Cavanagh*, 14 *Abbotts' Pr.*

141. Though the proceedings at law by petition are not taken away by the Code, the remedy by suit in equity is now by action under the Code. *Supreme Ct.*, *Sp. T.*, 1849, *Myers v. Rasback*, 4 *How. Pr.*, 68; *S. C.*, 2 *Code R.*, 18; *Row v. Row*, 4 *How. Pr.*, 183; 1853, *Ripple v. Gilborn*, 8 *Id.*, 456; and see *Jennings v. Jennings*, 2 *Abbotts' Pr.*, 6.

142. One action, only, for partition of several tracts. *Rule 77 of 1858.*

143. To be entitled to a partition, and, if necessary, a sale, under the statute, it is not necessary to be an actual occupant of the premises or hold an immediate present estate therein. A person possessed of an undisputed title to an undivided share in remainder, although there be an existing admitted life-estate covering the whole premises, is "a person in possession of the lands of which partition is sought, as tenant in common," within the meaning of the statute. *Supreme Ct.*, 1857, *Blakely v. Calder*,* 13 *How. Pr.*, 476. To the contrary, *Sp. T.*, 1854, *Fleet v. Dorland*, 11 *Id.*, 489.

144. Estate of inheritance. A deed con-

* The judgment was affirmed, *Ct. of Appeals*, 1857, in 15 *N. Y.* (1 *Smith*), 617, on the ground that where the jurisdiction of the court over the parties and the subject-matter is unquestioned, the fact that plaintiff had only an estate in remainder, even though it were conceded that by reason thereof she was not entitled to maintain the action, would not operate to impair the title acquired by the purchaser at the sale.

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veyed all mines, minerals, &c., in certain lands, with the right to work the same; and to put up buildings and to use all land necessary, and the right of ingress and egress; to have and to hold the said mines, &c., to the grantee, his heirs and assigns, forever. *Held*, that the estate conveyed was an estate of inheritance, and was such an interest as comes within the intent and meaning of the provisions of the Revised Statutes relative to partition; and that an action would lie for the partition of such interest. *Supreme Ct.*, 1858, *Canfield v. Ford*, 28 *Barb.*, 886; affirming S. C., 16 *How. Pr.*, 478.

145. Husband and wife. A testator having devised an undivided interest in an estate to a husband in trust for his wife during her life, and at her death to her heirs, subject to a life-estate in the husband, if he survived her, —*Held*, 1. That on a partition, the proceeds of the interest so devised should be brought into court and invested, the income to be paid to her during her life, to her husband after her death, if he survived her, and to go to her heirs thereafter. 2. That in such case, the husband and wife being plaintiffs in the action for partition, their having taken judgment that their share of the proceeds should be paid over to them, instead of being so brought into court, was an irregularity for which the purchaser's motion to be discharged should be granted, unless the plaintiff should amend. *Supreme Ct.*, *Sp. T.*, 1858, *Noble v. Cromwell*, 26 *Barb.*, 475; S. C., 6 *Abbotts' Pr.*, 59.

146. Infant plaintiff. Supreme Court may authorize proceedings to be instituted on behalf of an infant. *Laws of 1852*, 411, ch. 277.

147. Under section 2 of the above act,—which directs that no partition or sale shall be ordered, “unless it be made satisfactorily to appear that the interests of such infant require such partition or sale,”—it is not sufficient that the referee reports “that in his opinion it would be proper to allow said infants to prosecute an action for the partition or sale of the real estate mentioned in the petition.” The facts should be set forth, that the court may judge of the necessity. *Supreme Ct.*, *Sp. T.*, 1856, *Matter of Marsac*, 15 *How. Pr.*, 383.

148. The rule that adverse titles are not to be tried in partition [1 *Johns. Ch.*, 111; 4 *Barb.*, 498], is not changed by the Code. *Supreme Ct.*, 1858, *Stryker v. Lynch*, 11 *N. Y. Leg. Obs.*, 116.

149. All the incumbrancers should be made parties, so that the land may be sold free of all liens upon it; but general creditors need not be joined. *Supreme Ct.*, *Sp. T.*, 1852, *Bogardus v. Parker*, 7 *How. Pr.*, 305.

150. A creditor of a deceased person who has not recovered judgment which is a lien on the land, is not entitled to be made a party to a partition suit instituted for the purpose of apportioning real estate of the late debtor among his heirs and devisees, in order to enforce his claim to be paid out of such real estate. His remedy is to petition for a sale under the statute. *Supreme Ct.*, *Sp. T.*, 1856, *Waring v. Waring*, 8 *Abbotts' Pr.*, 246.

151. The wife of the plaintiff is, by virtue of her inchoate right of dower, a necessary co-plaintiff. [2 *Rev. Stat.*, 4 ed., 577; 7 *Paige*, 387.] *Supreme Ct.*, *Sp. T.*, 1858, *Ripple v. Gilborn*, 8 *How. Pr.*, 456.

152. A widow claiming a right of dower is a proper but not a necessary party to proceedings for partition, and a judgment which makes not a sale but actual partition, in no way affects her interest, and should not be disturbed upon her motion to set it aside for irregularity. [1 *Barb.*, 560.] *Supreme Ct.*, *Sp. T.*, 1856, *Gordon v. Sterling*, 18 *How. Pr.*, 405.

153. Owner of fee. In a suit between tenants in common, for the partition of an interest in real estate which has been carved out of the fee, the owner of the fee, who is the common source of the title of all the tenants in common, is not a necessary party. The partition does not affect his estate. *Supreme Ct.*, 1858, *Canfield v. Ford*, 28 *Barb.*, 886; and see S. C. below, 16 *How. Pr.*, 478.

154. Persons not in case. Under our statutes, an actual partition or sale under a judgment in partition, is effectual to bar the future contingent interests of persons not *in case*, though no notice is published to bring in unknown parties, and though such future owners may take as purchasers under a deed or will, and not as claimants under any of the parties to the action. *It seems*, that it would be the same in equity, apart from the statute. *Ct. of Appeals*, 1858, *Mead v. Mitchell*, 17 *N. Y.* (8 *Smith*), 210; affirming S. C., 5 *Abbotts' Pr.*, 92. To the same effect, *V. Chan. Ct.*, 1833, *Cheesman v. Thorne*, 1 *Edw.*, 629. *Supreme Ct.*, *Sp. T.*, 1858, *Noble v. Cromwell*, 26 *Barb.*, 475; S. C., 6 *Abbotts' Pr.*, 59. To

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the contrary was, 1854, *Woodham v. Maverick*, 2 *Liv. Law Mag.*, 487.

155. Appointment of guardian. An order of the court* appointing a guardian *ad litem* upon the petition of infant defendants over fourteen, is valid, although no summons had been previously served upon the infants. The jurisdiction of the court is complete, when an answer on behalf of the infants has been put in by the guardian so appointed. *N. Y. Superior Ct.*, 1853, *Varian v. Stevens*, 2 *Duer*, 685. To similar effect, *Supreme Ct., Sp. T.*, 1856, *Lyle v. Smith*, 18 *How. Pr.*, 104; 1857, *Disbrow v. Folger*, 5 *Abbotts' Pr.*, 58.

156. It is not an objection to the title that the petition by the infant for a guardian was not verified before a proper officer, or that the proofs did not show that the guardian had no interest adverse to the infant, if in fact he had none. *Supreme Ct., Sp. T.*, 1857, *Disbrow v. Folger*, 5 *Abbotts' Pr.*, 58.

157. The bond required by the Revised Statutes to be given by a guardian *ad litem* must be executed by the guardian himself, as well as by the sureties. *N. Y. Superior Ct., Sp. T.*, 1855, *Jennings v. Jennings*, 2 *Abbotts' Pr.*, 6.

158. Guardian's omission to give bond. The failure of a guardian *ad litem* for infant defendants, in a partition action, to file his bond according to the requirements of the statute, does not render the proceedings and judgment absolutely void. It is merely an irregularity, of which the court have the power to allow amendment by filing a bond *nunc pro tunc* before or after sale. The provisions of section 173 of the Code of Procedure,—relating to amendments,—are applicable to partition actions; and the power of the court to amend in such actions is not restricted by the provisions of the Laws of 1852, 411, ch. 277, which authorize the filing of a guardian's bond after judgment, in case of *actual* partition. The object and effect of Laws of 1852, 411, and Laws of 1857, ch. 679,—considered. *Ct. of Appeals*, 1858, *Croghan v. Livingston*, 17 *N. Y. (8 Smith)*, 218; *S. C.*, 6 *Abbotts' Pr.*, 350; affirming *S. C.*, 25 *Barb.*, 336. To similar effect, *Supreme Ct., Sp. T.*, 1858, *Waring v. Waring*, 7 *Abbotts' Pr.*, 472.

* That in the first district an order at chambers may operate as an order of the court, see *Disbrow v. Folger*, 5 *Abbotts' Pr.*, 58.

To the contrary was *N. Y. Superior Ct., Sp. T.*, 1855, *Jennings v. Jennings*, 2 *Id.*, 6. *Supreme Ct., Sp. T.*, 1856, *Lyle v. Smith*, 18 *How. Pr.*, 104.

159. Errors in complaint. Where, in an action for partition, all necessary parties are joined, any error in stating in the complaint their interests, or any omission to state what, on motion, the plaintiff might have been compelled to insert by way of amendment, is not an irregularity which can affect the title. *Supreme Ct., Sp. T.*, 1858, *Noble v. Oromwell*, 26 *Barb.*, 475; *S. C.*, 6 *Abbotts' Pr.*, 59.

160. The purchaser is not to be discharged because of the plaintiff's omission to allege in the complaint that there are no other parties in interest or incumbrancers than those joined, or the referee's omission to annex to the report the searches. If there are other incumbrances, the burden is on the purchaser, who asks on such grounds to be discharged, to point them out. [12 *Wend.*, 269; 10 *How. Pr.*, 190.] *Id.*

161. Claim of defendant to specific lien. In a partition suit, the complaint is not bad for misjoinder of actions, because it sets up the claim of one of the defendants to a specific lien for moneys paid to extinguish liens on the premises sought to be partitioned, and asks for an account to be taken of such advances. The claims of one defendant may be disputed by either of his co-defendants as well as the plaintiff, and these claims may be tried and settled in partition, though they involve long accounts. *Supreme Ct., Sp. T.*, 1852, *Bogardus v. Parker*, 7 *How. Pr.*, 805.

162. That where the notice to unknown owners has been omitted, it may be given, even after report. *Supreme Ct., Sp. T.*, 1856, *Hyatt v. Pugsley*, 28 *Barb.*, 285.

163. Reference as to title, &c. In an action for petition, if judgment is to be taken by default, there must be a reference to the clerk to take proof of the title and rights of the parties, before the appointment of commissioners. *Supreme Ct., Sp. T.*, 1852, *Porter v. Lee*, 6 *How. Pr.*, 491.

164. Omission to advertise for liens. In an action for the partition of real estate, an order for sale, though made without a reference as to general liens, and without any advertisement for them, is not void; but the parties who choose to omit this ordinary advertisement should produce at their own cost, for the purchaser, regular searches for all

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judgments and decrees for at least twenty years. A sale by the court in such a suit, brought by heirs for the partition of their ancestor's estate, does not supersede the power of the surrogate to sell the same property to satisfy the debts of the deceased. A purchaser at such a sale is not bound to rely upon the affidavit of the administrator that there are no such debts. *Supreme Ct., Sp. T., 1853, Hall v. Partridge, 10 How. Pr., 188.*

165. Unsettled estate. Where a sale is made in partition, within three years from the death of a former owner of the lands, the purchaser should be allowed, if he elects, to have a reference to ascertain whether there are any unpaid debts of such owner, for payment of which the land might be sold under order of the surrogate, and whether any will was left by him; and if either matter be found in the affirmative, the purchaser must be discharged from his purchase. [7 Paige, 552.] *Supreme Ct., Sp. T., 1857, Disbrow v. Folger, 5 Abbotts' Pr., 58.*

166. Indebtedness of a deceased part-owner of real property can form no valid objection to a partition between his heirs and the other part-owners, upon the application of the latter, or to a sale of the entire property in a partition action; but the proceeds may be held by the court subject to proceedings by the creditor. *Supreme Ct., Sp. T., 1858, Waring v. Waring, 7 Abbotts' Pr., 472.*

167. Purchase from judgment-creditor of heir. The testator devised one undivided third of his real property to his widow, and the rest in equal shares to his children. The interest of one of the sons was sold on execution against him upon a judgment recovered before the testator's death, and the purchaser brought an action against the other devisees for partition. *Held*, that it was no defence to the action that the testator held the notes of the son whose interest the purchaser had acquired, to an amount exceeding the value of the interest devised, and had bequeathed them as part of his personalty, it not appearing that the moneys for which such notes were given were paid by the father by way of advancement. The fact that notes had been given was reason to presume the contrary. *Supreme Ct., Sp. T., 1858, Wisner v. Teed, 9 How. Pr., 148.*

168. Notice of commissioners' meeting. The statute does not require notice of the

meeting of the commissioners to be given to the parties; but it is required by the rule of law, that no matter on which a judicial determination of the rights of a party is to be had shall be heard in his absence, unless he has notice [4 Bl. Com., 283; Cow. & H. Notes, 998; 6 Cow., 108; 28 Wend., 632]; and both parties are entitled to be heard. [15 Johns., 587; 7 T. R., 364; 8 Verm., 387, 389.] Where a party has no notice and does not attend, the report may be referred back, that the matter may be reheard on notice. *Washington County Ct. (1858?), Doubleday v. Newton, 9 How. Pr., 71.*

169. As technical notice is not required, personal notice to a party, although he appears by attorney, is sufficient, if he actually attends. *Supreme Ct., Sp. T., 1849, Row v. Row, 4 How. Pr., 188.*

170. Death pending action. The referee's report showed that certain of the defendants died pending the action for partition, and that their interests in the premises, specifying them, survived to other of the parties to the action. *Held*, 1. That although there was no reason to suppose that a suggestion of the deaths was necessary to be filed, leave should be granted to the plaintiffs after judgment to file such, *nunc pro tunc*. 2. That the objection that there was no proof of service of summons in the action upon the defendants so deceased, was obviated by their death, and the succession to their interests, of other parties who were shown to have been served. *Supreme Ct., Sp. T., 1858, Waring v. Waring, 7 Abbotts' Pr., 472.*

171. Judgment. The estate of each known owner, or of the defendants or some of them, collectively, when their rights between each other are disputed [8 Johns. Ch., 802], should be stated in the judgment. But a statement that certain definite portions belong, collectively, to owners who are unknown, is sufficient; and they may be described in general terms, as the descendants of a person deceased. *Supreme Ct., Sp. T., 1856, Hyatt v. Pugsley, 23 Barb., 285.*

172. Noting conveyance pending suit. The fact that a conveyance by some of the parties, of their interests in the premises, pending the proceedings in an action for partition, and before judgment, to the person who afterwards becomes the purchaser at the sale, was not noted in the judgment-roll, is

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not an irregularity to which such purchaser can object. *Supreme Ct., Sp. T., 1858, Noble v. Cromwell, 26 Barb., 475; S. C., 6 Abbotts' Pr., 59.*

173. The proper practice, in partition actions under the Code, discussed. *Jennings v. Jennings, 2 Abbotts' Pr., 6.*

174. References, &c., regulated. *Rules 78-80 of 1858.*

175. Setting off shares in common. Under the Laws of 1847, 557, ch. 480, § 4,* where two or more of the parties interested desire to have their shares set off to them to be enjoyed in common, the order of reference for that purpose should be granted before final decree. *Supreme Ct., Sp. T., 1858, Northrop v. Anderson, 8 How. Pr., 351.*

176. Arrears of taxes and assessments furnish no ground for ordering a sale instead of partition. *Supreme Ct., Sp. T., 1854, Fleet v. Dorland, 11 How. Pr., 439.*

177. Deficient quantity. The objection that the property was sold by a map, which described it as some four or five feet of front, and about six inches of depth, more than it proved to be, is capable of being removed by a reduction of price, and is not a sufficient ground to discharge the purchaser. *N. Y. Superior Ct., Sp. T., 1855, Jennings v. Jennings, 2 Abbotts' Pr., 6.*

178. For protection of a purchaser in partition against a contingent dower-right, the one-third may be invested as principal. *Supreme Ct., Sp. T., 1857, Disbrow v. Folger, 5 Abbotts' Pr., 58.*

PARTNERSHIP.

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I. THE RELATION, AND HOW IT IS CONSTITUTED.

1. General rule. In general, a joint undertaking among two or more persons who are to participate in the profit and loss resulting from it, constitutes a partnership. *Ct. of Appeals, 1849, Sage v. Sherman, 2 N. Y. (2 Comst.), 418. S. P., Supreme Ct., 1852, Vassar v. Camp, 14 Barb., 341; affirmed on other points, 11 N. Y. (1 Kern.), 441; Hodgman v. Smith, 18 Barb., 302; 1858, Fitch v. Hall, 16 How. Pr., 175.*

2. Where there is a joint purchase of property, although only for a particular adventure, upon an agreement to share jointly in the ultimate profit or loss, a partnership arises, authorizing one partner to give notes in the firm-name for moneys advanced, services rendered, &c., in relation to the particular business. *Supreme Ct., 1828, Cumpston v. McNair, 1 Wend., 457.*

3. If one advances money to a merchant, and the profit for its use is dependent upon the accidents of trade, he will be liable as partner, though, by his agreement, he is not to risk any part of his advance, or to share in the losses of the trade. Non-compliance with mere municipal regulations as to the formation, or registry of partnerships, will not affect this liability. *N. Y. Superior Ct., 1851, Oakley v. Aspinwall, 2 Sandf., 7; reversed on other grounds, 4 N. Y. (4 Comst.), 518.*

4. Joint-ownership. To constitute a part-

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nership as between the parties themselves, there must be a joint-ownership of the partnership funds as well as an agreement to participate in the profits and losses of the business. *Chancery*, 1838, *Chase v. Barrett*, 4 *Paige*, 148.

5. **Sharing profit and loss.** To constitute partnership so that the act of one partner will bind the others or inure to their benefit, there must be not merely a joint-ownership, but also an agreement to share in profit and loss. *Supreme Ct.*, 1801, *Holmes v. United Ins. Co.*, 2 *Johns. Cas.*, 829. *Ct. of Errors*, 1812, *Post v. Kimberly*, 9 *Johns.*, 470.

6. A mere community of interest in land or personal property does not make men partners. There must be some joint adventure, and an agreement to share in the profit and loss. *Supreme Ct.*, 1836, *Porter v. McClure*, 15 *Wend.*, 187.

7. Thus, where defendants being owners of a mill-site, contracted with mechanics to build a mill for them, and one of them advanced more than his half of the disbursements,—*Held*, they were not partners, and he could recover back the balance due on such advances in an action at law. *Id.*

8. **Working on shares.** An agreement by one to work another's farm on shares, not looking to a sale of the products, does not make them partners. [Oolby on Partn., 8, 12; 6 *Verm.*, 119; 10 *Id.*, 170.] *Supreme Ct.*, 1841, *Putnam v. Wise*, 1 *Hill*, 284.

9. **Gross earnings.** To constitute persons partners, as between themselves, there must be an interest in the profits, *as profits*. An agreement to divide gross earnings is not sufficient. *Ct. of Appeals*, 1851, *Pattison v. Blanchard*, 5 *N. Y.* (1 *Seld.*), 186. *S. P.*, *Supreme Ct.*, 1847, *Heimstreet v. Howland*, 5 *Den.*, 68.

10. The plaintiffs agreed with defendant that plaintiffs should run a line of stages from Saratoga to G., and defendant should run a line from G. to Whitehall; each to run the portion of the route at their own expense, &c., but in connection with the other, with power to receive fare on his portion for the whole route. The gross amount of all the fares received was to be divided periodically between them, in proportion to the distances the passengers had been carried by them respectively. *Held*, not a partnership as between the parties so as to prevent one suing the other at

law; though it might be one as between them and third persons. *Id.*

11. **Share of profits as compensation for services.** To make one a partner, he must have a right to a share of the profits, as profits; that is, as the result of the capital and industry in which both are interested, and not as a measure of compensation only; he must have an interest in the stock, with the right of control. *N. Y. Superior Ct.*, 1850, *Ogden v. Astor*, 4 *Sandf.*, 811.

12. This principle applied in a peculiar case. *Id.*

13. Where one person advances funds for carrying on trade, and another gives his personal services, for which he is to receive a portion of the profits, there is a partnership existing between them, both as between themselves and as regards third persons. *Supreme Ct.*, 1819, *Dob v. Halsey*, 16 *Johns.*, 84.

14. One who is employed in the business of a firm in a subordinate capacity, having no interest in the capital, nor sharing liability for losses, is not rendered a partner by the fact that he is to receive a portion of the profits in compensation for his services. *So held*, where the question was, whether such employee could be held liable upon contracts of the firm. *Ct. of Appeals*, 1849, *Burokle v. Eckhart*, 3 *N. Y.* (3 *Comst.*), 182.

15. *So held*, likewise, where the question was, whether such employee was a competent witness for his employers. *Supreme Ct.*, 1838, *Vanderburgh v. Hull*, 20 *Wend.*, 70.

16. **Underwriters** do not become partners because they subscribe the same policy. Nor is it enough to constitute them partners that after a loss they accept an abandonment, and appoint a common agent to manage the property. Different persons may appoint the same agent to manage their business without becoming partners. And to hold, that accepting an abandonment made them partners, would deprive them of the security intended by abandonment, and would be unjust, because a man ought to have opportunity to choose his partner. *Supreme Ct.*, 1806, *United Ins. Co. v. Scott*, 1 *Johns.*, 106.

17. **Undertaking relative to real property.** An agreement between two persons, that one shall advance to the other a sum of money and build for him a store, and receive, in lieu of rent and interest, one half of the profits of the business to be conducted therein, does not

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necessarily render them partners as between themselves. *N. Y. Com. Pl.*, 1855, Pinckney v. Keyler, 4 *E. D. Smith*, 469.

18. A. and B. enter into a contract with C. for a conveyance from him to them of a farm, and that they will pay a part in good negotiable promissory notes, to be indorsed by them;—*Held*, that this does not constitute them special partners, so that one can bind both by an indorsement in the name of both, without the knowledge and consent of the other. *Supreme Ct.*, 1825, Ballou v. Spencer, 4 *Conn.*, 168.

19. W., B., and A., having entered into a contract with a turnpike corporation to make and complete a certain road, afterwards made an agreement with M., "to let him have a share of the profits, if any, in making the second ten miles of the road, in proportion to the help he afforded in completing the same; the one half to be taken from W.'s part, the other from B.'s and A.'s part."—*Held*, that this agreement did not create a partnership between M. and the others, such as would prevent him from maintaining an action against them at law, but was only a mode of paying him for his help and labor. *Supreme Ct.*, 1818, Muzzy v. Whitney, 10 *Johns.*, 226.

20. Persons engaged in building a mill, on an agreement to share in the profit and loss,—*Held*, partners so as to render one liable for purchases made by the other in his own name, but for the use of the firm. *Supreme Ct.*, 1825, Reynolds v. Cleveland, 4 *Conn.*, 282.

21. H. and G. agreed with W. that W., with funds to be advanced by H. and G., should buy lands in his own name and on his own responsibility, and that H. and G. should not be responsible for any liabilities or acts of W., except that so far as cash capital should be placed in the hands of W., that capital should be subject to its proportion of the losses. In an action to charge H. as partner for services rendered by plaintiff, as clerk and book-keeper in conducting the joint business of the associates,—*Held*, that he was liable; the claim being not for purchase-money of lands, bought without the concurrence of the associates, but for mercantile services necessary for all, and rendered for the benefit of all the associates, in purchases and sales made for their joint benefit. *Supreme Ct.*, 1854, Benners v. Harrison, 19 *Barb.*, 58.

22. An agreement by a farmer on the one part, and his sons and son-in-law upon the

other, that the latter should contribute their implements and stock and labor upon the farms of the former for a term of years, and that, at the end of the term, they should have half the personal property thereon, and that he would convey to them one half of the land; it being apparently his intention to keep the title of the whole real and personal property in himself for the term;—*Held*, not a partnership. *Chancery*, 1833, Chase v. Barrett, 4 *Poige*, 148.

23. Shipping. Though the part-owners of a ship are, generally speaking, tenants in common, yet there may be a special partnership between them, in the ship as well as in the cargo, in regard to a particular voyage, or adventure, and in the proceeds arising from the sale of them, and the profits of the voyage. *Ct. of Errors*, 1822, Mumford v. Nicoll, 20 *Johns.*, 611.

24. And where, in such a case, one of two owners receives the whole proceeds, he has a right to retain them, until he is indemnified for what he has advanced, more than his share, for outfit, repairs, or expenses of the vessel for the particular voyage or adventure; but not for a general balance of account, there being no general partnership. *Id.*

25. A ship was built, one-fourth for D. & D., being partners, and the residue for C. and others, in several proportions, under a contract of all concerned, that she should run in a particular trade, under the command of C., and that the firm of D. & D. were to be ship's husbands, or agents. She was run under this arrangement for some time, when C. and the other owners removed D. & D. from the agency and appointed another agent, but made no change in the employment of the vessel;—*Held*, that this was a case of partnership in the vessel, as well as in the business of running her. *Supreme Ct.*, 1850, Dunham v. Jarvis, 8 *Barb.*, 88.

26. Cargo. H. and others were owners in distinct proportions, of a cargo purchased with the proceeds of an outward cargo, also belonging to the same persons. H. was not connected in trade with the others, and made insurance on his own account upon the cargo generally, "interest as may appear." There was no agreement between the parties, to share in the future sale of the cargo; and the other owners could not cover any part of their interest under the policy. *Held*, that they

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were not partners. *Supreme Ct.*, 1801, *Holmes v. United Ins. Co.*, 2 *Johns. Cas.*, 329.

27. A. & M., partners, owned three-fourths of a vessel, and B. & K. one-fourth. They agreed to fit her out on a voyage to L. Three-fourths of the cargo was purchased by A. & M., and the other fourth by B. & K., but the part of B. & K. was not distinguished from the rest of the cargo by any particular marks. The whole cargo was to be sold at L. for the joint account and benefit of both firms, and it was sold at L. accordingly; but there was no agreement to share jointly in the ultimate profit and loss of the adventure;—*Held*, that, under the circumstances, there was no partnership between A. & M. and B. & K., so as to render the act of M. in disposing of the return-cargo binding as the act of a firm upon B. & K. Even if there were a partnership as to the transportation and selling of the outward cargo, yet it terminated with the sale of the outward cargo, and the interest of A. & M. and B. & K. in the return-cargo was separate and distinct, each being entitled to his respective proportion of it, without any concern in the profit or loss which might ultimately arise. *Ct. of Errors*, 1812, *Post v. Kimberly*, 9 *Johns.*, 470.

28. **Goods bought.** The defendant sold absolutely one half of a lot of cotton to the plaintiff, and obtained an advance from him to the full value of the other half; and the whole was by consent consigned to the plaintiff's correspondents to be sold, and was sold at a loss. *Held*, that though partners in the transaction as to others, they were not so between themselves, and the plaintiff could recover half the loss. *Supreme Ct.*, 1834, *Peltier v. Sewall*, 12 *Wend.*, 886.

29. The plaintiff purchased of the defendants the one-sixth of sixty-six bales of cotton, for which he paid them in full. The purchase was made in Boston, under an agreement that the cotton should be delivered at New York, and be there sold on account of all the owners and be divided between them. When the cotton arrived in New York, the defendants, instead of making a sale or division, by mistake, and without the consent or knowledge of the plaintiff, sent it out of the State to a manufactory belonging to themselves in New Jersey.

Held, that the agreement did not constitute all who were interested in the cotton, partners,

so as to preclude the plaintiff from maintaining an action against the defendants alone for the eleven bales or their value to which he was entitled. The defendants, by not delivering the cotton in New York according to their agreement, rendered themselves separately liable. *N. Y. Superior Ct.*, 1857, *Ward v. Gaunt*, 6 *Duer*, 257.

30. Two persons engaged in a joint purchase and sale of a quantity of cotton,—*Held*, under the circumstances, partners in the adventure so as to enable one to maintain a bill for an accounting against the other. *Cunningham v. Littlefield*, 1 *Edw.*, 104.

31. Goods belonging to two individuals were consigned to a third, to be sold, upon an agreement that, instead of commissions, the consignee should retain one half of the proceeds of the sale, after reimbursing the consignors the cost of the property. *Held*, that this did not constitute a partnership between the parties, so as to render the consignee liable for the purchase-money. It was a case of a resort to the profits as a means of determining compensation for services. *Supreme Ct.*, 1856, *Fitch v. Hall*, 25 *Barb.*, 18.

32. **Storekeeping.** C. loaned B. \$1,000 for one year, demised to him a store, and furnished his son as a clerk, without specific compensation; B. agreeing to invest at least \$3,000 in the business of storekeeping, to manage it during the term, to render an account at the end of it, and, if required, to pay over the \$1,000 and surrender the store to C., and pay him one-third of the profits of the business. *Held*, a partnership, so as to render C. liable for debts to third persons. *Supreme Ct.*, 1841, *Cushman v. Bailey*, 1 *Hill*, 526.

33. Defendant was employed by plaintiff as superintendent of a store for one year, and was to receive for his compensation "a sum equal to one half the net profits." *Held*, they were not partners as between themselves, so as to restrict the plaintiff to a suit in equity. To make one a partner, he must have an interest in the profits, as profits. *Supreme Ct.*, 1853, *Brockway v. Burnap*, 16 *Barb.*, 809.

34. The plaintiff employed the defendant to act as his agent in certain mercantile business, to be carried on in the name of the plaintiff. The defendant, as a compensation for his services, was to receive one half of the profits of the business; but he had no authority to contract debts in the name of the plaintiff, nor

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was he liable to third persons for any responsibilities created for the concern. No profits were ever realized, but losses ensued, and the plaintiff brought an action against defendant for money received to his use. *Held*, that there was not such a partnership between the parties as would bar the action at law. *N. Y. Superior Ct.*, 1829, *Ross v. Drinker*, 2 *Hall*, 415.

35. An agreement between a merchant in France and one in the United States to share certain profits,—*Held*, under the circumstances, to constitute them partners, so as to make the French partner liable for goods sold to the one resident here. *Walden v. Sherburne*, 15 *Johns.*, 409.

36. *Manufacturing.* Joint-owners of a paper-mill sold no paper on joint account, but each partner sold individually, and accounted to the others for the value of his sales. Defendant bought from one partner, with knowledge of this course of dealing. *Held*, that such partner could sue alone for the price. The partnership was special; and the sale was, in effect, a sale by the individual partner. *Supreme Ct.*, 1799, *Ensign v. Wands*, 1 *Johns. Cas.*, 171.

37. Where one furnished a kiln, and both contributed materials and labor to making lime, which was to be equally divided between them,—*Held*, that there was a technical partnership; but that the adventure having terminated, and there being but a single item to liquidate, an action at law might be maintained by one partner against the other for the sum due. *Supreme Ct.*, 1880, *Musier v. Trumbour*, 5 *Wend.*, 274.

38. O. leased a manufacturing establishment to M. & P., they agreeing to carry it on, O. furnishing the means. It was stipulated that O. was to have, over and above his advances, "a profit" of one cent a yard for every yard manufactured, not exceeding six thousand yards a week, and M. & P. were to have the balance of profits, and the entire profit arising from the manufacture and sale of all goods made by them beyond six thousand yards a week. *Held*, an agreement for the profits, as profits, and that O. was a partner in the business, and liable for goods bought by M. & P. in the course of the business. *Supreme Ct.*, 1848, *Everett v. Coe*, 5 *Den.*, 180.

39. An iron manufacturing corporation leased their mills, machinery, and premises to

G., he agreeing to pay them one-fourth of the net profits of the business, after deducting all charges, with certain exceptions, which were not to be charged in making up the profits. One half the company's fourth was to be paid annually, and the rest at end of term; G. was to expend not exceeding \$5,000 in repairs and machinery for the works, and to retain the amount out of the company's fourth. *Held*, that the business to be carried on by G. being within the corporate powers of the corporation, the contract made it a partner, and it was liable to third persons. The effect of the agreement was to give the corporation an interest in the profits, as profits. *Supreme Ct.*, 1851, *Catskill Bank v. Gray*, 14 *Barb.*, 471.

40. *Ferry.* The proprietor of a ferry leased it to one who agreed to run it, pay expenses, and pay over to the lessor one half the gross receipts. *Held*, not a partnership therein, so as to render the proprietor liable to third persons—*e. g.*, for damages for negligence in running the boats. *Supreme Ct.*, 1847, *Heimstreet v. Howland*, 5 *Den.*, 68.

41. *Post-office.* One of two partners was deputed by a postmaster to keep the office for the profits. The office was kept at the partnership store, and the business transacted by the copartners and their clerks indiscriminately; all the accounts and entries were kept in the partnership books, and the receipts and disbursements of the office went into and were paid out of the partnership funds. There had been two adjustments of the partnership accounts, but it did not appear that the deputy had then set up any exclusive claim to the emoluments of the office. *Held*, that they belonged to the firm. *Chancery*, 1889, *Caldwell v. Lieber*, 7 *Paige*, 488.

42. *Two mercantile firms* mutually agreed each to put out contracts for sale and delivery of produce at future days, all profits of such adventures and all losses to be equally divided between the firms. *Held*, that the one firm were liable as partners upon a contract made accordingly, and signed by the other firm. *Ct. of Appeals*, 1854, *Smith v. Wright*, 1 *Abbotts' Pr.*, 243.

43. *Carrying routes, connected.* Proprietors of stages running them on a continuous route, under a peculiar agreement,—*Held*, partners, so that all were liable for the negligence of the servant of one. *Champion v. Bostwick*, 18 *Wend.*, 175; affirming *S. C.*, 11

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Id., 571; and see *Weed v. Saratoga & Schenectady R. R. Co.*, 19 *Id.*, 584.

44. An agreement to run stages under peculiar circumstances,—*Held*, not a partnership, such as would prevent an action at law for a balance struck. *Wetmore v. Baker*, 9 *Johns.*, 307. Compare *Mohawk & Hudson R. R. Co. v. Niles*, 8 *Hill*, 162.

45. Carriers upon a canal and lake, associated into a continuous line, and contracting by a common agent,—*Held*, all liable, under the circumstances, for a loss upon any part of the route. *Slocum v. Fairchild*, 7 *Hill*, 292.

46. Proprietors of three distinct transportation lines co-operating so as to form one entire route,—*Held*, under the circumstances, not partners so as to render the proprietor of one line answerable for a failure to carry, occurring upon another. *Briggs v. Vanderbilt*, 19 *Barb.*, 222; *Bonsteel v. Vanderbilt*, 21 *Id.*, 26.

47. Railroad companies forming in connection one entire route,—*Held*, not partners, under the circumstances, so as to render one liable for goods lost on the road belonging to another. *Straiton v. N. Y. & New Haven R. R. Co.*, 2 *E. D. Smith*, 184.

48. Telegraph association. A private association for the purpose of constructing and operating a telegraph line,—*Held*, under the circumstances, not a partnership, but that the members were tenants in common. *Irvine v. Forbes*, 11 *Barb.*, 587.

49. Joint associations. An association organized analogously to a corporation, and owning certain steamboat property,—*Held*, not a partnership, but that the parties were tenants in common of the property. *Livingston v. Lynch*, 4 *Johns. Ch.*, 578.

50. A joint-stock association being not incorporated, is a partnership, although organized by its articles analogously to a corporation. *Supreme Ct.*, 1838, *Townsend v. Goe- wey*, 19 *Wend.*, 424 (disapproving *Livingston v. Lynch*, 4 *Johns.*, 578); 1843, *Cross v. Jackson*, 5 *Hill*, 478; 1854, *Wells v. Gates*, 18 *Barb.*, 554; *Dennis v. Kennedy*, 19 *Id.*, 517.

51. Agreement need not be in writing. An agreement forming a partnership to commence immediately, is not required to be in writing by the Statute of Frauds, although the partnership is to continue for more than a year. *Chancery*, 1847, *Smith v. Tarlton*, 2 *Barb. Ch.*, 886.

52. Term of partnership. Partners are bound by their agreement that the partnership shall continue for a definite term. Chancery will not interfere to dissolve such an agreement, merely because one partner is dissatisfied; but only upon the ground of some misconduct or breach of contract by the co-partner. *V. Chan. Ct.*, 1838, *Eagle Fire Ins. Co. v. Cammet*, 2 *Edw.*, 127.

53. Transfer of interest. One partner cannot by selling out a part of his interest to another person, make him a partner in the firm against the will of the other partners. *Supreme Ct.*, 1817, *Murray v. Bogert*, 14 *Johns.*, 818.

54. No representatives of the estate of a deceased partner, or parties interested in it, can be compelled to become partners with the survivor, so as to make them personally responsible. A stipulation in the will of the deceased can do no more than give them a right to come in; and if they decline, the partnership is dissolved. There may, however, be a direction that the capital of the deceased partner shall remain in the firm, which will be binding on the estate. *N. Y. Superior Ct., Chambers*, 1855, *Jacquin v. Buisson*, 11 *How. Pr.*, 385.

55. Dormant partnership. What facts will be sufficient to constitute a dormant partnership. *Douglass v. Frame, Hill & D. Supp.*, 45.

II. THE FIRM-NAME.

56. What will be deemed a firm-name. F. O. and R. O. being in partnership, F. made a note, subscribing it "F. O. & R. O.," coupling the two names together. *Held*, sufficient, as a partnership signature, to charge R.; there being no proof as to what was the style of their firm, except that in two instances the name of F. & R. O. was used. *Supreme Ct.*, 1880, *McGregor v. Cleveland*, 5 *Wend.*, 475.

57. An estimate for a corporation contract purported by its title to be made by W. and D., under the name and style of D., W. & Co. It was subscribed by each individual name, and also by the firm-name. *Held*, that it was to be treated as a partnership act of the firm, and not as that of the individual partners. *Supreme Ct., Sp. T.*, 1857, *People v. Croton Aqueduct Board*, 5 *Abbotts' Pr.*, 316; affirmed, 6 *Id.*, 42; S. C., 26 *Barb.*, 240.

58. What name may be used. Partners may adopt any name for the transaction of

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their partnership business, and may bind themselves by different partnership names, in their different places of business. *Ot. of Appeals*, 1854, *Wright v. Hooker*, 10 *N. Y. (6 Seld.)*, 51.

59. J. & Co., residing at O., in pursuance of a partnership agreement with H. of T., for carrying on a transportation business, which was conducted at O. in the name of J. & Co., and at T. in the name of H., drew a bill of exchange on H. in the name of and payable to the order of J. & Co. It was indorsed by J. & Co., discounted by the plaintiff, and the proceeds applied to the general partnership business. H. having refused to accept, an action was brought against J. & Co. and H. jointly. *Held*, that H. was liable either for money lent to the partnership, or as one of the joint drawers of the bill. *Id.*

60. A copartnership may carry on business in the name of one only of the partners, used as a partnership name. Bills drawn upon and accepted by the partner whose name is so used, will be recoverable against the firm, in the absence of proof that such partner also carried on business on his private account. *Supreme Ct.*, 1845, *Bank of Rochester v. Montteath*, 1 *Den.*, 402. Followed, *Ot. of Appeals*, 1854, *Wright v. Hooker*, 10 *N. Y. (6 Seld.)*, 51. *S. P.*, *Supreme Ct.*, 1845, *Palmer v. Stephens*, 1 *Den.*, 471.

61. **Presumption.** Where a partnership is carried on in the name of an individual, and a suit is brought against the partners upon a note or other obligation signed by such individual, the presumption is that it is the note of the individual and not of the partners. The plaintiff, in order to recover against the partners, must not only prove the execution of the note, but prove that the money was borrowed on the credit of the partnership, or that it was used in the business of the partnership. [Coll. on Part., 227; Story on Part., § 189; *Manufacturers' Bank v. Winship*, 5 *Pick.*, 11; *Etheridge v. Burney*, 9 *Id.*, 272; *U. S. Bank v. Burney*, 5 *Mass.*, 176.] *Supreme Ct.*, 1853, *Oliphant v. Mathews*, 16 *Barb.*, 608.

62. S. was a member of a transportation firm, and carried on the business at A., and carried on a similar business at the same place alone, and drew checks in the name of "S., agent," indifferently, in his own and the firm business. The firm being sued on such checks,—*Held*, that the other partners had a

right to prove that the checks in question were drawn on the private account of S. *Supreme Ct.*, 1840, *Mechanics & Farmers' Bank v. Dakin*, 24 *Wend.*, 411.

63. **Restriction.** No person shall transact business in the name of a partner not interested in the firm. Where the designation "& Co.," &c., is used, it shall represent an actual partner. *Laws of 1833*, 404, ch. 231, § 1.

64. **Foreign firms.** The above provision declared inapplicable to commercial copartnerships located in foreign countries. They may use the styles of their houses in this State. *Laws of 1849*, 502, ch. 347, § 1.

65. Copartners in firms having business relations with foreign countries, allowed to continue to use the former partnership name, notwithstanding a change in the persons constituting the firm. Mode of registry and advertisement prescribed. *Laws of 1854*, 1084, ch. 400.

III. INTERPRETATION AND EFFECT OF PARTICULAR AGREEMENTS BETWEEN PARTNERS.

66. **Power to contract.** There is nothing in the partnership relation which precludes the partners from making a valid express contract *inter se*, and in respect to any branch of their partnership business, if they choose. *Supreme Ct.*, 1838, *Townsend v. Goewey*, 19 *Wend.*, 424.

67. **Stipulation as to time of commencing.** A provision in the articles of copartnership, that the partnership shall not commence till the partners have contributed equal means, may be waived by the parties; and if after such agreement, and while the contributions are unequal, the partners unite in hiring a store, fitting it up, repairing it, and they buy goods, and commence selling from the stock in trade, they become in fact so jointly interested in the stock in trade that neither can maintain an action for the exclusive possession. *N. Y. Com. Pl.*, 1853, *Azel v. Betz*, 2 *E. D. Smith*, 188.

68. **Time of dissolving.** An action can be maintained for a breach of a covenant to continue a partnership for a fixed period. In general, an action will lie for a breach of covenant, no matter in what instrument the covenant be found. No rule of law declares that a breach of a covenant contained in partnership articles shall be compensated only by nominal damages. The measure of damages must depend on the nature of the obligation, and the extent of the injury, in this as in all

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other cases of broken covenants. *Ct. of Appeals*, 1853, *Bagley v. Smith*, 10 *N. Y.* (6 *Seld.*), 489; *S. C.*, less fully, 19 *How. Pr.*, 1.

69. The loss of profits which plaintiff would have realized during the stipulated term, is a proper subject for compensation. *Id.*

70. A married woman entered into articles with her son, providing for a copartnership between them, which, by express terms, was to continue beyond the death of her husband. The copartnership was in fact commenced during her coverture, but was continued after the death of her husband, for upwards of six years, to the time of her own death. *Held*, that such copartnership related back to the time of the execution of such written agreement, so as to give both parties the same benefit they would have been entitled to if the feme covert had not been married when the partnership originally commenced. *Chancery*, 1843, *Everit v. Watts*, 10 *Paige*, 82.

71. Agreement to refer disputes. An article in the constitution of a copartnership association, that all matters in dispute between the members thereof shall be left to arbitration, will not deprive a partner of the right to bring an action for a dissolution. *N. Y. Com. Pl.*, 1852, *Kapp v. Barthan*, 1 *E. D. Smith*, 622.

72. — to state accounts. Where the copartnership agreement provides that one of the partners shall annually, on a certain day, make up and state the partnership accounts, and he accordingly makes them up and enters them in the books, the other party, if he does not object within a reasonable time, will be deemed to acquiesce in their correctness. *Chancery*, 1832, *Heartt v. Corning*, 3 *Paige*, 566.

73. — not to contract debts. A stipulation in articles of copartnership, that one partner shall not contract debts without the consent of the other, does not affect the claim of a third person against both, for goods sold to the firm on credit, in the usual course of business, without notice of the stipulation. *N. Y. Com. Pl.*, 1852, *Frost v. Hanford*, 1 *E. D. Smith*, 540.

74. Withdrawing funds. Partnership articles stipulated that the capital and profits of the company should remain in the business, each party being at liberty to draw so much only as was necessary for his private expenses. *Held*, that neither had a right to draw money

to purchase plate, musical instruments, and the whole furniture of a house, or interest on moneys with which he built the house in which he lived, but only for family expenses, and the education of children. And if no money was drawn out by either in any given year, it was to be presumed that he elected to support his family for that year out of other funds, and deemed it most advantageous that his portion of the funds of the company should continue to be employed in the business. *Chancery*, 1815, *Stoughton v. Lynch*, 1 *Johns. Ch.*, 467.

75. Articles of association. Where a sale and distribution of the property in a certain period is positively provided for by private articles of association, any of the shareholders have a right to insist upon the sale and distribution according to the articles, though it may not be for the interests of the concern. *Chancery*, 1847, *Mann v. Butler*, 2 *Barb. Ch.*, 862.

76. Complainant was employed by an association, on an engagement that he should have the dividends of ten shares while he continued in their service. No dividend was declared until after he left. *Held*, on a bill for an accounting, that the court could not apportion a dividend declared after he left, so as to award him any part of it. *V. Chan. Ct.*, 1835, *Clapp v. Astor*, 2 *Edw.*, 379.

77. The articles of association of an unincorporated company provided that the agents and trustees should have no authority to bind it by any contract, unless containing a restriction that payment should be made solely out of the joint property of the association. The president made an oral contract with plaintiff for work to be done by him, without any such restriction. *Held*, that the contract was void; but that the company having had the benefit of the work, its members were liable to plaintiff for it on a *quantum meruit*. *N. Y. Superior Ct.*, 1829, *Sullivan v. Campbell*, 2 *Hall*, 271.

78. Partners in a joint-stock association for manufacturing purposes, provided by their agreement that they should not be liable for their subscriptions upon default to pay assessments on their stock, but should forfeit the stock and previous payments;—*Held*, that they could not, by submitting to a forfeiture, shield themselves from liability to contribute to a loss sustained upon a contract made by

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the president in behalf of the association, and assented to by them. *Ct. of Errors*, 1822, *Skinner v. Dayton*, 19 *Johns.*, 518.

79. Agreement not to disclose secret. A covenant by one partner with another, upon dissolution, that he will not disclose a secret of the business, may be valid, and form a good consideration for a bond and mortgage. *Chancery*, 1848, *Jarvis v. Peck*, 10 *Paige*, 118; affirming *S. C.*, *Hoffm.*, 479.

80. — relative to settlement of affairs. Two partners agreed, in writing, to dissolve, and that one should leave and renounce the signature, and the other assume the business and the settlement of debts, and be responsible to the retiring partner for what should be coming to him. *Held*, not a mere assignment in trust to convert the assets to money, and pay the retiring partner his share. The remaining partner became owner of the assets, and was responsible to the other, but not as a trustee. *Supreme Ct.*, *Sp. T.*, 1853, *Weber v. Defor*, 8 *How. Pr.*, 502.

81. A partner who, on retiring from the firm, agrees to be responsible for a note belonging to the firm and transferred to the other partners, if it cannot be collected, becomes surety for the maker, and is discharged by an extension. *Chancery*, 1884, *Wilde v. Jenkins*, 4 *Paige*, 481.

82. Upon dissolution of partnership between S. and P., it was provided that S. should close the concern, and, after paying all debts, should take to his own account, from the assets or effects of the firm, an amount sufficient to equalize the accounts of the partners, P. being indebted to the firm. The assets were supposed enough to pay the debts and equalize the accounts; but this proved not to be the case. *Held*, that P. was not discharged from personal liability to S. for the deficiency of the effects. *Supreme Ct.*, *Sp. T.*, 1847, *Sayre v. Peck*, 1 *Barb.*, 464.

83. G. and S., being partners, agreed that S. should retire and G. should continue the business; that S. should receive his whole capital in ten days, and that G. should assume all debts and accounts outstanding, until they should be settled;—*Held*, an assignment of the firm effects to G., and that a release of a debt due to the firm, given by S., was void; it appearing that the debtor knew of the dissolution. *Supreme Ct.*, 1826, *More v. Trumbour*, 5 *Cow.*, 488.

84. The partners signed a paper announcing the dissolution, and stating that one of them was thereby authorized, from thenceforth, to collect the debts due to the firm, and that he would pay its debts, and that he would use the name of the firm in liquidation;—*Held*, an agreement that such partner exclusively was to settle the concerns of the firm. *V. Chan. Ct.*, 1847, *Hayes v. Heyer*, 4 *Sandf. Ch.*, 485.

85. Two partners, on the dissolution of the firm, constituted the third their attorney, to collect, &c., all debts due the firm;—*Held*, that the power, although in terms irrevocable, did not operate as a transfer; and that a release of a debt, subsequently executed by one of the other partners, was good. *Supreme Ct.*, 1832, *Napier v. McLeod*, 9 *Wend.*, 120.

86. Division of assets. Two partners contemplating a dissolution, agreed to divide their stock; their machinery to be given to the party who would give the most for it. They accordingly separated the stock into two portions, allotting one to each; but before the arrangement was completed, one partner complained that some of the stock was missing, and a quarrel interrupted the execution of their design. One of the parties then left their place of business in charge of the other, caused a demand to be made for half of the property, and recovered the value thereof in a justice's court. *Held*, that the judgment was erroneous, in relation both to the stock and the machinery, and that enough had not been done to vest in the plaintiff a separate, exclusive property in the subject of the suit. *N. Y. Com. Pl.*, 1851, *Koningsburg v. Launitz*, 1 *E. D. Smith*, 215.

87. Upon a dissolution of partnership, L. offered that R. should take all the assets, excepting certain machinery, upon conditions that he would pay all the debts of the firm, and that whatever amount should be realized above \$20,000 should belong to L.: also promising to furnish a list of assets. This offer was accepted. L. subsequently delivered to R. the promised list of assets, in which, the condition of the partnership affairs being more unfavorable than he had supposed, he voluntarily included the machinery excepted in his original proposition. *Held*, upon application to equity to reform the agreement so that it should vest the machinery in R., that the proper relief was a decree that the exception in the original agreement, reserving the machinery to L., was

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founded in mistake, and should be stricken out; and that the agreement should be reformed accordingly. *Supreme Ct.*, 1854, *Leroy v. Lowber*, 1 *Abbotts' Pr.*, 67.

88. One partner taking a draft for effects of the firm in the hands of a depository, and giving the other a note for a balance;—*Held*, under the circumstances, an adjustment of the partnership affairs. *Burch v. Newberry*, 1 *Barb.*, 648; affirmed, 10 *N. Y. (6 Seld.)*, 374.

89. **Assignment of interest.** Where, by an agreement between the partners and a third party, one of the partners assigns his interest to the third party, who by the agreement is to act with the other partner in settling the affairs of the firm, such assignee is entitled to an injunction and receiver to settle the affairs, in the same way as the retiring partner would have been had he not made the assignment. *Supreme Ct.*, *Chambers*, 1854, *Van Rensselaer v. Emery*, 9 *How. Pr.*, 185.

90. But such injunction should not be extended to restrain the acts of a receiver appointed in supplementary proceedings founded on a judgment against the firm. *It seems*, that the proper mode of controlling his course in the discharge of his official duties, is to apply to the court for instructions. *Id.*; and see *Hubbell v. Dana*, *Id.*, 424.

IV. POWER OF PARTNEERS TO BIND OR REPRESENT EACH OTHER, OR THE FIRM.

1. In General.

91. **Special partnership.** Where the partnership is special,—i. e., limited to a particular undertaking or class of business,—and no acts of the partners are shown holding themselves out as general partners, neither one can bind the other by any engagement outside of the particular business of the partnership. *Supreme Ct.*, 1809, *Livingston v. Roosevelt*, 4 *Johns.*, 251.

92. **Honest mistake.** One partner is not answerable to the other for an honest mistake as to what will be to the common interest of both. *So held*, where a loss happened, through one partner's countermanding orders previously given by the other, to their clerks. *Chancery*, 1839, *Caldwell v. Leiber*, 7 *Paige*, 488.

93. **Goods.** Where goods are received by partners, a demand of and refusal by one, equally affects the other. *Supreme Ct.*, 1840, *Holbrook v. Wight*, 24 *Wend.*, 189, 178.

94. If goods are consigned to factors who are copartners, the consignees are in the nature of co-obligors, and each is liable for the whole. [6 *Bac. Abr.*, 568; 5 *Com. Dig.*, 72, note f; 3 *Wils.*, 73, 114; 2 *Leon.*, 75; *Cowp.*, 814, n.; *Dunlap's Paley on Ag.*, 52; *Stor. on Ag.*, 281; 7 *Taunt.*, 408.] *Supreme Ct.*, 1855, *Briggs v. Briggs*, 20 *Barb.*, 477; affirmed, *Ct. of Appeals*, 1857, *S. C.*, 15 *N. Y. (1 Smith)*, 471. Compare *Moffat v. Wood*, *Seld. Notes*, No. 5, 14.

95. Where one partner delivers partnership property to his own creditor in payment of his individual debt, the creditor having notice that it is partnership property, such creditor becomes indebted to the partnership for the value of the property; and he cannot set off against their demand the individual debt of the partner. *Supreme Ct.*, 1819, *Dob v. Halsey*, 16 *Johns.*, 84.

96. **Debts due the firm.** One partner may settle or compound a demand due to the partnership, without the express assent or even knowledge of the other. If his power is exercised in good faith, he will not be liable to the other for error of judgment, even though he is deceived in supposing the debt to be secure. Nor will he be deemed to have made the demand his own, unless it is expressly assumed by him. [Distinguishing 17 *Johns.*, 80.] *V. Chan. Ct.*, 1831, *Cunningham v. Littlefield*, 1 *Edw.*, 104.

97. Where one partner makes an unjustifiable compromise of a demand due to the firm, he cannot require his copartner to share the loss. *Supreme Ct.*, 1819, *Halsted v. Schmelzel*, 17 *Johns.*, 80.

98. Where one of two partners receives from a debtor to the firm his mortgage to dispose of to his partner at a usurious rate of discount, and apply the proceeds in payment of a debt to the partnership, and the agreement is consummated and the money paid, the debt is discharged; and upon the defendant resisting the collection of the mortgage, and obtaining a decree declaring it void for usury, the partners cannot recover their original debt. The usurious contract in such a case is between the mortgagor and the partner who becomes the assignee of the mortgage, and not between the mortgagor and the partnership. *Ct. of Appeals*, 1853, *Green v. Elmer*, 8 *N. Y. (4 Seld.)*, 422.

99. One borrowed money of a firm, and de-

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posited a mortgage with them as security, and afterwards made an assignment of it to one of the partners, who foreclosed and bid in the land in his own name. *Held*, that the firm were liable to the borrower for the excess of the bid over the debt, as money had and received to his use. *Supreme Ct.*, 1832, *Gilchrist v. Cunningham*, 8 *Wend.*, 641.

100. A release of one of several partners executed by another one alone, does not discharge the partner released from his liability to contribute as respects the other partners. *Supreme Ct.*, 1841, *Curtis v. Monteith*, 1 *Hill*, 356.

101. Partner becoming surety. If a partner gives a mortgage on his property as collateral to the partnership debt, he becomes a surety for the firm, and is entitled to the rights and privileges of that character. His separate creditors succeed to his rights and privileges as such surety, and both he and they have a right to insist that the partnership property, as primarily liable, be applied to the payment of the debt so secured, before resort is had, for that purpose, to the separate estate of the surety-partner. And if his separate estate be so first applied, his separate creditors will be entitled to be subrogated to the rights of the secured creditor as against the partnership fund. *Supreme Ct.*, 1849, *Averill v. Loucks*, 6 *Barb.*, 470.

102. A judgment will be valid, notwithstanding it is confessed to one partner for a firm-debt. Such judgment belongs to the firm, and the plaintiff holds it as trustee for them. Satisfaction of the judgment will satisfy the partnership demand. *Supreme Ct.*, *Sp. T.*, 1847, *Chapin v. Clemitson*, 1 *Barb.*, 811.

103. Admitting service. The fact that two judgment-creditors of a mortgagor who are made parties to a bill of foreclosure are partners, does not authorize one of them to sign the name of the other to an admission of service of the subpoena. *Chancery*, 1840, *Tripp v. Vincent*, 8 *Paige*, 176.

104. Submitting to arbitration. One partner has no implied authority to refer to arbitration a partnership controversy, even by a submission not under seal. *Supreme Ct.*, 1853, *Harrington v. Higham*, 18 *Barb.*, 660; 15 *Id.*, 524.*

105. But where an award was made pursuant to a submission executed by one partner, and he afterwards accepted the amount awarded in favor of the partnership, and indorsed upon the award a receipt in full,—*Held*, sufficient to bar the copartnership claim; it operated as a release by one partner, or as an accord and satisfaction. *Supreme Ct.*, 1821, *Buchanan v. Curry*, 19 *Johns.*, 187.

106. Admissions. In an action against R. & S., as partners, it appeared that R. had admitted that he was liable to the plaintiff for the demand in suit, and S. had admitted that R. and himself were partners. *Held*, not sufficient to establish the joint liability as partners of R. & S. *N. Y. Superior Ct.*, 1829, *Mitchell v. Roulstone*, 2 *Hall*, 351.

107. Fraud. A member of a firm is liable for the consequences of frauds practised by his copartner in the transaction of the partnership business, although he was entirely ignorant of such frauds, and derived no benefit therefrom. Thus where goods are obtained for the use of a firm by means of the fraud of one of its members, the other partner by receiving and participating in the use of the goods, will be held to have adopted the fraudulent act of the one who obtained them, and will be placed in the same situation in reference to the rights of the vendors of the goods as if he had directed his partner to procure the property or had concurred with him in the transaction. *N. Y. Superior Ct.*, 1849, *Hawkins v. Appleby*, 2 *Sandf.*, 421.

108. False representations. A partner, upon selling promissory notes belonging to the firm, and for their benefit, made false representations to the purchaser as to the value of the notes, and stated that he would warrant them to be good. *Held*, that the firm was bound by the representations made by the partner on selling the notes, and that an action would lie against all members of it upon the warranty. *Supreme Ct.*, 1857, *Sweet v. Bradley*, 24 *Barb.*, 549.

109. Acts of a majority of the partners of a firm in continuing a clerk in the employment of the firm after he was discovered to have embezzled money,—*Held*, conclusive upon the minority. *Kirk v. Hodgson*, 8 *Johns. Ch.*, 400.

110. Negligence of servant. One partner is liable, in tort, for the negligence of the servant employed, and paid by one of them ex-

* To the contrary, see 12 *Serg. & E.*, 8; *Monr.*, 426; *Wright*, 420.

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clusively, by which a third person is injured, while such servant is engaged in the business, from which both were to derive, as partners, a profit. [18 Wend., 185, 286.] *N. Y. Superior Ct.*, 1857, *Cotter v. Bettner*, 1 *Boon.*, 490.

111. What are the necessary circumstances to constitute a partnership within this rule. *Id.*

112. Payment by one partner extinguishes the debt as to all. The creditor cannot authorize him to keep the demand alive, and enforce it by action against the other partner. *Supreme Ct.*, 1828, *Le Page v. McOrea*, 1 *Wend.*, 164.

113. Notice of protest. That where a bill is drawn by one and accepted by the other, of two firms having one common partner, formal notice of protest to the acceptors is not necessary. *Woodbury v. Sackrider*, 2 *Abbotts' Pr.*, 402.

114. Entries in the account-books of the partnership, made by one partner during the existence of the partnership, are competent against a copartner in an action to charge him as such. *Supreme Ct.*, 1818, *Walden v. Sherburne*, 15 *Johns.*, 409. Followed, 1881, *Patterson v. Choate*, 7 *Wend.*, 441.

115. Petition in insolvency. When partners are creditors, their petition, &c., in proceedings against insolvent debtors, may be made by either partner. 2 *Rev. Stat.*, 36, § 8.

116. Judge's partner restricted in practising law. 2 *Rev. Stat.*, 275, § 5; *Laws of 1841*, 255, ch. 272; *Laws of 1847*, 846, ch. 280, § 82; *Id.*, 647, ch. 470, §§ 48, 50, 52.

2. To Seal.

117. In general, one partner cannot bind his copartner by seal. *Supreme Ct.*, 1802, *Clement v. Brush*, 3 *Johns. Cas.*, 2 ed., 180; 1804, *Green v. Beals*, 2 *Cas.*, 254; 1884, *Gates v. Graham*, 12 *Wend.*, 53.

118. One partner or member of an association, cannot execute a deed or writing under seal so as to bind the others, without an express authority for that purpose. If he executes either without such authority, he makes himself personally responsible. But such authority may be by parol, and if shown, or if the other partners or associates have, by their subsequent assent or acts, ratified the contract, they will be equally responsible, and bound to contribute, ratably, to any damages that may be recovered at law, against the partner who executed the contract. *Ct. of Errors*, 1822,

Skinner v. Dayton, 19 *Johns.*, 518. Followed, *N. Y. Superior Ct.*, 1828, *Gram v. Seton*, 1 *Hall*, 262.

119. Submission. A partner cannot do any act under seal to affect the interest of his copartner, unless it is to release a debt. If he, in the firm-name, executes a sealed submission, his partner is not bound by the award. Such award, if against the firm, can be enforced only against the partner who executes the submission; though if it be in favor of the firm, the other partner may be concluded by receiving performance in satisfaction. *Supreme Ct.*, 1828, *McBride v. Hagan*, 1 *Wend.*, 826.

120. Simple contract. Express authority by one partner to another to make a contract not requiring a seal,—*Held*, not sufficient to authorize such partner to make such agreement under seal. *Supreme Ct.*, 1834, *Gates v. Graham*, 12 *Wend.*, 53.

121. Note. If one partner gives a note under seal, in the firm-name, for the simple contract-debt of the partnership, he alone is bound by the specialty; which, however, being of a higher nature, extinguishes the simple contract-debt. *Supreme Ct.*, 1802, *Clement v. Brush*, 3 *Johns. Cas.*, 2 ed., 180.

122. Arbitration bond. One of two partners subscribed a bond—an arbitration bond—with the name of the firm, and affixed one seal. This was done with the knowledge and consent of the copartner, and while he was present. *Held*, in an action on the award, that the bond was well executed as against both defendants. [4 T. R., 318.] *Supreme Ct.*, 1812, *Mackay v. Bloodgood*, 9 *Johns.*, 285.

123. A release, under seal, by one partner, in the name of the firm, of a debt due the partnership, is binding on all the partners. It is a general rule, that where two have a joint personal interest, the release of one bars the other, and the case of copartners forms no exception. Each partner is competent to sell the effects, or to compound or discharge the partnership demands. *Supreme Ct.*, 1808, *Piereson v. Hooker*, 3 *Johns.*, 68. Followed, 1817, *Bulkley v. Dayton*, 14 *Id.*, 387.

124. One partner of a firm may sign a deed of composition, and release a debt due to the copartnership. *Supreme Ct.*, 1819, *Bruen v. Marquand*, 17 *Johns.*, 58.

125. Power to release. One partner may make a power of attorney under seal, author-

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izing the attorney to discharge a partnership debt. The rule that one partner cannot bind another by seal, applies only where the firm is sought to be charged; not where the object is to discharge a debt due to it. One of two partners may release for both; and as he may give a release personally, so he may delegate this power by seal to another. *Supreme Ct.*, 1838, *Wells v. Evans*, 20 *Wend.*, 251; reversed on other grounds, 22 *Id.*, 384.

126. An assignment of an account due to a partnership, is valid, though made by one partner only, and under seal. *Ct. of Errors*, 1844, *Everit v. Strong*, 7 *Hill*, 585; affirming 5 *Id.*, 163.

127. Authority to seal. One partner may bind his copartner by a sealed contract made in the firm business, if authorized by his partner to seal for him. Such authority need not be under seal, but may be inferred from the copartnership, and the subsequent recognition of the contract by the copartner. *So held*, where S., a member of the firm of S. & B., established at Angostura, chartered a vessel for the firm at New York, for a voyage to Angostura and back, and executed the charter-party in the firm-name with a seal, and loaded the vessel; and B. received the cargo at Angostura, and furnished the return-cargo there. *N. Y. Superior Ct.*, 1828, *Gram v. Seton*, 1 *Hall*, 262.

128. One partner, if specially authorized, may subscribe the firm-name, and affix a seal to a covenant, and thereby bind his copartner. The authority to do this need not be in writing, but may be proved by parol;—*e. g.*, by subsequent admissions of the partner. *N. Y. Com. Pl.*, 1846, *Renwick v. McAllister*, 5 *N. Y. Leg. Obs.*, 16.

129. One of two partners may be bound by a sealed contract, executed in the names of both, by the other, in his absence, in reference to a transaction in which both were interested as partners, if there is either a previous parol authority or a subsequent parol adoption of the act. The more rigid rule of the common law, that one partner could not bind the others by seal unless the authority was given under seal, has been greatly relaxed. *Ct. of Appeals*, 1849, *Smith v. Kerr*, 8 *N. Y. (8 Comst.)*, 144.

130. Subsequent assent. One partner executed a contract in behalf of the partnership, but under seal, so that he only was

bound. Subsequently his copartners assented to and ratified the agreement. *Held*, that they were bound in equity to contribute to any damages which were recovered against the contracting partner upon the covenant. *Ct. of Errors*, 1822, *Skinner v. Dayton*, 19 *Johns.*, 518.

131. Two firms. Where a contract under seal is made, purporting to be between two firms in their partnership names, an action may be maintained against the member of the firm individually who subscribed the name of his firm, unless he proves that he had authority from his copartners to enter into the contract under seal. *Supreme Ct.*, 1884, *Gates v. Graham*, 12 *Wend.*, 58.

132. And such action may be brought in the names of all the members of the firm with whom the contract purports to be made, although the counterpart is signed by only one member of the firm, in the name of his firm, and no authority is shown authorizing him to affix the name of his firm to a contract under seal. *Id.*

8. To Make or Indorse Negotiable Paper.

133. Form of note. A note made by one partner, in which he says, I promise to pay, &c., but subscribes the partnership name, "A. B. & Co.," is binding on the firm, and not on the partner alone who executed it. Such note means, "I, one of the partners, promise, on behalf of the firm," &c. *Supreme Ct.*, 1814, *Doty v. Bates*, 11 *Johns.*, 544.

134. Note for debt due to partner. One partner has power to make the partnership-note for a debt due from the firm to a copartner, payable to the order of such copartner; and a third partner cannot defend against the indorsee upon the ground that the note was made without his consent, and that the indorsee had notice. *Ct. of Errors*, 1825, *Smith v. Lusher*, 5 *Cow.*, 688.

135. The power of a partner to make notes in the name of the firm, considered. *Id.*

136. Note for individual debt. A note given by one partner for his individual debt, in the firm-name, but without the consent of the copartner, is invalid against such copartner in the hands of a person who received it with notice of the fact. Such note can be enforced only against the partner making it. *Supreme Ct.*, 1804, *Livingston v. Hastie*, 2 *Cal.*, 246; 1808, *Dubois v. Roosevelt*, 4 *Johns.*,

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262, note *a*; 1809, *Livingston v. Roosevelt*, *Id.*, 251; 1814, *Doty v. Bates*, 11 *Id.*, 544; 1819, *Dob v. Halsey*, 16 *Johns.*, 34; 1821, *Foot v. Sabin*, 19 *Id.*, 154; 1829, *Williams v. Walbridge*, 3 *Wend.*, 415; *Wardell v. Hughes*, *Id.*, 419; 1831, *Vallett v. Parker*, 6 *Id.*, 615; *Bank of Rochester v. Bowen*, 7 *Id.*, 158; 1833, *Mercer v. Andrus*, 10 *Id.*, 461; 1852, *Parker v. Jackson*, 16 *Barb.*, 38.

137. *So held*, also, in a case where the note was delivered after a dissolution, of which the creditor had notice. *Supreme Ct.*, 1807, *Lansing v. Gaine*, 2 *Johns.*, 800.

138. Such a note cannot be enforced against one who has been led to indorse it in the belief that it was made for a partnership debt; except in favor of a holder without notice. *Supreme Ct.*, 1804, *Livingston v. Hastie*, 2 *Cas.*, 246. Followed, 1829, *Williams v. Walbridge*, 3 *Wend.*, 415.

139. A note made by one partner and indorsed by another, was discounted by a bank, and the proceeds credited to the indorser individually;—*Held*, that the bank could not prove this as a partnership debt, in a suit to wind up the partnership, even upon proof that the money was borrowed for and applied to partnership purposes. *V. Chan. Ct.*, 1841, *Ooster v. Clarke*,* 3 *Edw.*, 411.

140. One partner, without authority, and for his own exclusive benefit, indorsed a promissory note, made by himself in the firm-name, and the indorsee took the note with full knowledge of the facts. *Held*, that his copartner was bound by a subsequent promise to pay the note, without any independent consideration. *Ct. of Appeals*, 1857, *Commercial Bank of Buffalo v. Warren*, 15 *N. Y. (1 Smith)*, 577.

141. Name of firm subscribed as security. Where one of two partners subscribes the copartnership name to a note, as sureties for a third person, without the authority or consent of the other partner, the latter is not bound. *Supreme Ct.*, 1821, *Foot v. Sabin*, 19 *Johns.*, 154.

142. Where an indorsement in the firm-name is made, to the knowledge of the creditor, by one of the firm, as security for another person, and not for a debt due from the firm, the partner who did not sign the note is

not bound by it, unless he was previously consulted, and assented to the transaction; and the burden of proving that he consented, is thrown upon the creditor. *Supreme Ct.*, 1828, *Laverty v. Burr*, 1 *Wend.*, 529. Followed, 1831, *Boyd v. Plumb*, 7 *Id.*, 309.

143. Where one partner subscribes the firm-name, as surety, to a note, and the note is discounted by officers of a bank having notice of the signature and suretyship, the bank must prove, in order to charge the other partner, either that the firm was interested in the loan, or that such other partner consented to the making the note. *Supreme Ct.*, 1831, *Bank of Rochester v. Bowen*, 7 *Wend.*, 159.

144. Accommodation-note. Where a note, originally lent for accommodation, is the note of a firm, one of the members of which did not assent to the loan, he is not liable, unless the holder shows that he paid value for it. *N. Y. Com. Pl.*, 1846, *Sadler v. Tobias*, 5 *N. Y. Leg. Obs.*, 100.

145. Presumption. A note made by a partner in the copartnership name, is presumed to have been given upon the partnership account. *Supreme Ct.*, 1803, *Elwyn v. Drake*, 3 *Johns. Cas.*, 2 ed., 594; 1814, *Doty v. Bates*, 11 *Johns.*, 544; 1819, *Dob v. Halsey*, 16 *Id.*, 34; 1830, *McGregor v. Cleveland*, 5 *Wend.*, 475. *Ct. of Errors*, 1836, *Whitaker v. Brown*, 16 *Id.*, 505; overruling *The same v. The same*, 11 *Id.*, 75.

146. To entitle the payee to recover against a firm, on a note made by one member of the firm in the partnership name, it is not incumbent on him, in the first instance, to show that it was given for a partnership transaction. If it was not so given, the fact must be shown by the defendants. When the signature of a firm is found to a note, the presumption of law is, that it was given for a partnership debt. If the contrary be shown by the defence, in a suit between the original parties, then the plaintiff must show the assent of the partner who did not subscribe. *Supreme Ct.*, 1831, *Vallett v. Parker*, 6 *Wend.*, 615; 1843, *Austin v. Vandermark*, 4 *Hill*, 259.

147. Where it appears, in a suit against partners as indorsers of a note, that the note was not indorsed in the course of the partnership business, and that this was known to the payee, it becomes incumbent on him to show that the partners sought to be charged all assented to the indorsement. That the payee

* We judge this to be the case mentioned as affirmed by the chancellor, 2 *Ch. Sent.*, 65.

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parted with his goods in the usual course of trade, and on the credit of the indorsement, will not help him. *Supreme Ct.*, 1835, *Wilson v. Williams*, 14 *Wend.*, 146. To nearly same effect is, 1849, *Bank of Vergennes v. Cameron*, 7 *Barb.*, 143.

148. Bill of exchange. An action cannot be maintained by the acceptor of a bill of exchange against all the members of a firm, on a bill drawn by one of them, in the firm-name, as surety for a third person, where the fact that it is so drawn is known to the acceptor. The word *surety* added to the name of the firm, is sufficient to cast upon the holder the burden of proof that the bill was drawn with the assent of all the partners. *Supreme Ct.*, 1831, *Boyd v. Plumb*, 7 *Wend.*, 309.

149. W., R., and G., being partners in trade, W. took the lease of the store occupied by them in his own name, and paid one-third of the rent. To provide for the other two-thirds, G. drew a bill in the name of the firm, procured it to be accepted by the plaintiff, and at the same time agreed, in the name of the firm, to take care of the bill at maturity. W., in the presence of the plaintiff, and at the time this agreement was made, refused to assent to it. The bill went to pay the rent, with the knowledge and assent of W. and G. *Held*, that the plaintiff, having paid the bill as acceptor, might maintain an action against the firm for money paid.* *Ct. of Appeals*, 1849, *Pearce v. Wilkins*, 2 *N. Y. (2 Comst.)*, 469; affirming *S. C.*, 5 *Den.*, 541.

150. An authority to one partner to subscribe the name of the firm as accommodation sureties for a third person may be shown from circumstances,—*s. g.*, by proof that such partner has previously signed similar notes, and his copartner on being informed of it has approved of it. *Ct. of Appeals*, 1853, *Butler v. Stocking*, 8 *N. Y. (4 Seld.)*, 408.

* The Supreme Court held that G. was authorized by the relation of partnership to make a contract within the scope of the partnership business, notwithstanding the expressed dissent of his copartner. The Court of Appeals expressed no opinion on this point, but affirmed the judgment, on the ground that W.'s consent to the application of the acceptance to the payment of the rent was inconsistent with his previous dissent, and ought to be regarded as a waiver of it, and a ratification of the stipulation in the partnership name to provide for the draft at maturity.

151. Bona-fide holder. Although the name of a firm is indorsed upon a note, by one of the members without the consent of his partners, and for the accommodation of a stranger, yet if such note is discounted, by one who takes it without notice that the indorsement was not made in the partnership business, he can recover against the firm. *Supreme Ct.*, 1836, *Catskill Bank v. Stall*, 15 *Wend.*, 364; affirmed, *sub nom.* *Stall v. Catskill Bank*, 18 *Id.*, 466; 1838, *Wells v. Evans*, 20 *Id.*, 251; reversed on other grounds, 22 *Id.*, 324.

152. Negotiable paper made by a member of a firm, in the partnership name, although made contrary to the articles of copartnership, is nevertheless binding on the firm in the hands of a holder for value without notice. *Supreme Ct.*, 1845, *Bank of Rochester v. Montooth*, 1 *Den.*, 402.

153. One partner held liable on a note made by the other, in the firm-name, after the time fixed by the articles for the termination of the partnership, but before publication of notice of dissolution. *Supreme Ct.*, 1852, *Gould v. Homer*, 12 *Barb.*, 601.

154. What is notice. One applying for the renewal of an accommodation-note, made in the individual name of the borrower, presented to his indorser a renewal note to which he had subscribed the name of a firm, of which he had recently become a member, as makers;—*Held*, that, under the circumstances, the indorser was chargeable with notice that the note was given for the individual debt of the borrower, and that he could not enforce it against other members of the firm without proving an assent. *Supreme Ct.*, 1835, *Gansevoort v. Williams*, 14 *Wend.*, 133.

155. What is notice to the holder of a note, that it was made by one partner outside the partnership business. *Wilson v. Williams*, 14 *Wend.*, 146; *Joyce v. Williams*, *Id.*, 141; *Bank of Vergennes v. Cameron*, 7 *Barb.*, 143; *Elliott v. Dudley*, 19 *Id.*, 326; *Austin v. Vandermark*, 4 *Hill*, 259.

4. To Contract Debts.

156. Partner's authority. All partnerships, in one sense, are limited. They have particular branches of trade in view; none embrace all the varieties of trade. All that is requisite to render a debt contracted by one of the partners binding and obligatory on the others, is that the debt relate to the partner-

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ship. The authority delegated by one partner to another, is to act in their particular trade or line of business; and in such transactions, strangers have a right to act on the credit of the partnership fund. It is not necessary that the money lent, or credit given, should appear to have been actually used for the benefit of the partnership. *Supreme Ct.*, 1818, *Walden v. Sherburne*, 15 *Johns.*, 409.

157. Money borrowed. Where a general partnership exists, and money is borrowed by one of the firm *in the name* of the firm, all the partners are liable, although the money, when obtained, be appropriated by the partner borrowing it to his own use. So, also, they are liable where one of the firm borrows money (not expressly on his individual credit), and it is shown that it was borrowed for and appropriated to the use of the firm. Whether the money was so borrowed and appropriated, is a question which ought to be submitted to a jury. *Supreme Ct.*, 1830, *Church v. Sparrow*, 5 *Wend.*, 228.

158. All the members of a firm are liable for money lent to the firm upon the application of one of the partners, and it is not necessary to show the actual application of the money to the use of the firm, or the assent of the other members to such application thereof. *Ct. of Errors*, 1886, *Whitaker v. Brown*, 16 *Wend.*, 505. See *Thorn v. Smith*, 21 *Wend.*, 865.

159. Where there is a general partnership, and one partner borrows money in the name and upon the credit of the firm, the lender may recover against the firm, if he acted in good faith, notwithstanding that the money was ultimately misapplied by the partner borrowing it. It makes no difference that the money was advanced upon an exchange check. *Supreme Ct.*, 1837, *Onondaga County Bank v. De Puy*, 17 *Wend.*, 47.

160. To render a firm liable for money borrowed by a partner, it must appear either that it was borrowed in the name of the firm, and upon its credit, or that it was applied to the use of the firm. *N. Y. Superior Ct.*, 1857, *Porter v. Lobach*, 2 *Bow.*, 188.

161. Goods bought. To charge a partnership for goods delivered on the request of one partner, there must be proof either that the request was made in the name of the firm, or that the goods were applied to the use of the firm. *N. Y. Com. Pl.*, 1855, *Pinckney v. Keyser* 4 *E. D. Smith*, 469.

162. Individual debt. One partner cannot by his acts or admissions bind his copartners, without their assent, for an individual debt of his own. *Supreme Ct.*, 1855, *Elliott v. Dudley*, 19 *Barb.*, 326.

163. Owners of patent. Where two persons are joint owners or proprietors of a patent right or privilege, one of them is not, on that ground merely, responsible for any special contract entered into by the other, not connected with the enjoyment and exercise of their common right or privilege. *Chancery*, 1817, *Lawrence v. Dale*, 3 *Johns. Ch.*, 23; affirmed, *Ct. of Errors*, 1819; *sub nom.* *McNiven v. Livingston*, 17 *Johns.*, 487.

164. Repairs on steamboat. Defendants agreed with the owner of a steamboat that if sufficient stock should be subscribed for, they would form a limited partnership with him to run the boat; *he* to be the general partner. While they were endeavoring to raise the fund, the owner of the boat contracted a debt for repairs upon her. The intended partnership failed for want of a sufficient subscription. *Held*, that defendants were not liable for the debt thus contracted by the owner; they having had no personal agency in contracting it. Until the limited partnership was formed, the owner had no authority, express or implied, to bind his proposed associates or partners. *V. Chan. Ct.*, 1839, *West Point Foundry Association v. Brown*, 3 *Edw.*, 284.

165. Railroad contractors. Defendants were joint contractors in the construction of a railroad, and by their agreement each was to furnish his own team and teamsters. Plaintiff had previously been hired as a teamster by one of the defendants for a year, and under such hiring drove a team on the work in question. *Held*, that the defendants were not jointly liable to him. His services were so much contributed to the common stock by the defendant who had hired him, and such defendant was alone liable. *Supreme Ct.*, 1843, *McGuire v. O'Hallaran*, *Hill & D. Supp.*, 85.

166. Manufacturing association. After a manufacturing association had abandoned their enterprise, and all the other partners had determined to make no further advances, and to incur no further expense, a partner rendered services and incurred expenses tending to preserve the partnership building and to enhance its value. *Held*, that he could not be allowed

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therefor in the partnership accounting. *Chancery*, 1824, *Skinner v. White*, *Hopk.*, 107.

167. Mill. Three persons being partners in building a mill, the partner who had the management bought stones for it in his own name, the seller being ignorant of the partnership. *Held*, that the seller could maintain an action against the partnership for the price. *Supreme Ct.*, 1825, *Reynolds v. Cleveland*, 4 *Cow.*, 282.

5. To Confess Judgment.

168. By bond and warrant. If one partner, without special authority, give a bond and warrant of attorney in the name of himself and partner, the judgment entered thereon is valid only against himself. The court will not vacate it on his application. *Supreme Ct.*, 1804, *Green v. Beals*, 2 *Cai.*, 254; *S. P.*, 1839, *St. John v. Holmes*, 20 *Wend.*, 609.

169. On application of the injured partner, levy will be restricted. *Supreme Ct.*, 1804, *Green v. Beals*, 2 *Cai.*, 254.

170. One partner cannot bind another without his assent, by bond and warrant to confess a judgment; but such a bond is an extinguishment of the partnership debt. One partner cannot confess a voluntary judgment in the name of his partner, unless actually brought into court by a regular service of process against him and his partner. A voluntary judgment, confessed out of court, is valid only against the partner who confesses it. *Supreme Ct.*, 1828, *Crane v. French*, 1 *Wend.*, 311; *S. P.*, *Sp. T.*, 1852, *Stoutenburgh v. Vandenburg*, 7 *How. Pr.*, 229.

171. A declaration was served on one partner only, and he employed an attorney, and authorized him to give a *cognovit*, which he did for both, in good faith. The attorney, being responsible, the court refused to set aside the judgment, but permitted the partner who had not been brought in to contest the validity of the claim. *Supreme Ct.*, 1832, *Grazebrook v. McCreddie*, 9 *Wend.*, 437. Otherwise, where the attorney is irresponsible. *Supreme Ct.*, *Sp. T.*, 1845, *Groesbeck v. Brown*, 2 *How. Pr.*, 21.

172. Under the Joint-debtor Act. Under Laws of 1838, 395, ch. 271, judgment against partners may be entered, upon service on and confession by one only; but will be a lien and can be enforced only against the joint property of the defendants, and the individual property

of the defendant served. *Supreme Ct.*, 1834, *Pardee v. Haynes*, 10 *Wend.*, 630. Followed, *Sp. T.*, 1845, *Kidd v. Brown*, 2 *How. Pr.*, 20; 1852, *Stoutenburgh v. Vandenburg*, 7 *Id.*, 229. Compare, also, *Waring v. Robinson*, *Hoffm.*, 524; *Matter of Lowenstein*, 7 *How. Pr.*, 100.

173. After bill filed. The appointment of a receiver upon a bill for a dissolution, or for an accounting upon a prior dissolution, deprives the partner defendant of all power to give a preference to a particular creditor,—*e. g.*, by confessing judgment. *A. V. Chan. Ct.*, 1840, *Waring v. Robinson*, *Hoffm.*, 524.

174. Since the Code. No power is implied as within the scope of partnership authority, unless such as the partners can be presumed to have intended to grant to each other. A partner has no authority to confess judgment on behalf of the firm, contrary to the wish of his copartner. *Supreme Ct.*, 1854, *Everson v. Gehrman*, 1 *Abbotts' Pr.*, 167; *S. O.*, less fully, 10 *How. Pr.*, 301.

175. One partner of a firm in failing circumstances, for the purpose of securing a *bona-fide* partnership-creditor, admitted service of a summons and complaint, and gave an offer for judgment under section 385 of the Code of Procedure, on which judgment was entered and execution issued against and levy made on the partnership property. On motion to set aside the judgment and execution by the other member of the firm who was not cognizant of or consenting to the proceedings,—*Held*, that the proceedings were regular. *N. Y. Com. Pl.*, 1852, *Olwell v. McLaughlin*, 10 *N. Y. Leg. Obs.*, 316.

6. To make Assignments for Benefit of Creditors.

176. Assignment to creditor. One partner may make a valid general assignment of the partnership property in payment of debts. *So held*, where the assignment was made during the absence of the copartner, and the question arose in an action by the assignee for the price of some of the goods afterwards sold by him. *Mayor's Ct.*, 1802, *Foley v. Winant*, *Liv. Jud. Op.*, 43.

177. One partner may, during the continuance of the partnership, make a valid assignment of the partnership effects, or of so much as is necessary for the purpose, in the name of the firm, directly to one or more of the cred-

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itors in payment of their demands, notwithstanding such assignment operates to give them a preference over other creditors. *Chancery*, 1892, *Egberts v. Wood*, 8 *Paige*, 517.

178. By the law merchant, although the effects of a copartnership, upon the insolvency of the firm, were, in equity, considered a trust-fund for the payment of the partnership debts, and any of the partners might apply to have them appropriated ratably among all the creditors, yet either of the partners before a dissolution, or all of them afterwards, might appropriate them to the payment of one creditor in preference to another. The Revised Statutes have imposed a partial restriction upon this right, by depriving an insolvent debtor, who attempts to exercise it, of the benefit of the insolvent laws. But if he is willing to subject himself to this disability, the payment of one creditor to the exclusion of others is valid as against the others. And the surviving partners, upon a dissolution of the firm by death, may give a similar preference, with the consent of the personal representative of the decedent. *Id.*

179. One partner has authority, in the absence of fraud, to sell and transfer all the copartnership effects directly to a creditor of the firm, in payment of a debt, without the knowledge or consent of his copartner, although the latter is at the place of business of the firm, and might be consulted. Nor is such transfer invalid although the firm is insolvent, and thereby the one creditor gains a preference over the other creditors of the firm. *Ct. of Appeals*, 1855, *Mabbett v. White*, 12 *N. Y.* (2 *Kern.*), 442.

180. The relation subsisting between partners is of the most intimate and confidential nature. They are joint-tenants of the stock and effects of the company; their interests are joint and mutual, and each is seized *per my et per tout*; each has entire possession, as well of every part as of the whole, and not the undivided whole of a moiety. A partnership is a voluntary association, by which, in all the affairs connected with the business, an authority is impliedly given to every member to dispose of the partnership property, as if it were his own personal effects. Such is the indivisible nature of their interest, and the capacity of every member to act as the authorized agent of all, that whatever one does in the course of the partnership business, has the

same efficacy as if all had severally and directly joined in the act. *Id.*

181. Assignment to a trustee. A partner has not power, as such, to assign the assets of the firm to a trustee for the benefit of creditors. To support such an assignment by one partner, or any number short of the whole, it must be shown that it was made under circumstances that rendered it impossible to consult the other partners; or from their acts or declarations, either before or subsequent thereto, that it was executed with their assent or by their authority. *N. Y. Com. Pl.*, 1852, *Fisher v. Murray*, 1 *E. D. Smith*, 841.

182. A general assignment for the benefit of creditors, made by one partner without the consent of his copartner, and not ratified by them, is void, not only as against them, but also as against judgment-creditors, and may be set aside on a bill filed by them. *Supreme Ct., Sp. T.*, 1857, *Haggerty v. Granger*, 15 *How. Pr.*, 248.

183. A general assignment of the firm-effects will be valid although made by one partner alone, if the other partner has abandoned all control of the business, and an equitable distribution of all the assets is directed. *N. Y. Superior Ct.*, 1858, *Kemp v. Carnley*, 3 *Duer*, 1.

184. — with preferences. And a provision which operates to give a preference to one creditor, if there was no fraudulent intent, will not avoid the whole assignment, but the preference only will be void. *Id.*

185. An assignment made by one partner against the known wishes of his copartner, conveying the partnership effects to a trustee for the benefit of creditors and giving preferences, is invalid. The principle on which an assignment by one partner in payment of a partnership debt is sustained, is that there is an implied authority for that purpose, the payment of firm debts being a part of the necessary business of the firm. But it is no part of the ordinary business of a copartnership to appoint a trustee of all the effects for the purpose of distributing among creditors. *Chancery*, 1834, *Havens v. Hussey*, 5 *Paige*, 80. See, also, *Mills v. Argall*, 6 *Id.*, 577.

186. *So held*, also, where, though there was no express dissent by the copartner, he resided abroad and had never ratified the assignment. *V. Chan. Ct.*, 1840, *Hitchcock v. St. John*, *Hoffm.*, 511.

187. *So held*, where the assignment em-

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braced, substantially, all the assets of the firm, and was made to one creditor to secure him alone. *N. Y. Superior Ct., Sp. T.*, 1858, *Paton v. Wright*, 15 *How. Pr.*, 481.

188. That the law will not favor an attempt by one partner to give a preference to particular creditors against the wish of his copartners. *Matter of Lowenstein*, 7 *How. Pr.*, 100.

189. — *without preferences.* The reason why a general assignment of the firm effects, made by one partner only, is held invalid, is not that it operates as a fraud upon the other partner, but because the relation of partnership does not confer power upon any one partner to make it. Where the assignment is made after insolvency, and divides the funds equally among the creditors, it will be supported; for the partner making it might, by filing a bill, insure an equal distribution, and in the absence of any dissent by the copartner, his assent to such distribution may be presumed. But an assignment by one partner, giving preferences, will be deemed invalid. *A. V. Chan. Ct.*, 1840, *Hitchcock v. St. John*, *Hoffm.*, 511.

190. It is not competent for one member of a partnership, without the assent or concurrence of his copartner, being present or capable of acting, to make a general assignment of the property and effects of the firm to a trustee, for the payment of the partnership debts, even though no preferences are directed. The power to make such a disposal of the effects is not implied in the partnership relation. *N. Y. Superior Ct.*, 1849, *Deming v. Colt*, 8 *Sandf.*, 284. *S. P., Supreme Ct., Sp. T.*, 1857, *Haggerty v. Granger*, 15 *How. Pr.*, 243. *N. Y. Com. Pl.*, 1856, *Wetter v. Schlieper*, 6 *Abbotts' Pr.*, 123.

191. No one but the absent partner can question the validity of an assignment executed in his absence by his copartner. It is not void *per se*, but only voidable at the election of the absent partner. [4 *Wash. O. C. R.*, 232.] *Supreme Ct.*, 1858, *Sheldon v. Smith*, 28 *Barb.*, 593.

192. *Ratification.* If, upon his return, the absent partner affirms and ratifies an assignment executed during his absence by his partner, in his name and as his attorney, such ratification will relate back to the time of the original execution of the instrument, and render the assignment valid and operative from

that time. [5 *Hill*, 107; *Story on As.*, §§ 239, 244.] *Id.*

193. *Alteration.* In such case, an alteration in the matters referred to in the instrument, made after the execution of the instrument, but before its ratification, has no force. The instrument takes effect as of the time of its execution. *Id.*

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194. *General rule.* In general, a partner is not entitled to charge his copartners for services rendered in the management of the partnership property or business, unless upon a special agreement to that effect. *Chancery*, 1814, *Nicoll v. Town of Huntington*, 1 *Johns. Ch.*, 166; 1818, *Bradford v. Kimberly*, 3 *Id.*, 481. *A. V. Chan. Ct.*, 1839, *Dougherty v. Van Nostrand*, *Hoffm.*, 68. *Supreme Ct.*, 1841, *Paine v. Thacher*, 24 *Wend.*, 450. *N. Y. Superior Ct.*, 1853, *Coursen v. Hamlin*, 2 *Duer*, 518.

195. A part-owner of a vessel cannot charge the others for services in their common interest, except by special contract. And if he performs services under an entire contract, which fails, he cannot recover on a *quantum meruit*. [1 *Anst.*, 94.] *Chancery*, 1814, *Franklin v. Robinson*, 1 *Johns. Ch.*, 157.

196. Partners cannot charge each other or the firm for extra services in the business of the firm, except by special agreement, or where an agreement to that effect can be implied from the course of business between them. *Chancery*, 1839, *Caldwell v. Leiber*, 7 *Paiga*, 483.

197. *Expenses abroad.* A partner who went abroad on his own private affairs,—*Held*, not entitled to charge his expenses to the copartnership. *Chancery*, 1822, *Mumford v. Murray*, 6 *Johns. Ch.*, 1.

198. *Commissions.* One part-owner, appointed an agent for a special purpose in relation to their joint concern, may be entitled to the commissions and lien of a factor or agent, in relation to the subject of such agency. *Chancery*, 1818, *Bradford v. Kimberly*, 3 *Johns. Ch.*, 481.

199. If two agree to share the profits of a contemplated purchase, one of them may not receive from the seller a commission for his separate, private use. It would be a fraud on

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his associate. The *actual cost*, i. e., the net sum received by the seller, is the amount at which the property should be set down in ascertaining the profits, and whatever commissions have been allowed by the seller should be charged to him who received them, as part of his share of the profits. *N. Y. Com. Pl.*, 1853, *Dunlop v. Richards*, 2 *E. D. Smith*, 181.

200. Express agreement. A partner agreed, in the articles of partnership, to pay an equivalent for certain services to be rendered in the business by the others, and afterwards adjusted the amount, and expressly promised to pay it. *Held*, that an action lay upon the promise. *Supreme Ct.*, 1841, *Paine v. Thacher*, 25 *Wend.*, 450.

VI. REAL PROPERTY.

201. Common-law rule. The rules applicable to partnerships, and which govern the disposition of the partnership property, do not apply to real estate. Hence, when real estate is held by persons who are partners in trade, for the purposes of their partnership, they hold as tenants in common. The rules relative to partnership property do not apply to it. [3 *Br. Ch.*, 199; 9 *Ves., Jr.*, 500.] One partner can sell no more than his individual interest in the land; and if both join in a sale and conveyance and one only receives the purchase-money, the other may maintain an action against him for his proportion. *Supreme Ct.*, 1818, *Coles v. Coles*, 15 *Johns.*, 159.

202. There may be a partnership in the use or working of lands,—e. g., in the business of farming or mining,—so that the law merchant will apply and govern to the same extent as in ordinary mercantile associations. But in the buying and selling of lands for profit on the joint account of several, the lands retain the character of real estate. They are bought and sold as such; and each associate must contract for himself. *V. Chan. Ct.*, 1844, *Patterson v. Brewster*, 4 *Edw.*, 852.

203. Several persons associated under an agreement to contribute a capital to be employed by two of their number in the purchase and sale of lands, as agents and trustees, for three years, when they were to account;—*Held*, that the other associates were not liable, in equity, upon the obligations given by the managing associates in their own names, as security for the purchase-money of lands bought under the agreement. *Id.*

204. That there may be a partnership in the business of buying and selling real estate merely. *Sage v. Sherman*, 2 *N. Y. (2 Comst.)*, 417.

205. Rule in equity. Real estate taken by a partnership for debts due to it, or purchased for partnership use, is, in equity, chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another, upon the winding up of the affairs of the firm. *Chancery*, 1847, *Buchan v. Sumner*, 2 *Barb. Ch.*, 165; *Smith v. Tarlton, Id.*, 886. Compare *Oostar v. Clarke*, 8 *Edw.*, 428.

206. Where real estate is purchased with partnership funds or for the use of the firm, in equity it is chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another, upon winding up the affairs of the firm. But as between the personal representatives and the heir-at-law of a deceased partner, his share of the surplus of the real estate of the copartnership is treated as real estate. *Supreme Ct., Sp. T.*, 1850, *Buckley v. Buckley*, 11 *Barb.*, 48.

207. Land purchased by the partners for and used in the partnership business, and paid for from the partnership funds, is deemed, in equity, personal property, and goes to the survivor for the payment of the partnership debts. He may specifically enforce his contract for the sale of it, and may compel the heirs of the deceased partner to join in the conveyance. *A. V. Chan. Ct.*, 1845, *Delmonico v. Guillaume*, 2 *Sandf. Ch.*, 866.

208. To constitute real estate partnership property, it must not only be purchased with the firm funds, but be used for partnership purposes. *N. Y. Superior Ct.*, 1849, *Cox v. McBurney*, 2 *Sandf.*, 561.

209. Members of a firm of importers owned the real estate where the business was carried on, each owning a part in severalty. The copartnership had erected buildings and made improvements on the land. *Held*, that on a dissolution of the partnership, and appointment of a receiver, the lands should be treated as forming a part of the partnership assets. *N. Y. Superior Ct., Sp. T.*, 1852, *Smith v. Danvers*, 5 *Sandf.*, 669.

210. Lands of one partner. If the partnership funds are expended upon the land of one partner, the other acquires an equitable

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interest in or lien upon the improvements, and the improvements are a part of the partnership fund for the payment of partnership debts. *Supreme Ct., Sp. T., 1849, Averill v. Loucks, 6 Barb., 19.*

211. If two partners in the business of nurturing trees and plants for sale, use the land of one of them for the purpose of their nursery, the trees and plants are personal property as between them, but a part of the realty as between the owner and his subsequent mortgagee; but a mortgagee with notice, or a purchaser under his mortgage without notice, takes the lien upon or acquires the property in the trees, &c., subject to a settlement of the partnership affairs. *Supreme Ct., Sp. T., 1849, King v. Wilcomb, 7 Barb., 268.*

212. A partner confessed a judgment for a partnership debt. Afterwards the firm became insolvent, and made an assignment. The court refused, on motion, to restrain the judgment-creditor from selling land of the individual partner, upon which the firm had expended money, and in the improvements of which the assignees claimed an equitable interest; holding, that a notice of their equitable claim given at the sheriff's sale, would sufficiently protect their rights. *Supreme Ct., Sp. T., 1849, Averill v. Loucks, 6 Barb., 19.*

213. Leasehold interest. A lease for years to W., though the premises were thereafter occupied by his firm,—*Held*, his individual property, so that his partner could not transfer it, without competent authority from him. *Supreme Ct., 1849, Otis v. Sill, 8 Barb., 102.*

214. One partner may, in good faith, purchase and hold, for his own use, the reversion of real estate occupied by the copartnership under a lease for years. *Ct. of Appeals, 1858, Anderson v. Lemon, 8 N. Y. (4 Seld.), 286.*

215. But where one partner secretly made such purchase in his own name, while the other partner, with his concurrence, was negotiating with the owner to obtain the property for the use of the firm, the purchaser was declared a trustee for the firm. *Id.*

VII. DISSOLUTION.

1. How effected.

216. By assignment. A *bona-fide* assignment by one partner of his partnership interest, *ipso facto* dissolves the partnership, if the assignee elects to treat it as dissolved, and

to claim an accounting, notwithstanding the articles expressly provide that the copartnership shall continue until two of the partners shall demand a dissolution, and the other partners are desirous to have it continue notwithstanding the assignment. *Ct. of Errors, 1820, Marquand v. N. Y. Manufacturing Co., 17 Johns., 525.*

217. Where two persons are tenants in common of a farm, and partners in the business of farming, and one conveys his interest to a third person, the partnership is dissolved, and the third person becomes tenant in common with the other of the partners, of the growing crops, and of the firm property, subject to an account. *Supreme Ct., 1832, Mumford v. McKay, 8 Wend., 442.*

218. Copyrighted work. Partners in a copyright may make a valid agreement between themselves for the printing of the book by one of them, and the delivery of a part of the edition to the other. Such agreement is a dissolution of the partnership as between them, *pro tanto*. *Supreme Ct., 1832, Gould v. Banks, 8 Wend., 562.*

219. Dissensions between partners. When *held* ground for decreeing a dissolution of partnership. *Bishop v. Breckles, Hoffm., 584; Berry v. Cross, 8 Sandf. Ch., 1; Henn v. Walsh, 2 Edw., 129.*

220. Death. The French law of partnership, in respect to dissolution by death, considered. *Jacquin v. Buisson, 11 How. Pr., 385; Ames v. Downing, 1 Bradf., 321.*

221. War. A commercial partnership, existing between a citizen of the United States and the citizen or subject of a foreign country, is dissolved by the breaking out of a war between the two countries; for war renders all trading, negotiation, communication, or intercourse with the enemy, without the direct permission of the government, unlawful. The existence of war renders the prosecution of the partnership relations impossible, and legally disables each partner from co-operating with the other, as much as does death or insanity, &c. *Ct. of Errors, 1819, Griswold v. Waddington, 16 Johns., 488; affirming S. O., 15 Id., 57; Seaman v. Waddington, 16 Id., 510. Compare Buchanan v. Curry, 19 Id., 187.*

2. Its Consequences.

222. In general. A dissolution of a copartnership does not destroy the joint-tenancy

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of the partners in the partnership property, and create a tenancy in common. They are still partners for the purpose of settling the partnership concerns, and until that is effected. For that purpose the partnership still continues, with all the incidents belonging to that relation. *Supreme Ct.*, 1826, *Murray v. Mumford*, 6 *Cow.*, 441; *S. C. at N. P.*, *Anth. N. P.*, 294.

223. Transferring security. After the dissolution, all the partners must join in the transfer of a partnership security, in order to vest the title in the transferee. Neither partner, after dissolution, can make any disposition of the partnership property, in any manner inconsistent with the primary duty incumbent on all the partners, of winding up the whole concerns of the partnership. *Supreme Ct.*, *Sp. T.*, 1847, *Geortner v. Trustees of Canajoharie*, 2 *Barb.*, 265.

224. Making notes. The power of one partner to bind the others, ceases upon the dissolution of the partnership. If one partner, after the dissolution of the copartnership, issues notes signed with the name of the partnership, the other partner is not liable. And notes delivered after the dissolution are considered as made when delivered, though earlier dated. [8 *Esp.*, 108.] *Supreme Ct.*, 1807, *Lansing v. Gaine*, 2 *Johns.*, 800; 1841, *National Bank v. Norton*, 1 *Hill*, 572; 1842, *Mitchell v. Ostrom*, 2 *Id.*, 520; 1850, *Lusk v. Smith*, 8 *Barb.*, 570.

225. One partner cannot, after dissolution, indorse a note, given to the partnership so as to enable the indorsee to maintain an action against the makers, without special authority. A general authority to collect and pay debts is not enough. The general power, during partnership, of one partner to bind his copartner, ceases on dissolution; and with respect to antecedent debts contracted during the partnership, the power to receive payments, and give discharges, rests on the same principle with that of joint obligees, or payees of a note, not otherwise connected as partners. *Supreme Ct.*, 1809, *Sanford v. Mickles*, 4 *Johns.*, 224.

226. One partner may bind another by a note made, after dissolution, in the firm-name, if the payee is not chargeable with notice of the dissolution. It makes no difference that there was no time between the dissolution and the giving of the note, for notice to be given. The want of time cannot dispense with the

rule of law; so far as the public are concerned, the partnership obligations continue until notice is given. *Supreme Ct.*, 1832, *Bristol v. Sprague*, 8 *Wend.*, 428.

227. But if the payee of such note is chargeable with notice of the dissolution, he cannot recover against the copartner; no special authority to make the note being shown. Nor can one who has received such a note from the payee as collateral security for an antecedent debt, enforce the note against the copartner. *Id.*

228. New contracts. A member of a mercantile firm, after its dissolution, cannot bind his former partner by an agreement to collect a demand of a third person in the firm-name. Such an agreement has no necessary or legitimate connection with the winding up of the business of the copartnership. *Supreme Ct.*, 1848, *Sutton v. Dillaye*, 3 *Barb.*, 529.

229. The plaintiff sold goods to H., and charged them to him, and afterwards took his note in payment of the account. They then sought to charge the defendant, as being a partner of H.; and relied upon the fact that there had been a partnership between them, under the firm-name of H. & Co., and that no notice of the dissolution had been given to the plaintiffs; and upon the declarations of H., that the defendant was still interested with him in the business, and that the name had been changed for the purpose of collecting the debts. *Held*, that this was not sufficient to establish the liability of the defendant as a partner when the debt was contracted; and that after the partnership had been dissolved, no liability could be created upon its credit, unless the name of the firm was used in making the purchases. *Supreme Ct.*, 1858, *Kirby v. Hewitt*, 26 *Barb.*, 607.

230. — with former dealers. The rule, that after the dissolution of a copartnership, one member of the firm cannot bind his former partners by any new contract, only affects contracts made after dissolution with one who had not before had dealings with the firm, or who, having had dealings with them, has had actual notice of the dissolution. The acts of one partner, though after dissolution, will bind his copartners in respect to all persons who have previously dealt with them as a firm, except those to whom actual notice of the dissolution has been given. *Supreme Ct.*, 1849, *Van Eps v. Dillaye*, 6 *Barb.*, 244.

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231. Partner whose name was never used, not liable for debts contracted after he retires, with persons who did not know his interest. *Davis v. Allen*, 8 N. Y. (3 *Comm.*), 168.

232. Upon the dissolution of a copartnership, actual notice thereof must be given to persons who have had dealings with the firm on the united credit. Otherwise the partners will continue liable for the acts of each other, in using the partnership name, after the dissolution. *Supreme Ct.*, 1848, *Wardwell v. Haight*, 2 *Barb.*, 549. *Ct. of Appeals*, 1855, *Clapp v. Rogers*, 12 N. Y. (3 *Kern.*), 288.

233. Although a partnership has expired, by its own limitation, yet if no public notice of dissolution has been given, and the partners have continued to carry on business as if the partnership was still subsisting, an acceptance of a bill by one partner, in the partnership name, will bind the others. *Supreme Ct.*, 1810, *Ketcham v. Clark*, 6 *Johns.*, 144.

234. On dissolution of partnership, public notice, in the newspapers or otherwise, should be given, and that will conclude all persons who have had no previous dealings with the firm. Those who have formerly dealt with the firm, are entitled to actual notice of the dissolution; otherwise they will be entitled to hold all the partners, for the engagement of one of them given in the partnership name. *Id.*

235. What is sufficient notice. Notice in the newspapers, of the dissolution of a partnership, is sufficient notice to all persons who have had no previous dealings with the firm. [*Peake's N. P.*, 42, 154; 1 *Esp. Cas.*, 371; 3 *Esp.*, 108, 248.] *Supreme Ct.*, 1807, *Lansing v. Gaine*, 2 *Johns.*, 800.

236. As to all persons who have had no previous dealings with a firm, the notice of its dissolution must be a reasonable one. It need not be in a newspaper, but may be in some other proper manner. But it must be notorious, so as to put the public on guard. *Supreme Ct.*, 1848, *Wardwell v. Haight*, 2 *Barb.*, 549.

237. Who is a "dealer." To constitute one a "dealer" with a firm, so as to entitle him to actual notice of dissolution, he must be one who has had business relations with the firm, by which a credit is raised upon the faith of the partnership. *Ct. of Errors*, 1839, *Vernon v. Manhattan Co.*, 22 *Wend.*, 183. *Approved*, *Ct. of Appeals*, 1855, *Clapp v. Rogers*, 12 N. Y. (3 *Kern.*), 288; affirming S. C., 1 *E. D. Smith*, 549.

238. Three persons were copartners until January, 1849, when they dissolved. Two of them continued the business under the same firm-name. The plaintiffs had, on two occasions prior to the dissolution, sold goods of small value to the firm on credit, which were paid before the dissolution, and they subsequently, without notice of the change, sold to the firm on credit;—*Held*, that all the original members were liable therefor. *Ct. of Appeals*, 1855, *Clapp v. Rogers*, 12 N. Y. (3 *Kern.*), 288.

239. Two sales of goods by plaintiff to a firm,—*Held*, enough, under the circumstances, to constitute him a "dealer" within the rule entitling him to actual notice of dissolution. *Wardwell v. Haight*, 2 *Barb.*, 549.

240. A dormant partner is not liable for debts contracted by the active partner after a dissolution, although no notice of dissolution is published. *Supreme Ct.*, 1826, *Kelley v. Hurlburt*, 5 *Cow.*, 534.

241. Thus where S. and H. were in partnership, but the business was carried on in the name of H. alone, and the plaintiffs, after dissolution, sold goods to H. without knowing that a partnership ever had existed,—*Held*, that S. was not liable, although no notice of dissolution was published, and the partnership had been known to some extent. *Id.*

242. Notice, when unnecessary. Notice of dissolution of partnership is unnecessary where the dissolution is caused by the breaking out of war between the nations of which the partners are respectively citizens. Notice is requisite when a partnership is dissolved by the act of the parties, but not when the dissolution takes place by the act of the law. The declaration of war is, of itself, the most authentic and monitory notice. Any other would be useless. *Ct. of Errors*, 1819, *Griswold v. Waddington*, 16 *Johns.*, 488; affirming S. C., 15 *Id.*, 57; *Seaman v. Waddington*, 16 *Id.*, 510.

243. Collecting debts. The right of either partner to collect a partnership debt, and to sue thereon in the name of the firm, is an incident to the partnership relation, and which survives the dissolution. One partner is bound by the act of the other in the exercise of this right, as well when performed after as before the termination of the partnership. *N. Y. Com. Pl.*, 1852, *Ward v. Barber*, 1 *E. D. Smith*, 423.

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244. After dissolution, either of the partners may receive payment of the debts due the partnership, and is bound to apply the moneys received in payment of the partnership debts. *Supreme Ct., Sp. T., 1847, Geortner v. Trustees of Canajoharie, 2 Barb., 625.*

245. Closing up the business. On a dissolution by one partner's becoming insolvent, the remaining partner has not a right, as of course, to close up the business, as a surviving partner has. The copartner has a right to demand the appointment of a receiver. But the solvent partner ought to be appointed receiver, if he will give the necessary security, and his capacity and integrity are unquestioned. *N. Y. Superior Ct., 1853, Hubbard v. Guild, 1 Duer, 662.*

246. When the articles of dissolution intrust the charge of the property and the winding up of the concern to one of the partners, the court will not interfere with his proceedings, except upon proof of a palpable breach of the articles, or of some misconduct amounting to fraud, or endangering the property. *V. Chan. Ct., 1840, Walker v. Trott, 4 Edw., 88.*

247. The plaintiff deposited money with the defendants, who were partners, taking from them a certificate of deposit. Soon afterwards the partnership was dissolved. The business was continued by one of the firm, who advertised that he would pay all the certificates of deposit of the late firm. The plaintiff, however, did not present his certificate for nearly two years afterwards. *Held*, that the retired partner was not discharged from liability by the omission of the plaintiff to present the certificate in accordance with the notice. *Supreme Ct., 1857, Umbarger v. Plume, 26 Barb., 461.*

248. Interest upon balance. The continuing partner, when authorized to close up the business, is entitled to interest when in advance, and chargeable with it when in funds; but in the absence of any agreement therefor, he is not entitled to compensation for winding up the business, by way of commissions or otherwise. *A. V. Chan. Ct., 1839, Dougherty v. Van Nostrand, Hoffm., 68.*

249. There is no general rule fixing the time of dissolution as the time from which a partner shall be charged with interest on a balance due his copartner. In general, he is not chargeable prior to the time when he is affected with notice of the amount due. *A. V. Chan.*

Ct., 1844, Beacham v. Eckford, 2 Sandf. Ch., 116.

250. E. of New York and B. of Baltimore were partners in a business at the latter city. Accounts were kept at both places, both of which were necessary to an adjustment between them. E. knew that there was a large balance against him. On dissolution, each party demanded the other's accounts, but neither complied, and E. died, leaving the balance unascertained. B. demanded E.'s accounts from his executors, and finally filed a bill against them, and, during the progress of the suit, furnished an account which gave them the means of ascertaining the balance. *Held*, that the balance drew interest only from the time when such account was furnished. *Id.*

251. Liquidating debt. Though one partner cannot bind his copartner by a note, after dissolution, yet he may liquidate a previous account by note in the late copartnership name. By doing so he does not create a debt, the debt being already in existence. *Supreme Ct., 1838, McPherson v. Rathbone, 11 Wend., 96.*

252. Acknowledging debt. An acknowledgment of a debt by one partner made after dissolution, will not bind the copartner. After dissolution, the power of one partner to bind the others wholly ceases. *So held*, even though the partner making the acknowledgment was authorized to adjust unsettled business. *Supreme Ct., 1808, Hackley v. Patrick, 8 Johns., 536; approved, 1810, Smith v. Ludlow, 6 Id., 267; 1818, Walden v. Sherburne, 15 Id., 409, 424; S. P., 1827, Hopkins v. Banks, 7 Cow., 650; 1828, Gleason v. Clark, 9 Id., 57. Ct. of Errors, 1827, Baker v. Stackpoole, Id., 419, 432.*

253. After an actual dissolution of the firm, one partner cannot bind the other by an acknowledgment of a debt which is not legally or equitably due, or by giving a note for such supposed debt, even though the creditor has no knowledge of the dissolution. The want of knowledge of the dissolution of the partnership cannot benefit a customer who loses nothing by his ignorance of the fact, and who is only to be placed in the same situation as he would have been if the fact had been communicated to him in season. *Chancery, 1832, Brisbane v. Boyd, 4 Paige, 17.*

254. Outlawed debt. An acknowledgment of a partnership debt and promise to pay it,

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made by one partner after dissolution, will not enable the creditor to enforce it against the copartners after it is barred by the Statute of Limitations. Whether such acknowledgment, &c., is made before or after the statute has run, makes no difference. The principle on which a partner can bind his associates, is the principle of agency. Each partner, when acting within the scope of the partnership, is deemed to be the authorized agent of all his fellows. The authority is presumed from the nature and necessity of the case, for without it third persons would not be safe in dealing with one of the associates, and the business of the partnership could not be carried on with success. This presumed agency continues no longer than the necessity for it exists; and for most purposes the necessity ceases with the termination of the partnership. When that is dissolved, it may be presumed that each partner still has authority to dispose of the partnership property, to collect, adjust, and pay debts, and give proper acquittances. But there is no ground for presuming a power to make new promises or engagements in the name of the firm, even though they only change without increasing the prior obligations of the firm. *Ct. of Appeals*, 1849, *Van Keuren v. Parmelee*, 2 *N. Y. (2 Comst.)*, 528;* overruling *Smith v. Ludlow*, 6 *Johns.*, 267; *Johnson v. Beardslee*, 15 *Id.*, 8; *Patterson v. Choate*, 7 *Wend.*, 441; *Hopkins v. Banks*, 7 *Cow.*, 650; *Rosevelt v. Mark*, 6 *Johns. Ch.*, 266, 291; *Dean v. Hewit*, 5 *Wend.*, 257.

255. Compositions. After dissolution of a partnership, one or more of the partners may make separate composition with any or all creditors, and without affecting rights or liabilities of the others. *Laws of 1838*, 243, ch. 257. And in case of judgment, may have it satisfied as against himself. *Laws of 1845*, 410, ch. 348; same stat., 3 *Rev. Stat.*, 5 ed., 65.

256. The respective liabilities and powers of retiring and remaining partners, considered. *Chapman v. Kortright*, 1 *N. Y. Leg. Obs.*, 398.

As to rights of partners in the Good-will of the business, see GOOD-WILL.

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257. Suit for damages. A partner cannot sue his copartner for damages for a fraudulent

removal of the firm property. His remedy is a suit for an injunction and a receiver. *N. Y. Superior Ct., Chambers*, 1858, *Cary v. Williams*, 1 *Duer*, 667. Compare *Seldon v. Hickock*, 2 *Cai.*, 166.

258. Replevin. One partner cannot maintain replevin against the other for the recovery of the exclusive possession of the partnership property. Each is entitled to possession, the one as much as the other, and the possession of either is the possession of both. *N. Y. Com. Pl.*, 1858, *Azel v. Betz*, 2 *E. D. Smith*, 188.

259. Upon note. Where one of two partners, after dissolution, advances money to the other and takes his promissory note therefor, it is no defence to such note, that the money advanced was to be applied, and was applied by the maker, to pay the debts of the late partnership, the assets of the firm being in the hands and under the control of the partner receiving the money. Paying demands against the firm does not give to the partner paying any right of action at law against his copartner on an implied promise, but such rights must be adjusted by an account in equity. Such payment can, therefore, constitute no defence or set-off against the note. *Ct. of Appeals*, 1851, *Gridley v. Dole*, 4 *N. Y. (4 Comst.)*, 486.

260. Assumpsit. Partners cannot, in general, sue each other at common law. Assumpsit may be maintained if there is balance struck and express promise to pay [2 *Durnf. & E.*, 488], but not otherwise. Receiving an account and retaining it without objection, does not import a promise sufficient. It must be express. *Supreme Ct.*, 1805, *Casey v. Brush*, 2 *Cai.*, 293.

261. Partners cannot sue each other at law for any thing relating to their partnership concerns, unless there has been a settlement, a balance struck, and an express promise to pay. *Supreme Ct.*, 1817, *Murray v. Bogert*, 14 *Johns.*, 318; 1819, *Halsted v. Schmelzel*, 17 *Id.*, 80; 1828, *Westerlo v. Evertson*, 1 *Wend.*, 532. Compare *Duryee v. Smith*, *Liv. Jud. Op.*, 25; *Pattison v. Blanchard*, 6 *Barb.*, 587.

262. H. and S. made a joint purchase of goods, each paying one half the price. They sold one package of the goods to a third person, on credit, and divided the residue between themselves, and H. paid S. for one half of the price of the package sold. The pur-

* See the case of *Van Keuren v. Parmelee* reviewed at length and approved, in an action against joint makers of a note. *Ct. of Appeals*, 1854, *Shoemaker v. Benedict*, 11 *N. Y. (1 Kern.)*, 176.

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chaser of the package sold, having become insolvent, H. brought assumpsit against S. to recover one half of the loss arising from the sale. *Held*, that this was not only a balance struck but also a partnership transaction, and an action at law could not be maintained without proving an express promise to pay. *Supreme Ct.*, 1819, *Halsted v. Schmeltz*, 17 *Johns.*, 80.

263. The rule that an action of assumpsit will not lie by one partner against another for moneys paid in the partnership concern, unless there has been a settlement of accounts, a balance struck, and an express promise to pay, applies as well to a law partnership of practising attorneys as to other partnerships. *Supreme Ct.*, 1828, *Westerlo v. Evertson*, 1 *Wend.*, 532.

264. If partners have settled their partnership transactions, and have struck a balance, which one has promised to pay to the other, the latter may sue at law to recover that balance. *Supreme Ct.*, 1837, *Clark v. Dibble*, 16 *Wend.*, 601; 1856, *Powell v. Noye*, 28 *Barb.*, 184.

265. It will not defeat the action that some trifling matters between the partners and third persons remain unadjusted. *Supreme Ct.*, 1856, *Powell v. Noye*, 28 *Barb.*, 184.

266. Although the partnership was confined to a particular adventure, and has completely terminated, yet one partner cannot sue the other at law, unless a balance has been struck. *So held*, where A. and F. were jointly concerned in the purchase of stock of the Bank of the United States, upon speculation, and it resulted in a gain, but their account had not been liquidated. *N. Y. Superior Ct.*, 1828, *Attwater v. Fowler*, 1 *Hall*, 180.

267. Debt collected after assignment. If one partner, upon a dissolution, assigns to his copartners all his interest in the assets of the firm, and covenants not to interfere with the collection of the debts, and subsequently settles and receipts for one of the debts so assigned, as paid to him, his copartners can recover the amount of such debt from him. It is no answer to such action that the original debtors might, notwithstanding the settlement, be sued by the copartners for the debt, on the ground that no value passed on the settlement, but that the defendant receipted for the debt on receiving a receipt in full for a debt which he individually owed to the debt-

or. *N. Y. Superior Ct.*, 1858, *Ross v. West*, 2 *Bow.*, 360.

268. Firms having a common member. At law no action can be maintained between the members of two firms having one member common to both. In equity, such an action may be maintained. But the plaintiffs, to sustain their action, must clearly show equities upon all the circumstances of the case, entitling them to relief. *N. Y. Com. Pl.*, 1855, *Englis v. Furness*, 4 *E. D. Smith*, 587; *S. C.*, 2 *Abbotts' Pr.*, 838.

269. The complaint alleged that the plaintiffs and one of the defendants were a copartnership, and the defendants were another copartnership, and that the latter firm was indebted to the former firm on an account stated; on which it demanded a recovery. As a reason why the defendant, who was a member of both firms, was made defendant only, it was alleged, that he had refused to join as plaintiff.

Held, that the action was maintainable. 1. Under the Code it is no objection that one of the parties was a member of both firms. It is enough in such case that the proper parties are before the court, whether as plaintiffs or defendants, to enable it to pronounce judgment according to the facts. 2. It was not necessary that the complaint should demand, or the court order an accounting, as between the members of the firm at least, unless the defendants pleaded and proved as a defence, that as between the plaintiff's firm and the partner who was made a defendant, the state of accounts was such as to render it inequitable to require the debt to be paid without an accounting between them. *Ct. of Appeals*, 1858, *Cole v. Reynolds*, 18 *N. Y. (4 Smith)*, 74.

270. Bill in equity. Whether a partner who has been proceeded against as an absconding debtor, can, after the appointment of trustees, file a bill for a settlement of the partnership accounts. *Huyler v. Westervelt*, 7 *Paige*, 155.

271. A bill for an accounting, alleged a general partnership between complainant and defendant, as paviors. The answer denied a general partnership, but admitted a partnership in particular jobs, and set forth accounts of them, and denied that any thing was due to the complainant;—*Held*, that complainant was entitled to have the accounts investigated; and that the defendant could have a

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decree for a balance, without any special claim of one in the answer. *V. Chan. Ct.*, 1837, *Scott v. Pinkerton*, 8 *Edw.*, 70.

272. Equal division of balance of assets decreed, in a peculiar case, where the partnership was commenced under an agreement that prior debts of one partner should be paid through the firm; and large sums had been paid therefor. *Iddings v. Bruen*, 4 *Sandf. Ch.*, 223.

273. *Between members of association.* Although the articles of association provide that the government and management of the concern shall be subject to rules and regulations adopted by a majority of the associates, it does not follow that any individual member shall be debarred from resorting to a court of justice for redress, in case of fraudulent appropriation, or wilful destruction of the joint property. *Supreme Ct.*, 1854, *Dennis v. Kennedy*, 19 *Barb.*, 517.

274. Where an unincorporated joint-stock association is formed, and the members of it, by the articles of association, promise to pay the amount of stock by them severally subscribed, in calls to be made by trustees named in the articles, an action at law lies to enforce such promise, notwithstanding that both the plaintiffs and the defendants are members of the association, and consequently copartners. *Supreme Ct.*, 1838, *Townsend v. Goewey*, 19 *Wend.*, 424.

275. A promise made to trustees of an unincorporated association must be sued in the names of the original trustees, to whom the promise was made. Such promise is not negotiable, and although the beneficial interest may have passed to the successors of the plaintiffs, and thence to the corporation created by the charter, no agreement contained in the articles could work a transfer of the legal right of action to others, to be pursued in their own names. *Id.*

276. Where, by the articles of an unincorporated joint-stock association, it was agreed that all the property of the company should be vested in trustees thereafter to be elected, and that the subscribers would pay to such trustees the amount of their respective subscriptions;—*Held*, that an action to recover the amount subscribed by a member, might be brought and maintained in the names of the trustees so elected. *Supreme Ct.*, 1843, *Cross v. Jackson*, 5 *Hill*, 478.

IX. RIGHTS AND REMEDIES OF CREDITORS OF A PARTNERSHIP.

277. *As to estate of deceased partner.* Representatives of the deceased partner cannot be sued at law for the partnership debts. The suit must be brought against the survivors, into whose hands the partnership effects pass, by survivorship, for the payment of those debts. The representatives of the deceased partner are only entitled to their share of the surplus; and that share alone can be reached by his separate creditors, either at law or in equity. On the other hand, the separate estate of the deceased partner in the hands of the personal representatives, and the real estate descended to the heirs-at-law, are legal assets, which the separate creditors can only reach by a suit at law against the administrator or the heirs. The joint-creditors, however, upon an allegation of the insolvency of the surviving partners, have an equitable right to compel a satisfaction of their debt out of the estate of the deceased partner. *Chancery*, 1832, *Wilder v. Keeler*, 8 *Paige*, 167.

278. A creditor of a firm, one member of which is deceased, cannot sustain a bill in equity against the representatives of the deceased partner to recover the debt from his estate, without averring and proving that the surviving members are insolvent, or otherwise showing an excuse for not proceeding at law against them. [1 *Binn.*, 128; 1 *Raw.*, 212; 1 *Conn.*, 509; 8 *Id.*, 584; 1 *Gall.*, 885; 4 *Day*, 481; 8 *Ham.*, 267; 1 *Cal. Cas.*, 122; 2 *Johns. Ch.*, 508.] The contrary rule, established in England by late cases [1 *Meriv.*, 503; 2 *Russ. & M.*, 495; 1 *Myl. & K.*, 582; 1 *Keen*, 206; 10 *L. J.*, 14], disapproved. *Ct. of Errors*, 1845, *Lawrence v. Trustees of Leake Orphan House*, 2 *Den.*, 577; affirming *S. C.*, 11 *Paige*, 80. *A. V. Chan. Ct.*, 1845, *Slatler v. Carroll*, 2 *Sandf. Ch.*, 578. *Ct. of Appeals*, 1853, *Bloodgood v. Bruen*, 8 *N. Y.* (4 *Seld.*), 362. *Supreme Ct.*, 1854, *Voorhis v. Baxter*, 18 *Barb.*, 592; *S. C.*, more fully reported, 1 *Abbotts' Pr.*, 48. Compare *Ricart v. Townsend*, 6 *How. Pr.*, 460.

279. This rule has not been abrogated by the Code of Procedure. *Supreme Ct.*, 1854, *Voorhis v. Baxter*, 18 *Barb.*, 592; *S. C.*, more fully reported, 1 *Abbotts' Pr.*, 48. *Ct. of Appeals*, 1858, *Voorhis v. Childs*, 17 *N. Y.* (3 *Smith*), 354.

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280. In this State the rule is settled that joint-creditors will not be permitted to reach the individual estate of a deceased partner until all the separate creditors are satisfied. The exception maintained in England in case of no joint estate and no solvent surviving partner, does not prevail here. *N. Y. Surr. Ct.*, 1857, *North River Bank v. Stewart*, 4 *Bradf.*, 254; *S. C.*, *sub nom. Stewart's Case*, 4 *Abbotts' Pr.*, 408.

281. Upon a settlement of partnership affairs had after the death of S., one of the partners, the firm was found insolvent, and a large part of the joint debts remained unpaid. *Held*, 1. That the partnership creditors could not be paid out of the separate estate of the deceased until all separate debts were paid. 2. That if any surplus should remain after payment of those debts, it should be applied to the payment of the partnership creditors; in which case those that had received partial payment out of the partnership property, must bring in their dividends and share ratably with those who had not received dividends, or else be excluded until the latter class had received a sufficient amount to place them on terms of equality with the former. *Id.*

282. Chancery will give relief to the creditors of a firm, against the personal representatives of a deceased partner having assets, if the surviving partner is insolvent. *Chancery*, 1817, *Hamersley v. Lambert*, 2 *Johns. Ch.*, 508. *S. P.*, *Ct. of Errors*, 1804, *Jenkins v. De Groot*, 1 *Cal. Cas.*, 122.

283. The representatives cannot object a want of due diligence in prosecuting the survivor before insolvency; and no delay in this respect, nor lapse of time, nor dealing with the survivor, or receiving from him a part of the debt, will amount to a waiver, or bar of the claim on the assets of the deceased partner. *Id.*

284. If a partner dies and the survivor is insolvent, the estate of the deceased is liable, in equity, to the creditors of the firm, after payment of the individual debts of the decedent. *Chancery*, 1832, *Wilder v. Keeler*, 3 *Paige*, 167.

285. Where the surviving partner is insolvent, a creditor of the firm may enforce his demand, in equity, against the real as well as the personal estate of the deceased partner. The separate creditors of such partner are, however, entitled to a priority in payment,

out of his individual property. *Chancery*, 1835, *Butts v. Genung*, 5 *Paige*, 254.

286. Cross-bill. Where a firm sues for a firm demand on account, and a solvent partner dies, the other partners being insolvent, the defendant, claiming a balance, may file a cross-bill to make the personal representatives parties to the accounting. *Chancery*, 1831, *Brown v. Story*, 2 *Paige*, 594.

287. Injunction-suit by general creditor. The principle which allows an injunction at the suit of a general creditor of a limited partnership, restraining a special partner from disposing of the firm assets [7 *Paige*, 583] (see *infra*, 375), applies equally in favor of a creditor of a general partnership. In both cases the firm effects are in equity deemed applicable in the first instance to the firm debts. *Supreme Ct.*, *Sp. T.*, 1850, *Dillon v. Horn*, 5 *How. Pr.*, 85. Disapproved, *Crippen v. Hudson*, 18 *N. Y.* (8 *Kern.*), 161.

288. A creditor of a partnership, whose debt is admitted, may, in case of conceded insolvency, proceed in the same suit to establish his claim and to set aside as fraudulent an assignment by the debtors of their property for the benefit of their creditors. *Supreme Ct.*, *Sp. T.*, 1854, *Mott v. Dunn*, 10 *How. Pr.*, 225; but see 18 *N. Y.* (8 *Kern.*), 492.

289. To authorize any person to demand the aid of the Supreme Court in directing the application of partnership property, he must have a lien, either legal or equitable, upon it, or be in a situation to assert such a lien. A copartner does this by virtue of his lien for final balance; and a creditor can only do so by obtaining a lien by judgment, in case of real estate; by levy under execution in case of personal property liable thereto; or by return of an execution unsatisfied, and filing a complaint when the application relates to choses in action. Until such lien be obtained, the partners may make any *bona-fide* sale of the property they think proper. *Supreme Ct.*, *Sp. T.*, 1850, *Greenwood v. Brodhead*, 8 *Barb.*, 593.

290. To entitle a general creditor of a partnership to interfere adversely in the administration of the partnership assets, he must in the first place acquire an equitable lien by exhausting his legal remedy, or in some other way. A creditor at large has no standing in court upon such a question. A lien must be obtained upon the property, before the creditor can invoke the equitable powers of the court

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to control its administration. *Ct. of Appeals*, 1855, *Crippen v. Hudson*, 18 *N. Y.* (8 *Kern.*), 161; approving *Greenwood v. Brodhead*, 8 *Barb.*, 598; distinguishing *Innes v. Lansing*, 7 *Paige*, 583; and overruling *Dillon v. Horn*, 5 *How. Pr.*, 85.

291. Two members of a firm sold and transferred their interest in the copartnership to the third, upon his assuming the payment of all the debts of the firm. *Held*, that an action could not be maintained against the latter by a simple contract-creditor, upon the ground that, since the transfer to him, he had confessed judgments for individual debts, upon which judgments the partnership property had been sold for a sum far below its value, even though this was done in bad faith, and for the purpose of defrauding the creditors of the firm. *Supreme Ct.*, *Sp. T.*, 1855, *Sage v. Chollar*, 21 *Barb.*, 596.

292. *Surety*. One partner gave his individual bond, with a surety, for duties payable upon goods imported by the partnership;—*Held*, that upon the acceptance by the custom-house officer of the bond, the claim for the duties secured thereby became confined to that bond, and the debt against all the partners for those duties, was extinguished. *Supreme Ct.*, 1807, *Tom v. Goodrich*, 2 *Johns.*, 218.*

293. Where one partner executes a bond with a surety, although for the benefit of the partnership, the surety cannot maintain an action against the other partners to recover back money he has been compelled to pay on the bond. The law does not imply a promise by all persons who may be benefited in consequence of a surety's payment, but only one by the person whose debt is discharged. *Id.* Followed, 1809, *Sluby v. Champlin*, 4 *Johns.*, 461, 468.

294. Where one of two partners executed a bond for duties on goods imported by the partnership with a surety, and the surety advanced money with which he paid off the bond;—*Held*, that the surety might maintain an action against both partners, the money being advanced for the benefit of the partnership; though, if the surety himself had taken up the bond, he could only have brought an action for money paid, against the partner who executed it with him. *Supreme Ct.*, 1818, *Walden v. Sherburne*, 15 *Johns.*, 409.

295. Where a creditor accepts the individual obligations of one of several partners, or of a third person, and thereupon gives up notes of the partnership, such obligations will not be considered as any thing more than the conditional payment of an existing debt; unless it is proved that they were agreed to be taken absolutely as payment of such debt. The question in such cases always is, whether the creditor agreed to and did accept the notes, either of the debtor or of a third person, as payment of the original debt. If he did not, the original debt is not discharged, and the remedy upon it is only suspended until the maturity of the notes received. *Supreme Ct.*, 1849, *Van Eps v. Dillaye*, 6 *Barb.*, 244. See PAYMENT.

296. Creditors of a partnership can claim their entire debt out of the partnership fund, although they have a security from third persons who sustain the character of sureties for the partnership. The sureties in such case have an equity that the creditor should for their indemnity prove his demand, and collect it, if possible, against the estate of the principal debtors. *Chancery*, 1832, *Wilder v. Keeler*, 8 *Paige*, 167.

297. *Separate judgments*. Where a creditor has separate judgments against each of the partners, the partnership property is bound to the same extent as if there had been one judgment for the whole against all the partners. *Chancery*, 1831, *Brinkerhoff v. Marvin*, 5 *Johns. Ch.*, 320.

298. *Severance of liability*. Two partners assigned the property of the firm by assignment, upon condition that the creditors should agree to accept the individual responsibility of each partner for one half their demands, and to release the other half. The creditors afterwards executed an instrument, agreeing to this condition, and containing a covenant, on the part of the partners, that they would pay, each one half; but this instrument was never executed by either partner. *Held*, that until the partners had given their individual security to pay their respective halves of the debts, there was no severance of their joint liability as partners. *Supreme Ct.*, 1828, *Le Page v. McOrea*, 1 *Wend.*, 164.

299. *Who is a firm-creditor*. W. invested money of C. in goods, and brought them, with others, into a partnership, on a general understanding with his partner that his debts for

* But compare *U. S. v. Lyman*, 1 *Mason*, 432. Vol. IV.—21

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the goods were to be paid from the concern. Afterward, his partner being absent, he made an assignment of the assets of the copartnership for the benefit of its creditors, among whom he named C., but without C.'s knowledge;—*Held*, that C. was to be deemed a partnership-creditor, and as such, entitled to the benefit of the assignment. *V. Chan. Ct.*, 1882, *Colt v. Wilder*, 1 *Edw.*, 484.

300. L. and M. carried on trade as partners, with the funds of L., in the name of M. M. afterwards, without any dissolution of the partnership, or rendering any account to L., and without his consent, entered into a partnership with T., and carried into the new concern all the funds of the former partnership. *Held*, that L., on the death of M., might maintain a bill against the administratrix, and T., the surviving partner, for a discovery and accounting. *Chancery*, 1814, *Long v. Majestree*, 1 *Johns. Ch.*, 805.

301. Secret partnership. V. and R. carried on business, at different places, each in his own name, but, in fact, were secret partners. A., in ignorance of the partnership, lent money to R., and obtained a judgment therefor, and levied on the partnership goods in R.'s possession. *Held*, that V. could not set up that the goods were partnership goods and must be first applied to partnership debts. *Supreme Ct.*, 1852, *Van Valen v. Russell*, 18 *Barb.*, 590.

302. Renewal of notes. The complaint set forth promissory notes given to plaintiff by a firm, alleged a dissolution, and that new notes were given by one partner, and the old ones surrendered, with the consent of the other partners, who had acknowledged their liability on the same. It demanded judgment for the amount due on the new notes. *Held*, that, on failing to prove a ratification of the settlement by the partners who did not sign the new notes, the plaintiff could not recover upon the old ones. *Supreme Ct.*, 1850, *Lusk v. Smith*, 8 *Barb.*, 570.

303. Dissolution. Rights of a creditor of a firm on a dissolution and reorganization, in a peculiar case. *Brown v. Davis*, 6 *Duer*, 549.

X. RULES GOVERNING THE APPLICATION OF ASSETS TO DEBTS.

304. General rule. In equity, the partnership property must first be applied to the pay-

ment of partnership debts; and individual property of the partners to their individual debts. *Chancery*, 1882, *Wilder v. Keeler*, 3 *Paige*, 167.

305. In marshalling the assets of a deceased partner, the partnership property is to be first applied to the payment of partnership debts, and until such debts are all paid, no creditor of the individual partner is entitled to any share in the assets of the partnership. The separate creditors of the deceased partner are entitled to priority over the creditors of the partnership in respect to the separate estate of the deceased partner. *Supreme Ct.*, 1849, *Kirby v. Carpenter*, 7 *Barb.*, 878. Followed, 1857, *Ganson v. Lathrop*, 25 *Id.*, 455.

306. It makes no difference that the claim against the firm consists of notes which are in terms joint and several. *Supreme Ct.*, 1857, *Ganson v. Lathrop*, 25 *Barb.*, 455.

307. In a case of insolvency the joint-creditors of a copartnership are entitled to payment out of the effects of the firm, in preference to the separate creditors of the individual copartners; and such separate creditors have a corresponding right to a priority in payment out of the individual estate of the copartners, in case of the debt or bankruptcy of the latter, so that such estate cannot be reached by the partnership creditors by an execution at law. [8 *Paige*, 167; 1 *Har. & Gill.*, 96.] *Chancery*, 1836, *Payne v. Matthews*, 6 *Paige*, 19.

308. Right of partners. Each partner, upon the dissolution, has a right to require, in the first place, that the partnership funds be directly and regularly applied to the discharge of the partnership debts, and, after these are discharged, to have his share of the residue of the partnership funds. *Supreme Ct.*, *Sp. T.*, 1847, *Geortner v. Trustees of Canajoharie*, 2 *Barb.*, 625. *S. P.*, *Chancery*, 1848, *Kirby v. Schoonmaker*, 3 *Barb. Ch.*, 46. *V. Chan. Ct.*, 1847, *Addison v. Burckmyer*, 4 *Sandf. Ch.*, 498.

309. Notwithstanding an agreement between partners on dissolution, by which the retiring partner assigns all his interest in the firm effects to the other, and the latter agrees to pay the firm debts, such retiring partner may maintain a bill, so long as rights of *bona-fide* purchasers do not intervene, to compel the application of the assets to the debts of the firm. The effect of such agreement is to transfer all interest in any surplus; but it

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does not destroy the equity of each partner, on dissolution, to have the partnership property applied to the payment of the debts. *Chancery*, 1831, *Deveau v. Fowler*, 2 *Paige*, 400.

310. — of creditors. If one partner, upon a dissolution of the firm, takes the assets and agrees to indemnify the other partner against the debts, the latter may, in equity, insist upon the application of the property to the firm debts. But creditors of the firm cannot claim this. Creditors, as such, have no specific lien on the partnership property. The rule which appropriates it to the payment of firm debts in preference to those of the individual partners, is for the protection of partners, not for the benefit of creditors. *V. Chan. Ct.*, 1840, *Robb v. Stevens*, *Clarke*, 191. S. P., *Chancery*, 1846, *Ketchum v. Durkee*, 1 *Barb. Ch.*, 480; 1848, *Kirby v. Schoonmaker*, 3 *Id.*, 46.

311. In general, partnership property is regarded in equity as a trust-fund appropriated to the payment of the partnership debts. But upon a voluntary dissolution, one partner may agree that the partnership property shall belong to his copartner. Where such an agreement is made in good faith, the property will be held by the partner to whom it has been transferred free from any lien or equity in favor of partnership creditors. *Supreme Ct. Sp. T.*, 1855, *Sage v. Chollar*, 21 *Barb.*, 596.

312. Where the assets are transferred, on dissolution, to one of the partners, on his covenanting to apply them to the partnership debts, a trust is raised for the creditors, and they may pursue the property in the hands of third persons. *V. Chan. Ct.*, 1846, *Wildes v. Chapman*, 4 *Edw.*, 669. Compare *Ketchum v. Durkee*, 1 *Barb. Ch.*, 480.

313. Order of debts. Upon the death of a partner, his representative has a right to insist upon the application of the firm property to the payment of the firm debts; but he has no interest in the question as to what debts shall be paid first, where the partnership is insolvent. The legal title to the effects being vested in the survivor, he alone has the right, at law, to determine that question. *Chancery*, 1832, *Egberts v. Wood*, 3 *Paige*, 517.

314. Where a creditor has been partially paid from legal assets, the equitable assets will be distributed among the other creditors so as to produce equality. *Chancery*, 1832, *Wilder v. Keeler*, 3 *Paige*, 167.

315. Surplus in foreclosure. The rule that the joint property of the partnership must first be employed in paying the partnership debts,—*Held*, applicable to a surplus accruing to the firm upon a sale under foreclosure of real property purchased by the partners with the partnership funds. *V. Chan. Ct.*, 1838, *Smith v. Jackson*, 2 *Edw.*, 28.

316. Balance due surviving partner. Where, upon the death of one of the members of an insolvent firm, the surviving copartner, who was solvent, was obliged to pay the debts of the firm out of his own property, and the separate estate of the decedent was insufficient for the payment of all his debts,—*Held*, that the balance due from the estate of the decedent to the surviving copartner, on account of the partnership transactions, must be paid ratably with the other debts of the decedent of the same class, according to the provisions of the Revised Statutes. *Chancery*, 1836, *Payne v. Matthews*, 6 *Paige*, 19.

317. Partner holden as indorser. Where one of several partners is not only jointly liable for a joint debt, but is also separately liable as indorser for the firm, his separate estate as to such debt is to be considered as legal assets, and must be applied in payment thereof, in preference to the joint debts due the other creditors; but the joint estate being primarily liable, that must be first applied towards the payment of such debt. *Chancery*, 1832, *Wilder v. Keeler*, 3 *Paige*, 167.

318. Debt satisfied. Though a partnership debt may be satisfied at law by reason of a technical extinguishment by the acceptance of a higher security from an individual partner, it is still a subsisting partnership debt in equity, and a court of equity will so regard it, in the distribution of the partnership assets. *N. Y. Superior Ct.*, 1850, *Nicholson v. Leavitt*, 4 *Sandf.*, 252; S. C., 9 *N. Y. Leg. Obs.*, 105; reversed on another point, 6 *N. Y. (2 Seld.)*, 510.

XI. OF SURVIVING PARTNERS.

319. Powers of surviving partner. The surviving partner has the legal right to the partnership effects; but in equity he is considered merely as a trustee to pay the partnership debts, and dispose of the effects of the concern for the benefit of himself and the estate of his deceased partner. He cannot make any profit by the use of the partnership effects

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for his own benefit. *Chancery*, 1829, Case v. Abeel, 1 *Paige*, 898.

320. Upon dissolution of the firm by death of one copartner, the survivor is entitled to close up the affairs of the concern. *Chancery* will not appoint a receiver and deprive him of that right, if he is responsible and acts in good faith. *So held*, where the survivor resided in England, but was engaged in closing up the affairs of the firm, by a competent agent, with all reasonable diligence. *Chancery*, 1841, *Evans v. Evans*, 9 *Paige*, 178. S. P., *N. Y. Superior Ct.*, *Chambers*, 1855, *Jacquin v. Buisson*, 11 *How. Pr.*, 885.

321. The law imposes upon the surviving partner, as an incident to the contract of partnership, the duty of collecting the assets and winding up the business of the firm, and allows him no commissions for its performance, unless specially provided for by agreement. *N. Y. Surr. Ct.*, 1850, *Ames v. Downing*, 1 *Bradf.*, 821.

322. As to the books. On a dissolution of partnership, the books, &c., were left with one partner to settle the business of the firm. He died, and his former partner sued his administrator to recover possession of the books. *Held*, he was entitled to recover. His right as surviving partner was the same as if the partnership had continued until the death. *Supreme Ct.*, 1826, *Murray v. Mumford*, 6 *Cov.*, 441; S. C. at N. P., *Anth. N. P.*, 294.

323. Assignment. A surviving partner has the power to assign any chose in action—*e. g.*, a bond and mortgage—belonging to the late firm, and payable to them. *N. Y. Com. Pl.*, 1854, *Pinckney v. Wallace*, 1 *Abbotts' Pr.*, 82.

324. Prior to the Revised Statutes, the surviving partner, having the assent of the representatives of the decedent partner, might assign the partnership property in trust for the creditors of the firm, and give preferences. *Chancery*, 1882, *Egberts v. Wood*, 8 *Paige*, 517; 1887, *Hutchinson v. Smith*, 7 *Id.*, 26.

325. Using firm-name. A surviving partner is not entitled, without consent of the representatives of the deceased partner, to use the firm-name in continuing the business. Either the partnership name perishes with the firm itself, and neither the representative nor the survivor is entitled to use it; or it is an interest held in common after the death of one partner, possessed legally by the survivor but

held for mutual benefit. *N. Y. Superior Ct.*, *Sp. T.*, 1858, *Fenn v. Bolles*, 7 *Abbotts' Pr.*, 202.

326. If, after the death of one partner, the survivors continue to use the original firm-name in the prosecution of a general business, they are liable as partners for engagements made by either in such firm-name. *So held*, in the case of a note signed by one of the survivors in the name of the late firm, thus:—"H., for the late firm of P., H. & T." *Supreme Ct.*, 1847, *Staats v. Howlett*, 4 *Den.*, 559.

327. Buying in the assets. A surviving partner cannot take the property of the firm to himself at an estimated value, without the consent of the representatives. He is bound to sell it to the best advantage. *N. Y. Superior Ct.*, 1850, *Ogden v. Astor*, 4 *Sandf.*, 811.

328. A surviving partner, being also one of the executors of his deceased partner, agreed with his co-executor that he, the surviving partner, should take the stock at a valuation. *Held*, that if he had not been executor the agreement would have been valid; but that being an executor he could make no such agreement without being liable to account for profits. *Chancery*, 1829, Case v. Abeel, 1 *Paige*, 898.

329. Disclosure to representatives. The surviving partner is bound to give to the representatives of the deceased partner full information upon the affairs of the firm. *N. Y. Superior Ct.*, 1850, *Ogden v. Astor*, 4 *Sandf.*, 811.

330. An account stated between a surviving partner and the representatives of the deceased, allowed to be opened notwithstanding great lapse of time, on the ground of an omission to disclose important facts on the part of the survivor. *Id.*

331. Reviving debt. A surviving partner cannot revive a debt barred by the statute against the copartnership, so as to charge the estate or interest of the deceased copartner. [2 Comst., 258; 1 Peters, 878.] *Ct. of Appeals*, 1853, *Bloodgood v. Bruen*, 8 *N. Y. (4 Seld.)*, 862.

332. Defendant gave plaintiff a guaranty to hold him harmless for any indorsement he might make for the late firm of P., H. & F. The firm had already become dissolved, before the giving of this writing, by the death of one of the members;—*Held*, that a note subsequently made by one of the surviving part-

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néra, in the course of liquidating the business of the firm, and signed, "S. R. Howlett, for the late firm of Peck, Howlett & Foster," was within the terms of the guaranty. *Supreme Ct.*, 1847, *Staats v. Howlett*, 4 *Den.*, 559.

333. Liability to contribution. Where the whole of a partnership debt has been paid by the representatives of a deceased partner, they may be substituted in the place of the creditor to enforce contribution from the survivor; unless such survivor shows that he is the creditor partner, and that the estate of the deceased partner owes him a balance, as much or more than it has been obliged to pay. This renders it requisite to take an account between the partners, before the court can interfere to enforce the claim for contribution. *Chancery*, 1817, *Brasher v. Cortlandt*, 2 *Johns. Ch.*, 400.

334. — to accounting. When the next of kin of a deceased partner can maintain a bill for an accounting against one who is surviving partner, and also administrator of the deceased. *Hyer v. Burdett*, 1 *Edw.*, 325.

335. Survivorship. The custom of merchants excluding survivorship in cases of partnership, extends to all classes of traders. It applies to persons who are partners in the practice of medicine. *Ct. of Errors*, 1827, *Allen v. Blanchard*, 9 *Cow.*, 681.

XII. OF LIMITED PARTNERSHIPS.

336. Formation. Limited partnerships for the transaction of any mercantile, mechanical, or manufacturing business, allowed to be formed; consisting of one or more persons, called general partners, responsible as general partners now are by law, and one or more persons contributing a specific sum as capital, who shall be called special partners, and who shall not be liable for the debts of the partnership beyond the sum so contributed. 1 *Rev. Stat.*, 764, §§ 1, 2.

337. General partners only authorized to transact business for the partnership, except, &c. 1 *Rev. Stat.*, 764, § 8; as amended, 1 *Laws of 1857*, 886, ch. 414, § 1.

338. Certificate. The persons desirous of forming a limited partnership, shall make and sign a certificate, stating, 1. Name of firm; 2. General nature of business; 3. Names and residences of partners, distinguishing which are general and which special; 4. Amount of capital contributed by each special partner; 5. Dates at which the partnership is to commence and terminate. 1 *Rev. Stat.*, 764, § 4.

339. Acknowledgment, or proof, and filing of certificate prescribed. 1 *Rev. Stat.*, 764, §§ 5, 6; amended, *Laws of 1837*, 101, ch. 129.

340. Affidavit must be made and filed with certificate of one or more of the general partners, stating that the sums specified in the certificate

to have been contributed by each of the special partners, have been actually and in good faith paid in cash. 1 *Rev. Stat.*, 765, § 7.

341. Affidavit that capital has been paid in, not evidence of that fact, further than to throw the burden of proof on the creditor *Supreme Ct.*, 1843, *Madison County Bank v. Gould*, 5 *Hill*, 809.

342. An affidavit to accompany a certificate of a limited partnership, need not follow the exact words of the statute. If it clearly establishes the facts required by the statute it is sufficient. And where the affidavit refers to the certificate, it may be explained by the statements of the certificate. *Supreme Ct.*, 1855, *Johnson v. McDonald*, 2 *Abbotts' Pr.*, 290.

343. An affidavit to accompany a certificate of special partnership, which states that the special partner has "actually paid in" the capital contributed by him, is equivalent to an affidavit that he has paid it in "in cash." *Id.*

344. False statement. If any false statement is made in certificate or affidavit, all the persons interested in the partnership shall be liable for its engagements as general partners. 1 *Rev. Stat.*, 765, § 8.

345. Publication. Terms of the partnership required to be published in newspapers. 1 *Rev. Stat.*, 765, § 10.

346. The amount of the capital to be paid in by the special partner, is a material portion of the terms required to be published. Where, by a misprint in one of the papers, the capital contributed was published as \$5000 instead of \$2000, which was the fact,—Held, that the special partner was liable as a general partner. *Ct. of Errors*, 1846, *Argall v. Smith*, 8 *Den.*, 485.

347. In the publication of the certificate of the terms of a limited partnership, a mistake in the publication of the names of the partners, as ARGALL for ARGALL, will not vitiate the publication. *Supreme Ct.*, 1840, *Bowen v. Argall*, 24 *Wend.*, 496.

348. The papers connected with the organization of a limited partnership were all sufficient in form, and the notice sufficiently published; but the notice stated that the partnership was to commence November 16th, instead of October 16th, as provided in the articles. In an action to charge the special partner for a debt contracted after November,—Held, that the error in date being unintentional, it formed no objection to the notice. *Supreme*

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Ot., 1848, *Madison County Bank v. Gould*, 5 *Hill*, 809.

349. The terms of the partnership must be *truly* published, in *two* papers, as required by the statute. Not to publish at all would be clearly fatal, and it is equally so to publish in but one paper. The duty of making such publication is by the statute devolved upon the partners; and it is one which they must see to at their peril. *Ot. of Errors*, 1848, *Argall v. Smith*, 8 *Den.*, 485.

350. A publication once in each of the six weeks immediately following the registry, is sufficient. The statute counts by weeks, taking one day, no matter which, if according to the common course of weekly publication, in each week. One publication in each of six consecutive weeks of seven days each, the first publication being within the first seven days after the registry, satisfies the statute. *Supreme Ct.*, 1840, *Bowen v. Argall*, 24 *Wend.*, 496.

351. Every renewal or continuance of a limited partnership, required to be certified, advertised, &c. 1 *Rev. Stat.*, 765, § 11.

352. Dissolution. Limited partnerships formed under the statute are governed, and the mutual rights, duties, and liabilities of the partners are regulated, by the common law, in every respect not taken out of the general rule by the statute. The death of the special partner, within the period fixed for the duration of the agreement, dissolves it. *N. Y. Surr. Ct.*, 1850, *Ames v. Downing*, 1 *Bradf.*, 821; *S. P.*, *Jacquin v. Buisson*, 11 *How. Pr.*, 885.

353. Certain alterations in terms of limited partnership,—or death of any partner,—effect a dissolution. Carrying on the business thereafter makes the partnership general, except, &c. New special partners allowed to be brought in; and the former special partner allowed to sell out. 1 *Rev. Stat.*, 765, § 12; amended, 1 *Laws of 1857*, 837, ch. 414, § 2; *Laws of 1858*, 449, ch. 289, § 1.

354. Firm-name. Only the names of the general partners may be used in the firm-name. 1 *Rev. Stat.*, 766, § 18.

355. Withdrawal of capital contributed by special partner, prohibited. 1 *Rev. Stat.*, 766, §§ 15, 16.

356. The mere giving notes, payable at a future time, by the general partners, in the same name as that of the partnership, upon the making of an agreement of dissolution with a view of purchasing his interest, is not a withdrawal of capital within section 15 of the Statute of Limited Partnerships. *N. Y.*

Com. Pl., 1855, *Lachaise v. Marks*, 4 *E. D. Smith*, 610.

357. The receipt of dividends by a special partner will constitute him a general partner, if they are drawn as a device to withdraw capital; but dividends may be paid to him in good faith, with the effect only to require him to restore, in case the capital shall thereby be unintentionally reduced. *Id.*

358. Special partner. Powers of the special partner defined. 1 *Rev. Stat.*, 766, § 17; amended, 1 *Laws of 1857*, 837, ch. 414, § 3.

359. Accounting. The general partners liable to account to each other, and to the special partner, in the same manner as other partners. 1 *Rev. Stat.*, 766, § 18.

360. Bill for accounting and receiver, on dissolution, sustained, notwithstanding the partnership was a limited one, and the complainant was the special partner. The limited partner has the same right that a general partner has, to insist that the assets be applied to pay the partnership debts; and the statute [1 *Rev. Stat.*, 766, § 18] expressly entitles him to an accounting. *Supreme Ct., Sp. T.*, 1858, *Hogg v. Ellis*, 8 *How. Pr.*, 478.

361. Penalty for fraud committed by partner in affairs of the partnership. 1 *Rev. Stat.*, 766, § 19.

362. Assignment, &c., by insolvent partnership in favor of creditors, and giving preferences, void, as against creditors. 1 *Rev. Stat.*, 766, §§ 20-22.

363. Debt due to special partner. Special partner not allowed, on insolvency, &c., of the partnership, to claim as a creditor, except for certain specified demands. 1 *Rev. Stat.*, 767, § 23; amended, 1 *Laws of 1857*, 837, ch. 414, § 4.

364. Assignment which provides for demand due to special partner ratably with other debts, void. *Mills v. Argall*, 6 *Paige*, 577.

365. Where the special partner is a member of another general firm, to which the special partnership is indebted when it becomes insolvent, neither the debt of the general partnership, nor the special partner's interest in it, is within the provision that, "in case of the insolvency or bankruptcy of a special partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor, until the claims of all other creditors of the partnership shall be satisfied. This provision simply places the special partner, so far as he is a creditor, upon the same footing as if he were a general partner. In both cases the partner must wait until all the other creditors

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are paid. If the same person be a partner in two firms, one of which becomes insolvent, while the other is solvent and a creditor of the insolvent firm, then the creditor firm may recover from the insolvent firm, notwithstanding a member of the insolvent firm is also a member of the solvent firm. *N. Y. Superior Ct.*, 1850, *Hayes v. Bement*, 3 *Sandf.*, 894; *S. C.*, 8 *N. Y. Leg. Obs.*, 88.

366. Notice of dissolution. As the original term during which a limited partnership is to continue is required to be published at the commencement of the business [1 *Rev. Stat.*, 764, § 4, subd. 5; §§ 9, 11], every person dealing with the firm is presumed to have notice of the termination of the copartnership; so that no formal notice of the dissolution of the firm is necessary to be given, to prevent any of the general partners from charging the copartnership with new debts, contracted after the termination of the copartnership. *Chancery*, 1848, *Haggerty v. Taylor*, 10 *Paige*, 261.

367. Dissolution by act of the parties prior to time fixed by the certificate, must be advertised. 1 *Rev. Stat.*, 767, § 24.

368. Where a limited partnership is dissolved by the agreement of the parties before the period fixed for its termination by the original certificate, it continues as to persons crediting the firm without actual notice of such dissolution, until the notice required by the statute has been filed, recorded, and published for four weeks, as therein prescribed. *Ct. of Appeals*, 1854, *Beers v. Reynolds*, 11 *N. Y. (1 Kern.)*, 97; affirming *S. C.*, 12 *Barb.*, 288.

369. If any alteration is made in the capital or shares, and the partnership is in any manner thereafter carried on, before the publication of the notice is completed, the special partner becomes liable as a general partner. *Id.*

370. Therefore, where parties to a limited partnership agreed to dissolve it, and caused notice of dissolution to be filed and recorded, and commenced publication of it, and the special partner at the same time sold his interest in the copartnership effects to the general partner, who secured the price by a mortgage on the effects and other property, and by a judgment, and continued the same kind of business; and afterwards, and before the publication was completed, he purchased goods of the plaintiff, who had no actual notice of

the dissolution;—*Held*, that the special partner was liable to the plaintiff as a general partner, without reference to the intent with which the dissolution was made, and the mortgage and judgment taken. *Id.*

371. In 1846, D., B. & M. formed a limited partnership, M. being the special partner in 1846, to continue until 1849. In 1847, they agreed that D. should withdraw, and B. should carry on the business; but that D. should allow his name to be used as a partner in purchasing goods and giving notes therefor, until certain notes should be paid, and then the partnership should be publicly dissolved. *Held*, that the three were partners as to third persons until the notes referred to were paid; and were liable on notes given on the intermediate purchase of goods, under the new arrangement. *Supreme Ct.*, 1851, *Bulkley v. Dingman*, 11 *Barb.*, 289.

372. Title to real estate should be taken in the name of the general partners alone. To take it in the name of all renders the special partner a tenant in common, and so operates as a withdrawal of capital to the extent of his undivided interest in the land. But if it is not shown that the special partner knew and consented to the use of his name in the conveyance, he does not by it become chargeable as a general partner. *Supreme Ct.*, 1848, *Madison County Bank v. Gould*, 5 *Hill*, 809.

373. Insolvency of limited partnership. Creditors of a limited partnership prior to the period limited for it to terminate, are entitled in equity to be paid out of its assets, in preference to even *bona-fide* holders of notes issued by the general partner, although in the name of the firm, but after the dissolution. If the special partner has become liable as general partner, by reason of the business being carried on after the expiration of the limited partnership, the remedy of the note-holder is by suit at law against him individually. *Chancery*, 1848, *Haggerty v. Taylor*, 10 *Paige*, 261.

374. When the special partner, under a limited partnership, does not pay in the amount of his capital specified in the certificate, and the firm having become insolvent assign the property thereof for the benefit of creditors, the assignee may maintain an action against the special partner to recover for the estate the capital agreed to be put in. *N. Y. Com. Pl.*, 1854, *Robinson v. McIntosh*, 8 *E. D. Smith*, 221.

What are.

375. The property of a limited partnership, after insolvency, is deemed a trust-fund for the benefit of all the creditors; if the partners neglect to place it in the hands of a proper trustee for distribution, any creditor may proceed at once, in equity, for the appointment of a receiver and a distribution. It is not necessary he should first obtain judgment at law. *Chancery*, 1889, *Innes v. Lansing*, 7 *Paige*, 588. *Supreme Ct.*, 1848, *Whitewright v. Stimpson*, 2 *Barb.*, 879.

376. When a limited partnership becomes insolvent, the partnership property becomes trust-funds, which it is the duty of the partners to place in the hands of a trustee for the benefit of all creditors without preferences. It is not in the power of a portion of the creditors to obtain, by any act or omission on the part of the partners, a priority over other creditors. *Supreme Ct.*, 1859, *Jackson v. Sheldon*, 9 *Abbott's Pr.*, 197.

377. General assignment. The rule that a partner can in no case make a general assignment to a trustee for the benefit of creditors, without the assent of his copartner, the latter being present, and capable of acting, is applicable to a limited partnership. *N. Y. Superior Ct.*, 1840, *Hayes v. Heyer*, 8 *Sandf.*, 284, 293.

378. Such a partnership being insolvent, one of the general partners, with the consent of the special partner, made an assignment of all the partnership effects for the payment of all the firm debts ratably. *Held*, that the other general partner, who might have been, but was not consulted in the matter, was entitled to have it set aside and a receiver appointed. *Id.*; but compare *Robinson v. McIntosh*, 8 *E. D. Smith*, 221.

PARTY-WALLS.

1. What are. When the owners of adjoining lots, by agreement, construct a wall, partly on each lot, for the common support of their buildings, the wall so constructed, if used as such for twenty years, is a party-wall in the legal sense of the term, and the owner of each house has an easement for its support in that portion of the wall which stands on the adjoining lot. So, when the owner of two adjoining lots erects a building on each, with a wall partly on each lot, for their common sup-

Right to rebuild.

port, a conveyance by him of either lot, conveys with the building an easement for its support on that part of the wall which stands on the other lot. *N. Y. Superior Ct.*, 1856, *Webster v. Stephens*, 5 *Duer*, 558; *S. P.*, 1854, *Eno v. Del Vecchio*, 4 *Id.*, 58.

2. Length of time. A grant to A. and his heirs, &c., of the right to erect and maintain a party-wall on the top of the grantor's wall;—*Held*, even if not in fee, to give the right so long as the sustaining wall stood and answered the purpose. *Supreme Ct.*, 1841, *Brondage v. Warner*, 2 *Hill*, 145.

3. Extension. An agreement for a party-wall,—*Held*, not to prohibit from extending the building beyond it in front and in rear. *A. V. Chan. Ct.*, 1846, *Wolfe v. Frost*, 4 *Sandf. Ch.*, 72.

4. Interference with a party-wall by one owner, which injures the other's building, is a trespass; and either the tenant or the reversioner may maintain an action therefor. Such action may be maintained against the owner who employs a contractor to do the work by which the injury is done, as well as against the contractor, and it is not necessary to prove any negligence. *N. Y. Superior Ct.*, 1856, *Eno v. Del Vecchio*, 6 *Duer*, 17.

5. In such an action by the owner of the injured building, if it is alleged that the defendant's acts injured the plaintiff's house, and this is proved, it is sufficient, although it be also alleged that the injuries disturbed him in his enjoyment, &c., and this be not proved, the possession being in a tenant. *Id.*

6. That the tenant had covenanted to make repairs is no defence. *Id.*

7. Right to rebuild. Where the owner of adjoining houses having a party-wall, conveys the houses to different grantees and makes the centre of the wall the boundary, each grantee acquires an easement for the support of his building by means of the half of the wall belonging to his neighbor. This right exists, at the least, so long as the wall continues to be sufficient for the purpose. When one building becomes so dilapidated as to be unsafe and unfit for occupation, and the removal of the front and rear walls of such building, with the floors and beams, would occasion the destruction of the whole wall, the owner of such building may, upon reasonable notice to the tenant of the adjoining building, lawfully take down the whole wall; and if he occupy no

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unnecessary time in completing the work, and use proper care and skill in its execution, he will not be responsible to the tenant of the adjoining building for damages resulting from its exposure to weather, from loss of business, or inability to let the upper lofts.* *Ct. of Appeals*, 1857, *Partridge v. Gilbert*, 15 *N. Y.* (1 *Smith*), 601; affirming *S. C.*, 3 *Duer*, 185.

Held, otherwise where the plaintiff was a lessee, with a covenant for quiet enjoyment. *N. Y. Superior Ct.*, 1843, *Armstrong v. Schermerhorn*, 2 *N. Y. Leg. Obs.*, 40.

8. Contribution. The owner of the contiguous lot is bound to contribute ratably to the cost of a new party-wall, rendered necessary by the dilapidation of the old one; but he is not bound to contribute to building the new wall higher than the old; nor, if materials more costly, or of a different nature, are used in it, is he bound to pay any part of the extra expense. *Chancery*, 1820, *Campbell v. Mesier*, 4 *Johns. Ch.*, 334.

The contrary held where the buildings were destroyed by fire. In such case, if one party rebuilds the wall it is at his own expense, and the part on the other's land becomes absolutely the property of the latter. *N. Y. Superior Ct.*, 1851, *Sherred v. Cisco*, 4 *Sandf.*, 480.

9. Agreement to pay. That where a party-wall is built by one person, under an agreement with the other that the latter will pay for it whenever it should be used by him or his heirs, &c., one who is shown to have claimed under him, and who covenanted with his immediate grantor that he would pay for it when used, with knowledge as to who was the original builder, is liable to such builder when he uses it. *Ct. of Appeals*, 1851, *Brown v. Pentz*, 11 *N. Y. Leg. Obs.*, 24. Followed, *N. Y. Superior Ct.*, 1858, *Burlock v. Peck*, 2 *Duer*, 90.

10. Where the owner of two adjoining lots conveyed one, providing in the deed that the grantor might erect a party-wall, and covenanted to pay for the wall when used; and the grantee erected such a party-wall, and then conveyed the lot and building to a third person,—*Held*, that the latter, or on his death his administrators, on such party-wall being used by the grantee of the other lot, might

recover from him or his executors the value of the party-wall. The right to compensation is a right in action, enforceable at the suit of the administrator. *N. Y. Superior Ct.*, 1853, *Burlock v. Peck*, 2 *Duer*, 90.

11. Under a contract that a "division wall" should be taken down, and "in the place thereof" a party-wall put up "on the division line," "to rest equally on the ground of each" party;—*Held*, that the new wall was to be erected on the division line occupied by the former wall, and that A.'s devisees, sued upon his covenant, could not defend on the ground that the line was not the true boundary. *N. Y. Com. Pl.*, 1855, *Keteltas v. Penfold*, 4 *E. D. Smith*, 122.

12. Construction of a deed with peculiar provisions, reserving one half of the wall, with the covenant on the part of the grantee to pay half the expenses of maintaining it. *Ogden v. Jones*, 2 *Bowm.*, 685. Consult, also, *COVENANT*, 26, 53.

13. Excavations. Party and other walls, in New York and Brooklyn, how supported during excavations. *Laws of 1855*, 11, ch. 6.

PASSENGERS.

Carriers of, forbidden to employ intemperate persons. 2 *Laws of 1857*, ch. 628, § 31; 1 *Rev. Stat.*, 695, §§ 2, 3.

Consult, also, *CARRIERS*, 96–128; *CONSTITUTIONAL LAW*, 37; *EMIGRANTS*; *NEW YORK*.

PATENTS (for Inventions, &c.)

1. A patent for an improvement should describe the machine in use, that it may be known in what the improvement consists; and must distinguish particularly the parts claimed by the patentee, or the whole will be void. If the specification is in part defective, the patent fails *in toto*; and proof that the thing covered by it was not a new invention, is fatal. [7 *Wheat.*, 856; 1 *Pet.*, 322; 8 *Wash. O. C.*, 443; 1 *Paine*, 441; 6 *Com. L. R.*, 509.] *Supreme Ct.*, 1835, *Cross v. Huntly*, 13 *Wend.*, 885; 1838, *Head v. Stevens*, 19 *Id.*, 411. See *Hotchkiss v. Oliver*, 5 *Den.*, 314.

2. A description of the original machine is unnecessary when there is another way in which it can be ascertained with reasonable

* The act of 1857 (1 *Laws of 1857*, 435, ch. 225) relates to the strengthening or reconstruction of party-walls in the city of New York.

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Patents not to be impeached.

certainty, in what the improvement consists, and how it is to be applied. *Supreme Ct.*, 1889, *Harmon v. Bird*, 22 *Wend.*, 118.

3. If the specification is sufficient to enable a skilful mechanist to construct the thing, without other aid, it is not void because some minor details are not set forth at large; but if the machine will not answer its purpose without some modification not discovered or invented by the patentee at the time his patent was issued, the patent is void. *Chancery*, 1880, *Burrall v. Jewett*, 2 *Paige*, 184.

4. The drawing required by the statute may be referred to in aid of an imperfect specification; or to show that the machine in question is not the one patented. *Id.*

5. Disclaimer. The act of 1887, enabling one who has taken a patent for too much, to file a disclaimer of what he is not entitled to, applies to patents issued before the act; but to validate a patent by such disclaimer, it must appear that the part not disclaimed is a material and substantial part, and definitively distinguishable. *Supreme Ct.*, 1848, *Hotchkiss v. Oliver*, 5 *Den.*, 814.

6. Filing the disclaimer not a condition precedent. *Id.*

7. Physician. A patent for making and vending a medicine, does not authorize the patentee or his assigns to prescribe it as a physician, without a license as required of physicians by 1 Rev. Stat., 454. *Supreme Ct.*, 1886, *Thompson v. Staats*, 15 *Wend.*, 895. *N. Y. Superior Ct.*, 1829, *Smith v. Tracy*, 2 *Hall*, 465.

8. Reassignment. On the sale of an interest in letters-patent, it was agreed that the purchaser, after trial for a specified time, might, if it proved useless, reassign it and receive back the consideration. The sellers promised, after the sale, to furnish to the purchaser the means of testing the usefulness of the patent, but failed to do so; and after the expiration of the time for trial, a reassignment, reciting an excuse for non-performance of the condition, was accepted by the sellers. *Held*, that although the promise to furnish means of trial was without consideration, yet as the purchaser relied upon it, as he had a right to do, and was thus prevented from performing the conditions of his contract, the sellers could not set up such non-performance in defence to a suit against them for the consideration. Moreover, accepting the assignment was a waiver of the condition requiring a trial of

the patent, and entitled the purchaser to a return of the consideration. *Ct. of Appeals*, 1852, *Young v. Hunter*, 6 *N. Y.* (2 *Seld.*), 208.

PATENTS (for Lands).*

1. Not to be impeached collaterally. Where two patents are granted for the same thing, the second is inoperative until the first is set aside. If the elder patent was issued by mistake, or upon false suggestions, it is voidable only; and unless letters-patent are absolutely void on the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading, in which the fraud, irregularity, or mistake, is directly put in issue. [1 *H. & M.*, 187; 1 *Munf.*, 184.] The regular tribunal for this purpose is chancery, founded on a proceeding by *scire facias*, or by bill, or information. *So held*, where the second patent recited that the first was issued by a mistake. *Supreme Ct.*, 1818,

* The construction of the following patents has been the subject of judicial consideration in the cases indicated. *Baker & Flodder's*, *Frier v. Jackson*, 8 *Johns.*, 495; *Braine's*, *Jackson v. Wood*, 3 *Cai.*, 118; *Bushwick*, *People v. Schermerhorn*, 19 *Barb.*, 540; *Cambridge*, *Jackson v. Murch*, 9 *Johns.*, 818; *Catakill*, *Jackson v. Reeves*, 3 *Cai.*, 293; *Van Gordon v. Jackson*, 5 *Johns.*, 440; *Cosyman's*, *Jackson v. Huyck*, 2 *Johns. Cas.*, 64; *De Bruyn's*, *Frier v. Jackson*, 8 *Johns.*, 495; *Gravesend*, *Emans v. Turnbull*, 2 *Id.*, 818; *Gregory's*, *Jackson v. Murray*, 7 *Id.*, 5; *Hardenbergh*, *Jackson v. France*, 10 *Id.*, 428; *Hosick*, *Jackson v. Dennis*, 2 *Cai.*, 177; *Jackson v. Sherwood*, 2 *Johns. Cas.*, 37; *Jackson v. Williams*, 2 *Johns.*, 297; *Jackson v. Joy*, 9 *Id.*, 102; *Kayaderoseras*, *Jackson v. Lindsey*, 8 *Johns. Cas.*, 86; *Brandt v. Ogden*, 3 *Cai.*, 6, and 1 *Johns.*, 156; *Livingston's*, *People v. Livingston*, 8 *Barb.*, 258; *Minisink*, *Jackson v. Thomas*, 16 *Johns.*, 298; *New Utrecht*, *Cortelyou v. Van Brundt*, 2 *Id.*, 857; *Nicoll's*, *Nicoll v. Town of Huntington*, 1 *Johns. Ch.*, 166; *Nine Partners*, *Jackson v. Sowle*, 18 *Johns.*, 836; *Patrick's*, *Brink v. Richtmyer*, 14 *Id.*, 255; *Petrie's*, *Orendorff v. Steele*, 2 *Barb.*, 126; *Platt's*, *People v. Platt*, 17 *Johns.*, 195; *Rensselaerwyck*, *Canal Commissioners v. People*, 5 *Wend.*, 423; *The same v. The same*, 17 *Id.*, 570; *Rochester*, *Jackson v. Schoonmaker*, 2 *Johns.*, 280; *Rumbout & Phillips'*, *Jackson v. Wood*, 18 *Id.*, 346; *Sanders & Heermance's*, *Jackson v. Sowle*, 18 *Id.*, 886; *Springfield*, *Jackson v. Carey*, 2 *Johns. Cas.*, 350; *Staat's*, *Jackson v. Lucett*, 2 *Cai.*, 363; *Stoney Arabia*, *Jackson v. Lepper*, 8 *Johns.*, 12; *Van Slyck's*, *Jackson v. Vedder*, 2 *Cai.*, 210.

Validity.	Effect	Colonial Patents.	State Patents.
<p>Jackson v. Lawton, 10 <i>Johns.</i>, 23. Followed, 1815, Jackson v. Hart, 12 <i>Id.</i>, 77; 1826, Jackson v. Marsh, 6 <i>Cow.</i>, 281; 1848, People v. Mauran, 5 <i>Den.</i>, 389. To the same effect [citing <i>Code</i>, § 438], <i>Ot. of Appeals</i>, 1851, Parmelee v. Oswego & Syracuse R. R. Co., 6 <i>N. Y.</i> (2 <i>Seld.</i>), 74; <i>affir'g S. C.</i>, 7 <i>Barb.</i>, 599.</p> <p>2. The patent, as a record, cannot be impeached collaterally. It can make no difference that the evidence relied on against it, was introduced without objection, or by the patentee. <i>Supreme Ct., Sp. T.</i>, 1850, People v. Livingston, 8 <i>Barb.</i>, 258.</p> <p>3. — unless absolutely void. Objections showing that a patent was absolutely void from the beginning, are open to consideration. <i>Ot. of Appeals</i>, 1853, People v. Van Rensselaer, 9 <i>N. Y.</i> (5 <i>Seld.</i>), 291; reversing <i>S. C.</i>, 8 <i>Barb.</i>, 189. <i>Supreme Ct., Sp. T.</i>, 1850, People v. Livingston, 8 <i>Id.</i>, 253, 277.</p> <p>4. Actions given to vacate letters-patent granted by the people of the State. <i>Code of Pro.</i>, § 438; and see People v. Clarke, 10 <i>Barb.</i>, 120; 11 <i>Id.</i>, 337; 9 <i>N. Y.</i> (5 <i>Seld.</i>), 349.</p> <p>5. Entry of judgment with commissioners of land-office. <i>Code of Pro.</i>, § 446.</p> <p>6. When effective. A patent for land, though it does not pass the great seal until after its date, takes effect, as between the parties and as against a wrongdoer, by relation, from its date. <i>Supreme Ct.</i>, 1815, Heath v. Rosa, 12 <i>Johns.</i>, 140.</p> <p>7. A patent takes effect only from the time when it is approved by the commissioners of the land-office, and passes the secretary's office, although dated and signed by the governor before that time. <i>Supreme Ct.</i>, 1826, Jackson v. Douglass, 5 <i>Cow.</i>, 458.</p> <p>8. Capacity of patentee. A patent duly issued, according to the direction of a statute, to one who is incapable of transmitting by descent,—<i>e. g.</i>, an Indian, alien, or slave,—and to his heirs, confers upon his heirs the capacity to take by descent the land patented. <i>Ot. of Errors</i>, 1823, Goodell v. Jackson, 20 <i>Johns.</i>, 698. <i>Supreme Ct.</i>, 1826, Jackson v. Etz, 5 <i>Cow.</i>, 314; Jackson v. Lervey, <i>Id.</i>, 397; <i>S. P.</i>, 1831, Jackson v. Adams, 7 <i>Wend.</i>, 367.</p> <p>So a patent to a body of men granting to them lands, confers a quasi corporate capacity. <i>Chancery</i>, 1817, Denton v. Jackson, 2 <i>Johns.</i> <i>Ch.</i>, 320. <i>Supreme Ct.</i>, 1855, People v. Schermerhorn, 19 <i>Barb.</i>, 540.</p> <p>9. Colonial patents. The undivided lands</p>		<p>in the town of Hempstead became, under the patent of Kieft, in 1644, and that of Dongan, in 1685, the property of the town, and remained so to the time of its division. <i>Chancery</i>, 1817, Denton v. Jackson, 2 <i>Johns.</i> <i>Ch.</i>, 320.</p> <p>10. The colonial patents were authenticated by the great seal, without the signature of the governor. It is no objection to such a patent that the king, in whose name it was granted, was dead when it was executed. <i>V. Chan. Ct.</i>, 1847, Bogardus v. Trinity Church, 4 <i>Sandf. Ch.</i>, 628, 729.</p> <p>11. Royal letters-patent (issued in 1685), granting lands in the province of New York, are not void by reason of their conferring manorial privileges and franchises upon the patentees. 1. It was within the competency of the colonial government in 1685 to grant a manor, with the usual incidents and franchises of an English barony. 2. If it had no such right, and nevertheless made such grant, in a patent which also, in a distinct part thereof, contained the usual grant of lands to the patentee, his heirs and assigns, the manorial grant alone will be void, and the grant of lands operative and effectual. 3. Moreover, even if such patents were void, they are confirmed and made valid by the colonial act of May, 1691. <i>Ot. of Appeals</i>, 1853, People v. Van Rensselaer, 9 <i>N. Y.</i> (5 <i>Seld.</i>), 291; reversing <i>S. C.</i>, 8 <i>Barb.</i>, 189.</p> <p>12. A patent is to be deemed valid although it runs in the name of the lieutenant-governor of the province, and it does not appear affirmatively that he had the requisite advice and consent of the council to issue it; his authority may be presumed. The seal, if stated in the patent to be the seal of the province, must be deemed to have been such. <i>Supreme Ct., Sp. T.</i>, 1850, People v. Livingston, 8 <i>Barb.</i>, 258.</p> <p>13. Early State patents. It is no objection to an exemplification of a patent granted in 1787, that the name of the governor of the State <i>pro tempore</i> does not appear subscribed to it, and that the letters L. S., designating the place of the great seal, do not appear upon it; it being judicially known that at that period, and long after, the seal was appended to patents instead of being impressed upon its face; and the legal presumption being that no patent would be issued or recorded, unless executed in due form of law. <i>Supreme Ct.</i>, 1833, Williams v. Sheldon, 10 <i>Wend.</i>, 654.</p>	

Patents for Lands.

Grants by Patentee.

Payment.

14. Power of the commissioners of the land-office to convey by patent. *People v. Mauran*, 5 Den., 889.

15. Recitals of former grants, being matters of public record, are to be considered as recitals of the crown, and not as suggestions of the patentee. *Supreme Ct., Sp. T.*, 1850, *People v. Livingston*, 8 Barb., 258, 268.

16. Construction. That when a grant is susceptible of two constructions, that should be adopted which is most favorable to government. *Supreme Ct.*, 1805, *Jackson v. Reeves*, 8 Cai., 298. Compare *Jackson v. Smith*, 9 Johns., 100.

17. A patent granting land under the water of a navigable river, is within the rule, that, in grants in derogation of public rights, nothing is to be taken by implication; and, if it implies a right to erect a wharf, there is also implied a reservation of the right to regulate the use of it and the adjacent waters, and the right to make a public improvement in front of the land granted, even to the consequential injury of the grantee. *Ct. of Errors*, 1829, *Lansing v. Smith*, 4 Wend., 9; affirming 8 O., 8 Cow., 146; and see *Brink v. Richtmyer*, 14 Johns., 255.

18. A patent from the State, of lands on a stream, gives no right to erect a mill-dam overflowing land above; and if the patentee erects such dam, another who takes a patent of the land above, though it refer to a map showing the dam below, may bring an action for the continued overflow of his land. *Supreme Ct.*, 1842, *Colvin v. Burnet*, 2 Hill, 620. Compare *Le Roy v. Platt*, 4 Paige, 77.

19. A tract of land in a river, and usually covered with water,—*Held*, to pass by the designation of an island; there being no other land answering to the description. *Supreme Ct.*, 1817, *Brink v. Richtmyer*, 14 Johns., 255.

20. Void in part. A patent may be good for one thing and void for another. [5 Den., 389; 2 Marsh., 61; 8 O., 6 Taunt., 369.] Thus, where a patent not only granted land, but erected a manor,—*Held*, that if the erection of the manor was void, for want of authority, or as being forbidden by statute, the grant of the land was not thereby invalidated. *Supreme Ct., Sp. T.*, 1850, *People v. Livingston*, 8 Barb., 258; and see *People v. Mauran*, 5 Den., 889; and *supra*, 11.

21. Breach of condition. No one but the State can take advantage of an omission on

the part of the patentee to comply with the condition of the grant. *Supreme Ct.*, 1833, *Williams v. Sheldon*, 10 Wend., 654.

22. A conveyance by patentee, subject to the conditions,—*Held*, not to enable the grantor to take advantage of his grantee's omission. *Supreme Ct.*, 1842, *Welch v. Silliman*, 2 Hill, 491.

23. Lots reserved by the act of Feb. 8, 1789, to make up certain deficiencies therein mentioned, but not applied for on or before Jan. 1, 1798, became unappropriated lands, and may be disposed of as such by the commissioners of the land-office. *Supreme Ct.*, 1808, *Jackson v. Seaman*, 3 Johns., 495.

PAWNBROKING.

Forbidden, at unlawful interest, except where authorized according to law. Proceedings to punish. 1 Rev. Stat., 711.

PAYMENT.

1. Who may receive price of land. Two persons joined in an agreement to sell and convey land. The purchaser paid the price to one of them. *Held*, that the other could not object that the one paid had no title to the land. *Ct. of Errors*, 1812; *Waters v. Travis*, 9 Johns., 450.

2. Where a vendee, in a contract to sell and convey land, being under covenant to pay the purchase-price to the vendor or his assigns, has notice of a conveyance to a third person, he becomes bound to pay the price to such third person; and any payment to the original vendor will be unavailing. *A. V. Chan. Ct.*, 1844, *Ten Eick v. Simpson*, 1 Sandf. Ch., 244.

3. — rent. Lands were sold under a decree of the Court of Chancery on the 29th of January, 1824, deed to be delivered, &c., in ten days. On the 1st of February the tenant paid the rent to his landlord. The deed had not yet been delivered, but the tenant had notice of the purchase. On the 5th of February the purchaser paid the consideration and took a deed from the master, dated 29th January. *Held*, that the payment by the tenant was unauthorized, and he was bound to pay again to the purchaser. *Supreme Ct., Circuit*, 1825, *Whiting v. Street*, Anth. N. P., 276.

4. — mortgage-debt. Possession of bond is presumptive evidence of agent's authority to receive payments; but only so long as the

Power to receive Debt to Estate.

Payment under Attachment.

possession actually continues. *A. V. Chan. Ct.*, 1845, *Williams v. Walker*, 2 *Sandf. Oh.*, 225; *S. C.*, less fully reported, 3 *N. Y. Leg. Obs.*, 204. *S. P., N. Y. Superior Ct.*, 1852, *Megary v. Funtis*, 5 *Sandf.*, 376. Compare *Stone v. Steere*, *Seld. Notes*, No. 2, 14.

5. The presumption of authority is removed by the death of the principal. *N. Y. Superior Ct.*, 1852, *Megary v. Funtis*, 5 *Sandf.*, 376.

6. — **debt to estate.** Payment of a debt due to the estate of a deceased person, made before letters granted, to a person who subsequently takes out letters, is rendered valid by the subsequent letters. *Supreme Ct.*, 1842, *Priest v. Watkins*, 2 *Hill*, 225. Followed, 1845, *Matter of Faulkner*, 7 *Id.*, 181.

7. Payments made to an executor under peculiar circumstances,—*Held*, within his authority to receive, and valid. *Frost v. Frost*, 4 *Edw.*, 733.

8. — **payment of notes.** When mercantile paper, about to fall due, is sent by the holder to his agent, with general authority to collect it, and the agent, with the evidence of such authority in his possession, calls on the debtor for payment, the debtor is authorized to pay the claim, even before it is due. *Supreme Ct.*, 1854, *Bliss v. Cutter*, 19 *Barb.*, 9.

9. That one who has given his note for goods sold is protected in paying it to the order of the seller; and cannot refuse on the ground that the seller is a mere agent, and the goods were the property of his principal. *N. Y. Com. Pl.*, 1855, *Maniort v. Roberts*, 4 *E. D. Smith*, 88.

10. A mortgagor gave his note for the first instalment of his bond and mortgage, to be credited thereon when paid. The mortgagee negotiated the note, and the mortgagor paid it at maturity to the holder, but meantime the mortgagee had made an assignment of the bond and mortgage. *Held*, that it was a good payment on the bond. The mortgagor could not recover the amount back from the original mortgagee, but must set up his equity against the assignee. *Supreme Ct.*, 1838, *Seymour v. Lewis*, 19 *Wend.*, 512.

11. The giving of negotiable promissory notes for the price, is not of itself such a payment as will constitute one a *bona-fide* purchaser in equity; but if such notes have been negotiated, and when due are in the hands of a holder in good faith for value, the makers

are warranted in paying the same, although they then are informed of the equity of the party claiming the thing sold to them; and they may rely upon the giving of the notes and such payment as constituting them *bona-fide* purchasers. *A. V. Chan. Ct.*, 1846, *Freeman v. Deming*, 3 *Sandf. Ch.*, 327.

12. **Absconding debtor.** Payment to debtor after publication of notice of issuing of warrant under the Absconding Debtors' Act, declared fraudulent. 2 *Rev. Stat.*, 8, § 85.

13. **Payment to sheriff.** After issuing execution against property, any person indebted to the judgment-debtor may pay to the sheriff the amount of his debt, or so much as will satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid. *Code of Pro.*, § 293.

14. Where a debtor upon an execution recovered a judgment for damages for the selling of exempt property belonging to him, upon an execution, and the defendant paid in the amount of the damages to the sheriff, under section 203 of the Code;—*Held*, that this was a good payment. The recovery became a debt, on the perfecting of judgment upon it. A party may protect himself in such case by bringing an action in the nature of replevin, for the delivery of his property, and thus have it restored, and the intention of the Legislature will be preserved. If he chooses to bring his action to recover the value, and obtains a judgment which, within all the cases, becomes a debt, he takes the risk of subjecting himself to the provisions of section 293. *Supreme Ct.*, 1856, *Mallory v. Norton*, 21 *Barb.*, 424.

15. A debtor who, after notice that his creditor has assigned the debt, pays it to the sheriff upon execution on a judgment against the creditor, at suit of third parties, in an action in which the debtor was served with a copy of a warrant of attachment against the creditor, is not protected, by such payment, from liability to the assignees. *N. Y. Com. Pl.*, 1854, *Lyman v. Cartwright*, 3 *E. D. Smith*, 117. See, also, on this statute, *EXECUTION*, 671-673.

16. **Payment under foreign attachment.** The London agents of an American citizen residing in New York were compelled, by process of foreign attachment, from the Mayor's Court of London, to pay money due from them to him to a creditor in London. *Held*, a good payment, the court being of competent jurisdiction; and a bar to a suit brought here by

Creditor's Acceptance.

Foreclosure.

the trustees of the London creditor appointed under the act against absconding debtors, notwithstanding the attachment here was issued before the foreign attachment. *Chancery*, 1820, *Holmes v. Remsen*, 4 *Johns. Ch.*, 460. *Supreme Ct.*, 1822, *The same v. The same*, 20 *Johns.*, 229.

17. A compulsory payment made in another State under process of foreign attachment, is recognized in this State as good against the creditor. *A. V. Chan. Ct.*, 1843, *Cochran v. Fitch*, 1 *Sandf. Ch.*, 142.

18. Creditor's acceptance necessary to constitute payment. To constitute a payment, the money or other value delivered by the debtor to the creditor, to extinguish the debt, must be accepted by the creditor for that purpose. Unless the creditor consents to receive it in payment, there is no payment. *Supreme Ct.*, 1854, *Kingston Bank v. Gay*, 19 *Barb.*, 459.

19. Thus, where the defendants forwarded money to the plaintiffs sufficient to pay a note held by the latter against the former, but the plaintiffs refused to receive the money in payment, unless costs of suit were added, and informed the defendants that the money was subject to their order,—*Held*, that this did not amount to a payment of the note. If the defendants intended to protect themselves against the costs of an action, they should have withdrawn the deposit, and have made a tender of the amount. *Id.*

20. The solicitor of a complainant in foreclosure refused to receive from the defendant (mortgagor) money as a partial payment to stop interest, but took it as a deposit, with the understanding that if the complainant would take the same as a payment and allow interest it should be indorsed on the mortgage. The complainant refused to receive the money, unless the whole debt was paid. Subsequently his solicitor handed him the money, with the understanding that it was not to carry interest until the residue was paid, of which the defendant was informed and he acquiesced. The complainant, on receiving the money, used it as his own. *Held*, that the defendant was equitably entitled to have the money applied as a payment on his mortgage, as of the time it was received and used by the complainant. *Chancery*, 1844, *Toll v. Hiller*, 11 *Paige*, 228.

21. Acquiescence for more than two years in an account stated,—*Held*, under the circum-

stances, equivalent to a payment. *Seymour v. Marvin*, 11 *Barb.*, 80.

22. Partial payment. That payment under an agreement to accept less than the whole debt if paid by a certain day, is no discharge, unless the condition is strictly complied with. *Supreme Ct.*, 1823, *Inman v. Griswold*, 1 *Cow.*, 199. Compare 2 *Rev. Stat.*, 353, § 12.

23. The payment by a debtor of a part of a sum of money, which is actually due and payable, is no consideration for an agreement by the creditor to forbear or give time for the payment of the residue. *N. Y. Superior Ct.*, 1856, *Hunt v. Bloomer*, 5 *Duer*, 202.

24. Giving a mortgage for a debt less a certain deduction agreed to be thrown off in consideration of the security, is not payment of the debt so that a note subsequently given for the sum deducted will be deemed devoid of consideration. *Supreme Ct.*, 1843, *Platts v. Walrath*, *Hill & D. Supp.*, 59.

25. The rule that a partial payment, without a release, is no bar to an action for the residue, only applies to cases where the amount due is settled and understood by the parties. Where an unliquidated claim is adjusted between the creditor and the debtor or his agent, and payment made of the amount arrived at, on such settlement, it is conclusive, unless there is proof of mistake or error. *N. Y. Com. Pl.*, 1854, *Harris v. Story*, 2 *E. D. Smith*, 363.

As to when Part payment will operate as a discharge, see ACCORD AND SATISFACTION.

26. Foreclosure of mortgage. Where, upon foreclosure of a mortgage and sale under the statute, the premises produce less than the mortgage-debt, the debt is paid only *pro tanto*. *Ct. of Errors*, 1827, *Lansing v. Goellet*, 9 *Cow.*, 346. *Supreme Ct.*, 1826, *Globe Ins. Co. v. Lansing*, 5 *Id.*, 380.

27. A strict foreclosure of a mortgage operates as payment of the mortgage-debt only to the extent of the value of the premises. *Supreme Ct.*, 1830, *Spencer v. Harford*, 4 *Wend.*, 381; 1832, *Morgan v. Plumb*, 9 *Id.*, 287.

28. Chattel mortgage. Taking possession under a chattel mortgage, upon forfeiture, if the property be equal in value to the debt, is payment. No other act is necessary to discharge the debt. *Supreme Ct.*, 1833, *Case v. Boughton*, 11 *Wend.*, 106.

29. Where the mortgagee of chattels, after the law-day, sells part of the property by vir-

Payment returned.**Maker and Indorser.**

tue of the mortgage-power, for sufficient to pay the debt with interest and expenses, this is equivalent to payment, and his title to the remaining chattels is extinguished. *Supreme Ct.*, 1846, *Charter v. Stevens*, 3 *Den.*, 83.

30. Payment returned. A mortgagor delivered a sum of money due on the mortgage to the mortgagee, intending it to be applied on the mortgage. No receipt was given or indorsement made, however, and subsequently the mortgagee returned the money. *Held*, that the delivery operated as a payment and discharge, and that the subsequent return was to be deemed a loan on the personal security of the mortgagor, and could not reinstate the lien of the mortgage to the prejudice of junior lien-holders. *Ct. of Errors*, 1825, *Marvin v. Vedder*, 5 *Cow.*, 671.

31. Where one who has received coin in payment returns it as light weight, and it is taken back, the payment and any indorsement thereof is virtually rescinded. The return of the coin makes it again the property of the debtor. *Supreme Ct.*, 1822, *Hawkins v. Stark*, 19 *Johns.*, 305.

32. A devise intended as a satisfaction of a debt, and accepted as such, is payment. *Supreme Ct.*, 1849, *Rose v. Rose*, 7 *Barb.*, 174.

33. But where a testator being indebted to his son for labor, devised a farm to him in satisfaction of the debt, but afterwards conveyed it to him, in consideration of "\$1200, and natural love and affection;"—*Held*, that the son's claim remained unsatisfied, at least, presumptively. *Id.*

34. Award. The parties to an arbitration agreed that in case the award was in favor of F., the sum awarded was to be "cancelled on a note" held by the other against F. *Held*, that the award being made was a payment *pro tanto*, and so long as the other party held the note, F. could not maintain an action for his refusal to indorse the payment. *Supreme Ct.*, 1815, *Flint v. Clark*, 12 *Johns.*, 874.

35. Agreement to receive goods. Agreement between maker and payee of a note, that the latter shall take goods to apply on the note from the former's firm,—his partner assenting,—is valid; and the account, when contracted, operates as payment. *Supreme Ct.*, 1837, *Eaves v. Henderson*, 17 *Wend.*, 190.

36. Services. If one who renders services to A. at the request of B., charges them to B. in the first instance, B. is the debtor; and such

charge is, as between A. and B., equivalent to payment by B. to A.'s use. [11 *Johns.*, 518; 2 *Esp.*, 571.] *N. Y. Superior Ct.*, 1850, *Conway v. Conway*, 8 *Sandf.*, 650.

37. Delivery of cattle under certain circumstances,—*Held*, not to be deemed a payment on an outstanding note. *Supreme Ct.*, 1842, *Godfrey v. Warner*, *Hill & D. Supp.*, 82.

38. Money paid to creditor's use. Where money due on a contract is applied by the party owing it, to purposes authorized by the creditor, the expenditure is a payment, and extinguishes the demand *pro tanto*. A subsequent suit upon the demand in which such expenditures are set up in defence, is not to be deemed a case of "mutual accounts" within the statute defining jurisdiction of justices' courts. *N. Y. Com. Pl.*, 1853, *Brady v. Durbrow*, 2 *E. D. Smith*, 78.

39. Tender of bonds, &c., of a banking association to them in payment of a debt, pursuant to their agreement to receive them in payment,—*Held*, a good discharge under the circumstances. *Supreme Ct.*, 1848, *Leavitt v. Beers*, *Hill & D. Supp.*, 221.

40. Failure of payment. A vendee in a contract for sale of land, conveyed certain lands to his vendor in part-payment of the lands he had contracted for. The value of the land (\$1,000) was indorsed, as a payment upon the contract. There was, however, an incumbrance on the land which the vendee covenanted to pay. He afterwards assigned his contract; but the land he had conveyed to his vendor, was lost to the latter in consequence of the vendee's failure to remove the incumbrance as agreed. *Held*, that the assignee—he having had notice—could not maintain the \$1,000 payment. *Supreme Ct.*, 1848, *Thomas v. Austin*, 4 *Barb.*, 265.

41. Exchange of orders. The holder of unpaid county orders exchanged them at the request of the treasurer for orders which the latter had taken up, but which had not been charged or allowed in his accounts with the county. The treasurer afterwards became insolvent. *Held*, a mere exchange of vouchers, and that the debt represented by the unpaid orders, remained undischarged. *Supreme Ct.*, 1848, *Chemung Canal Bank v. Supervisors of Chemung*, 5 *Den.*, 517.

42. Maker cannot set up payment by indorser. Suits were brought against the maker and indorser of a promissory note, the

Laborer.**Effect of giving Credit in Account.**

indorser paid the amount, but it was agreed between the holder and indorser, that the suit against the maker should be prosecuted for the benefit of the indorser. *Held*, that the maker could not avail himself of the payment by the indorser, as a defence. *Supreme Ct.*, 1816, *Mechanics' Bank v. Hazard*, 18 *Johns.*, 353.

43. And therefore the bail of the indorser could not avail themselves of the payment in an action against them on their recognizance. *Id.*

44. Laborer employed by municipal corporation, whose pay had been reduced by disbursing officer without authority,—*Held*, entitled to recover balance unpaid, notwithstanding he had received the reduced amount and had receipted for it in full. *Smith v. Mayor, &c.*, of N. Y., 4 *N. Y. Leg. Obs.*, 423.

45. Advance to pay notes. Where one who had purchased property by giving his notes for it, sold to one who agreed to pay the notes, and the latter sold it with warranty to the plaintiffs, who, to protect their title, advanced the amount of the notes to the holder;—*Held*, that whether they were thereby paid or merely transferred, the plaintiffs could not recover on them, and also hold the entire interest in the property. *Supreme Ct.*, 1853, *Wayne v. Sherwood*, 14 *Barb.*, 688.

46. Valuation of merchandise. Where an advance is made, to be repaid in certain merchandise to be purchased at a foreign port, the merchandise must be estimated at the port of purchase at its cash value in specie, or the legal tender of the country, and not in a fictitious or depreciated currency. *Chancery*, 1830, *Colton v. Dunham*, 2 *Paige*, 267.

47. Voluntary payment. Payment made to a collector of assessments, under his threat to remove and sell goods levied upon for payment of the assessment, will not be deemed a voluntary payment. *N. Y. Superior Ct.*, 1849, *Wetmore v. Campbell*, 2 *Sandf.*, 341. Approved, *Manice v. Mayor, &c.*, of N. Y., 8 *N. Y. (4 Seld.)*, 120.

48. Effect of giving credit in account. A bank paid a depositor's note, charged the amount to him, and marked it cancelled;—*Held*, no payment as against the bank, but that the bank could recover upon the note from the maker as a subsisting security. *Supreme Ct.*, 1845, *Watervliet Bank v. White*, 1 *Den.*, 608.

49. The president of a bank, having his notes indorsed for his accommodation, lying therein under protest, procured the cashier to make a new note, which the president indorsed and exchanged for the protested one; delivering the latter to the cashier for his security. *Held*, that the latter remained unpaid, although the president had entered it as paid, and the new note as discounted. *Supreme Ct.*, 1848, *Highland Bank v. Dubois*, 5 *Den.*, 558.

50. The holder of a promissory note sent it, when due, to the bank at which it was payable. The bank, erroneously supposing the maker to be in funds, credited the holder with the amount. On discovering its mistake, next day, the bank corrected it, and served the indorsers with notice of non-payment. *Held*, in an action against the indorsers, that the note had not been paid. *Supreme Ct.*, 1843, *Troy City Bank v. Grant, Hill & D. Supp.*, 119.

51. A charge by a bank, in its books, against a depositor of a note maturing on which he is holden, is not a valid payment of his deposit as against an assignee to whom (for benefit of creditors) the fund has been previously assigned; even though, at the time of making the charge, the bank has received no notice of the assignment. *Ct. of Appeals*, 1853, *Beckwith v. Union Bank*, 9 *N. Y. (5 Seld.)*, 211.

52. A carrier gave a postmaster a receipt for an account against the United States for carrying the mail, and the postmaster gave him back a written undertaking to pay him the amount, if paid by the department. The account was forwarded by the postmaster, and he was credited the amount in his account with the Post-office department. *Held*, that it was paid within the meaning of the undertaking. *Supreme Ct.*, 1848, *Haddock v. Kelsey*, 8 *Barb.*, 100.

53. Giving an agent, who has sold goods for a principal, credit for the price, upon a previous indebtedness of the agent, is not such a payment to the agent as will defeat a subsequent suit by the principal. *N. Y. Com. Pl.*, 1854, *Henry v. Marvin*, 3 *E. D. Smith*, 71.

54. Giving credit by the owner of premises to a contractor for the amount due the contractor for labor and materials, in an account with the owner as against the contractor, is equivalent to a payment to the contractor, and will defeat a subsequent proceeding by a laborer to create a mechanic's lien. *N. Y.*

Taking Notes in Payment.

Instances.

Com. Pl., Allen v. Carman, 1 *E. D. Smith*, 692.

55. Taking notes in payment. Receiving a bill or note in payment of a debt, does not operate to discharge the debt, unless it is expressly so agreed by the parties. *Ch. of Brs.*, 1800, Murray v. Gouverneur, 2 *Johns. Cas.*, 488. *Supreme Ct.*, 1810, Schermerhorn v. Loines, 7 *Johns.*, 811; 1823, Porter v. Talcott, 1 *Cow.*, 359; 1858, Van Steenburgh v. Hoffman, 15 *Barb.*, 28.

56. Accepting a note for a debt due is no payment of the debt, unless it be specially so agreed, or unless the creditor negotiates the note. It can only postpone the time of payment of the debt until a default in the payment of the note. *Supreme Ct.*, 1802, Herring v. Sanger, 3 *Johns. Cas.*, 71.

57. Taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment in due time. He is not obliged to sue upon it. He may return it when dishonored, and resort to his original demand. It only postpones the time of payment of the old debt, until a default is made in the payment of the note. *Supreme Ct.*, 1809, Tobey v. Barber, 5 *Johns.*, 68; *S. P.*, 1849, Van Eps v. Dillaye, 6 *Barb.*, 244.

58. A note given for the amount of a bond, which was surrendered under peculiar circumstances;—*Held*, a good payment of the bond. *Supreme Ct.*, 1808, Parsons v. Gaylord, 3 *Johns.*, 468.

59. Effect of receipt. The fact that the creditor, on receiving the bill or note, gives a receipt for the debt, is not conclusive that the paper was accepted in payment. The actual agreement may be shown, notwithstanding. *Supreme Ct.*, 1809, Tobey v. Barber, 5 *Johns.*, 68; 1810, Schermerhorn v. Loines, 7 *Johns.*, 811; 1811, Putnam v. Lewis, 8 *Id.*, 389; 1812, Johnson v. Weed, 9 *Id.*, 810; 1851, Houston v. Shindler, 11 *Barb.*, 36. *Ch. of Appeals*, 1849, Davis v. Allen, 3 *N. Y. (3 Comst.)*, 168. *N. Y. Superior Ct.*, 1829, Higgins v. Packard, 2 *Hall*, 547.

60. A creditor, on receiving from his debtor the note of a third person, gave him a receipt therefor, expressed to be "on account without recourse;"—*Held*, payment, and that the

contract contained in the receipt could not be contradicted by parol. *N. Y. Superior Ct.*, 1852, Graves v. Friend, 5 *Sandf.*, 568.

61. Receiving the debtor's own note does not discharge the indebtedness for which it is given. The creditor may sue for the original debt, notwithstanding. *Supreme Ct.*, 1811, Putnam v. Lewis, 8 *Johns.*, 389; 1841, Cole v. Sackett, 1 *Hill*, 516.

62. The giving of one's own note, on his oral agreement to exchange chattels, is not payment within the Statute of Frauds. *Supreme Ct.*, 1850, Combs v. Bateman, 10 *Barb.*, 578.

63. Where it appears that a debtor has given his note for a debt, and that the note was negotiable, the creditor cannot recover upon the original debt, without producing and cancelling the note, or proving it lost. *Supreme Ct.*, 1806, Holmes v. D'Camp, 1 *Johns.*, 84; 1811, Angel v. Felton, 8 *Id.*, 149; 1818, Pintard v. Tackington, 10 *Id.*, 104; Smith v. Lockwood, *Id.*, 875; 1818, Burdick v. Green, 15 *Id.*, 247.

64. Taking a note, although negotiable, is, however, only an extinguishment *sub modo*. If the note is not paid, the creditor may recover on the original debt, if he can produce or account for the note, on the trial. *Supreme Ct.*, 1818, Burdick v. Green, 15 *Johns.*, 247; *S. P.*, 1827, Hughes v. Wheeler, 8 *Cow.*, 77.

65. Instances. The landlord distrained for more than was due. Tenant gave his negotiable note with sureties for the amount distrained for and costs of distress, at sixty days, and took a receipt specifying that the note was received "as security," and in consideration, agreeing to relinquish distress and not to distrain again within sixty days. Thereafter the tenant sued for damages for distress in a greater sum than was due. *Held*, that the giving of the note was not a payment of the rent, and it not having been paid nor negotiated, the tenant could recover at most, only nominal damages. *Supreme Ct.*, 1829, Lewis v. Lozee, 8 *Wend.*, 79.

66. An executor offered to take up a note of the decedent, indorsed with his note as executor. This being refused, he took it up with his own note. *Held*, that the decedent's note was paid and the indorsers discharged. *Supreme Ct.*, 1843, Borst v. Bovee, 5 *Hill*, 219.

67. The owner of a demand employed a lawyer to collect it, agreeing to allow him 25 per cent. in case it should be collected, or the

Note of Third Person.

Individual Note.

creditor should settle, compromise, or receive the same, or in any way dispose thereof. *Held*, that the mere receipt of the debtor's own notes for the claim, without payment or security, did not entitle the attorney to the percentage. *N. Y. Com. Pl.*, 1855, *Mills v. Fox*, 4 *E. D. Smith*, 220.

68. The payment of a part of a judgment-debt, and the giving the debtor's own notes for a part of the balance, will not, without a satisfaction or release, discharge the indebtedness, although received in full payment and satisfaction. And it makes no difference that the notes were made payable to the attorney of the creditors, who is acting for and on their behalf, instead of being made payable to them directly. *N. Y. Com. Pl.*, 1856, *Moss v. Shannon*, 1 *Hilt.*, 175.

69. Taking the note of a third person for an existing debt does not operate as payment, unless it is agreed that it shall be so received. *Supreme Ct.*, 1812, *Johnson v. Weed*, 9 *Johns.*, 310; 1848, *Monroe v. Hoff*, 5 *Den.*, 360. *Ct. of Appeals*, 1850, *Vail v. Foster*, 4 *N. Y.*, 812.

70. The landlord took the note of the tenant and another person on time, secured by a chattel mortgage, the note to be, when paid, in full of rent accrued, and a satisfaction of the mortgage. *Held*, no payment such as would defeat the right to distrain. *A. V. Chan. Ct.*, 1845, *Lofsky v. Maujer*, 8 *Sandf. Ch.*, 69.

71. When it will be payment. The acceptance by a creditor from the debtor of the note of a stranger in payment of the debt, is a satisfaction of the demand. *N. Y. Superior Ct.*, 1847, *St. John v. Purdy*, 1 *Sandf.*, 9. *Ct. of Appeals*, 1858, *Oonkling v. King*, 10 *N. Y.* (6 *Seld.*), 440; affirming 10 *Barb.*, 379.

72. And where the debtor offered to the creditor, either to deliver him such a note in payment, or to pay him the money at an early day, and the creditor said he would take the note, and thereupon received it, and credited it to the debtor; it was *Held*, that the note was accepted in payment, and that the debtor was discharged. *N. Y. Superior Ct.*, 1847, *St. John v. Purdy*, 1 *Sandf.*, 9.

73. Where a bill or note of a third person is, by the agreement of parties, transferred and received in payment of the debt, the prior liability of the debtor is extinguished, and it is only as an indorser that he can be charged. *N. Y. Superior Ct.*, 1853, *Francia v. Del Banco*, 2 *Duer*, 183.

74. This rule applied in a peculiar case. *Id.*

75. Plaintiff held defendant's note, and defendant proposed to give in exchange for it the note of N., which was agreed to by defendant, and the notes were exchanged accordingly. N. had the day before become insolvent and absconded; but this was not known to either party, at the time of the exchange. *Held*, that the transaction was a discharge of defendant. The plaintiff took the risk of N.'s solvency. *N. Y. Com. Pl.*, 1854, *Heidenheimer v. Lyon*, 3 *E. D. Smith*, 54.

76. The distinction between payment in bank-notes and in notes of individuals, in respect to the right of the creditor to return the paper on discovering the maker's insolvency, considered. *Id.*

77. Negotiable paper of a third person, if expressly accepted as payment, is payment of the debt, whatever be its grade—a *g.*, a judgment. *Supreme Ct.*, 1830, *New York State Bank v. Fletcher*, 5 *Wend.*, 85.

78. That a note made by a third person, but paid out of plaintiff's funds, may be deemed a payment by plaintiff, so as to raise a resulting trust in plaintiff's favor. *Ct. of Appeals*, 1859, *Lounsbury v. Purdy*, 18 *N. Y.* (4 *Smith*), 515.

79. Effect of false representation. A representation by a debtor, that he knows the note of a third person to be good, in reliance upon which a creditor takes the note and agrees to receive it in payment of a debt, when, in fact, the maker is insolvent, will relieve the creditor from his agreement, although the maker's insolvency was not known to the debtor when he made the representation. *N. Y. Com. Pl.*, 1854, *Galoupeau v. Ketchum*, 3 *E. D. Smith*, 175.

80. Where the vendor of goods was induced to take the note of a third person, payable at a future day, in payment, at his own risk, by a fraudulent representation on the part of the vendee as to the solvency of the maker of the note,—*Held*, that the vendor might bring his action immediately for goods sold and delivered. *Supreme Ct.*, 1810, *Willson v. Force*, 6 *Johns.*, 110. Followed, 1818, *Pierce v. Drake*, 15 *Johns.*, 475.

81. Individual note of one administrator. Individual note of one of several administrators given for a debt due from the estate,—*Held*, payment; the creditor having given a long delay and accepted a renewal note, and the administrator having finally become insol-

Individual Note.

Goods sold for a Particular Note.

vent. *Supreme Ct.*, 1819, James v. Hackley, 16 *Johns.*, 273.

82. — of one partner. Individual note of one partner given, under peculiar circumstances, for a balance of a firm debt which he had assumed with consent of the creditor, and on which he had paid a part,—*Held*, not a payment. *Supreme Ct.*, 1820, Smith v. Rogers, 17 *Johns.*, 840.

83. When one holding a firm note delivers it up and accepts a note of one partner instead, with intent to accept it as payment, this operates as a satisfaction of the firm note. *Supreme Ct.*, 1815, Arnold v. Camp,* 12 *Johns.*, 409.

84. Where a copartner, after the dissolution of the firm, gave his individual note and the note of a third person to adjust and settle a partnership debt,—*Held*, an extinguishment of the demand against the other partners, the creditors having agreed to receive the same in payment of such demand. *Ct. of Errors*, 1846, Waydell v. Luer, 8 *Den.*, 410.† Followed, 1849, Livingston v. Radcliff, 6 *Barb.*, 201.

85. Note of agent. Where an agent, on buying for his principal, gives his own note for the price, it is to be deemed, so far as the question whether it operates as payment is concerned, as the note of the debtor, not that of a third person. *Supreme Ct.*, 1823, Porter v. Talcott, 1 *Cow.*, 859.

86. Thus, where an agent exchanged his principal's vessel for another, and gave his own notes for the difference in value, and there was no express agreement that they were to be payment,—*Held*, that they were not payment. *Id.*

87. Taking the note of an agent does not discharge the principal without payment at maturity, unless the principal shows that he has been injured by such dealing with the agent,—*e. g.*, when the principal has been led to believe that the debt was paid, or the sole liability of the agent accepted for it, and has dealt with the agent accordingly. *Ct. of Errors*, Rathbone v. Tucker, 18 *Wend.*, 175. *Ct. of Appeals*, 1849, Davis v. Allen, 3 *N. Y. (3 Comst.)*, 168.

88. Thus, merely taking the note of the

ship's husband for supplies, though upon an extension of the credit, does not discharge the owners. *Id.*

89. A person furnished supplies to a vessel of which there were several owners, on the order of one of them, who acted as ship's husband, and took his note in payment, and gave a receipt in full. *Held*, no discharge of the other owners. *Supreme Ct.*, 1810, Schermerhorn v. Loines, 7 *Johns.*, 311; *S. P.*, 1823, Muldon v. Whitlock, 1 *Cow.*, 290. *N. Y. Superior Ct.*, 1829, Higgins v. Packard, 2 *Hall*, 547.

90. Receiving the note of an agent in settlement by him of his principal's indebtedness is not in itself payment, even though the agent was at the time largely indebted to the principal, and had charged the principal, on account of that indebtedness, with the amount of the note. *N. Y. Superior Ct.*, 1858, Higby v. N. Y. & Harlem R. R. Co., 7 *Abbotts' Pr.*, 259.

91. To make the receipt of such note operate as payment, the principal must show that there was an agreement to take it as actual payment. *Id.*

92. If, however, one sells goods to an agent, and with full knowledge of the agency takes the note of the agent for the price, and relies upon his credit, he cannot resort to the principal. *Supreme Ct.*, 1850, Hyde v. Paige, 9 *Barb.*, 150.

93. Goods sold for a particular note. The rule, that a note given for a precedent debt is not payment unless there is an express agreement to receive it in payment, is not applicable to an express agreement to sell goods for a particular note. In such case the delivery of the note is a full payment of the debt; and whether the note is afterwards paid or not, the vendor cannot rescind his contract by returning the note and claiming the value of the goods sold. *N. Y. Com. Pl.*, 1858, Fardon v. Jones, 2 *E. D. Smith*, 106.

94. If a vendor of goods receives from the vendee the note of a third person, without such note being indorsed by the vendee,—such note not being forged, and there being no fraud or misrepresentation on the part of the purchaser, as to the note, or the solvency of the maker,—such note will be deemed to have been accepted by the vendor in payment and satisfaction, unless the contrary be expressly proved. *Supreme Ct.*, 1814, Whitbeck v. Van Ness, 11 *Johns.*, 409. Followed, 1818,

* Disapproved by the Supreme Court, in Cole v. Sackett (1 *Hill*, 516); but approved by the Court of Errors, in Waydell v. Luer (3 *Den.*, 410).

† Compare remarks of PALEX, J., upon this case, in Elwood v. Diefendorf, 5 *Barb.*, 398, 408; also Cole v. Sackett, 1 *Hill*, 516.

Bank notes.

Checks.

Breed v. Cook, 15 *Id.*, 241. Followed, 1824, Rew v. Barber, 8 *Cow.*, 272.

95. When a note of a third person is taken by the vendor of property at the time of sale, there is a presumption that the parties agreed it should be taken in payment. But this presumption may be rebutted; and if it is shown that such was not the agreement, the vendor may sue for goods sold. *Supreme Ct.*, 1858, Torry v. Hadley, 27 *Barb.*, 192. *Ct. of Appeals*, 1855, Noel v. Murray, 18 *N. Y.* (8 *Kern.*), 167.

96. Upon an agreement to accept notes in payment of goods sold, if before the delivery of the articles purchased, the notes turn out not to be good, a tender of them is not to be considered as payment, unless it was part of the agreement to take them as such, and run the risk of their being paid. [6 D. & E., 52; 7 *Id.*, 64.] *Supreme Ct.*, 1804, Roget v. Merritt, 2 *Cal.*, 117. Followed, *Ct. of Appeals*, 1858, Benedict v. Field, 16 *N. Y.* (2 *Smith*), 595.

97. Otherwise if the goods have been delivered before the insolvency of the maker of the notes is known to either party. *Ct. of Appeals*, 1858, Des Arts v. Leggett, 16 *N. Y.* (2 *Smith*), 582.

98. Bank-notes. If a creditor receives in payment counterfeit bank-notes, or other bills or notes which prove to be of no value, it is no payment; and he may resort to the original debt, although the debtor paid the notes in good faith, supposing them to be genuine. *Supreme Ct.*, 1809, Markle v. Hatfield, 2 *Johns.*, 455.*

99. Bank-bills are deemed money only so long as the bank continues to redeem them. When a bank stops payment, its bills cease to be a representative of the legal currency, whether the holder is aware of the suspension or not. If such bills are passed to one who is ignorant of the failure of the bank, they are no payment. *Ct. of Errors*, 1884, Ontario Bank v. Lightbody, 18 *Wend.*, 101.

100. Where a counterfeit bank-note is given and received for a debt, in the belief on the part of both parties that it is genuine, it is no payment; but the creditor is entitled, within a reasonable time after discovery of the character of the bill, to return it. *Supreme Ct.*, 1844, Thomas v. Todd, 6 *Hill*, 840.

101. A delay of three months,—*Held*, unreasonable. *Id.*

102. Bill of exchange. Where a bill of exchange is remitted for the payment of a precedent debt, if due diligence is not used in obtaining payment, and due notice of dishonor given, it will be a satisfaction of such debt. *Supreme Ct.*, *N. P.*, 1808, Copper v. Powell, *Anth. N. P.*, 68.

103. An order for the payment of money, not negotiable, and which has not been paid or accepted by the drawee, cannot be deemed payment of a precedent debt. *Supreme Ct.*, 1818, Hoar v. Olute, 15 *Johns.*, 224. *S. P.*, *N. Y. Com. Pl.*, 1848, Sandford *ads.* June, 5 *N. Y. Leg. Obs.*, 20.

104. Where a creditor has received drafts, to be applied when paid upon his demand, he cannot recover upon the original debt without producing or accounting for the drafts. The presumption is that they were duly paid, or would have been, by use of due diligence. *Supreme Ct.*, 1840, Dayton v. Trull, 23 *Wend.*, 845.

105. Taking a check is not, in general, payment of the debt for which it is given, if the check is not paid by the drawee, on presentment. *Supreme Ct.*, 1809, People v. Howell, 4 *Johns.*, 296. *N. Y. Superior Ct.*, 1855, Strong v. Stevens, 4 *Duer*, 688.

106. The check of a third person, received on the surrender of a note, without an express agreement that it shall be received in payment, is not payment, if the check is dishonored. The bare fact of the old note being delivered up is not conclusive that the check was received absolutely. *Supreme Ct.*, 1830, Olcott v. Rathbone, 5 *Wend.*, 490.

107. On a cash sale of stocks, the seller delivered the stock and received the buyer's check for the price; but the check was drawn on a bank where the buyer had no funds;—*Held*, that the seller had not waived his right to immediate payment, and could commence an action for the price on the same day. *Supreme Ct.*, 1851, Genin v. Tompkins, 12 *Barb.*, 265.

108. The plaintiff in an action took, "in full settlement of the suit," the post-dated check of the defendant's attorney. The defendant did not pay the attorney any value, but gave him credit on account. The attorney failed, and the check was worthless. *Held*, no payment of the demand in suit, but that the plaintiff

* See this case explained and doubted, Benedict v. Field, 4 *Duer*, 154.

Receiving Check by Bank.**Acceptance of Property.**

could sue again. *Supreme Ct.*, 1851, *Houston v. Shindler*, 11 *Barb.*, 36.

109. Receiving a check,—*Held*, not payment where presentment, though not made, would have been nugatory, by reason of an injunction served upon the bank. *Supreme Ct.*, 1881, *Lovett v. Cornwell*, 6 *Wend.*, 369; affirming *S. C.*, 1 *Hall*, 56.

110. — by bank. There is a distinction between the acceptance by a creditor, from his debtor, of a new security for an old debt, and the acceptance by a bank of a check drawn upon itself in payment of a note. The first-mentioned transaction is the mere substitution of one executory agreement for another; and there is no extinguishment of the precedent debt, unless there is an express agreement to accept the new security as a satisfaction. But when a bank receives upon a debt a check drawn upon itself by one of its customers, and charges it in account, it admits that it has funds of the drawer to meet the check, and the acceptance is, *per se*, an appropriation of the funds to pay it. The transaction operates directly as a payment of the debt. *Ct. of Appeals*, 1854, *Pratt v. Foote*, 9 *N. Y.* (5 *Seld.*), 463. Followed, 1854, *Commercial Bank of Pennsylvania v. Union Bank of N. Y.*, 11 *N. Y.* (1 *Kern.*), 203.

111. There is a farther distinction between an executory agreement on the part of a bank to accept a check drawn upon itself in payment of a debt, at a future time, and an actual acceptance of it, *in presentia*. The maker of a note, held in bank and nearly due, offered in payment a check drawn on the bank by one of its own customers. The bank declined to accept it as payment, but consented to retain and apply it to the note, if the check were made good on the day the note fell due. On that day a balance appeared against the drawer of the check, but soon after, new credits having been made to him, the bank charged the check in his account, and credited the note as paid. *Held*, that this transaction operated as an absolute payment of the note. *Id.*

112. Effect of giving time to debtor's drawee. Where a creditor takes a draft payable at sight from his debtor, and accepts from the drawee notes on time for the draft, this operates as payment of the original debt. The creditor has no right to extend the time as against his debtor. *Supreme Ct.*, 1882, *Southwick v. Sax*, 9 *Wend.*, 122.

113. The defendant being indebted to the plaintiffs, directed them to apply for the amount to a third person, who was indebted to him. The plaintiffs accepted, in lieu of money, such third person's check on time, and wrote to the defendant, sending a receipt for the account as paid. The drawer of the check failed before it came due. *Held*, that receiving the check operated as payment. *N. Y. Superior Ct.*, 1847, *White v. Howard*, 1 *Sandf.*, 81.

114. A debtor gave his creditor a note of a third person as security. The note being protested at maturity, the creditor took from the maker part-payment in cash, and his note on time for the balance. *Held*, that this operated as payment of the original debt; and that the note given as collateral being larger in amount than the debt, the creditor was liable to his debtor for the difference. *Supreme Ct.*, 1843, *Nexsen v. Lyell*, 5 *Hill*, 466.

115. The holder of a sight-draft presented it and took the drawee's check on a bank for the amount, and surrendered the draft; the bank, however, refused payment of the check on its presentment the next day. *Held*, that the check, not having been taken expressly as payment, the draft was not to be deemed paid. *A. V. Chan. Ct.*, 1846, *Kobbi v. Underhill*, 3 *Sandf. Ch.*, 277.

116. Receiving an overdue mortgage, made by a third person upon a pre-existing debt, is no extinguishment, unless the mortgage is expressly agreed to be accepted in full discharge. Nor does it become a payment by mere omission of the creditor to prosecute it. *Supreme Ct.*, 1844, *Coonley v. Coonley*, *Hill & D. Supp.*, 812.

117. Property accepted as sufficient to satisfy a judgment, upon an agreement to take it in payment, is payment, without any other act of the parties. *Brown v. Feeter*, 7 *Wend.*, 801.

118. Paying debt, without costs accrued, to unauthorized agent, a nullity. *Adams v. Kearney*, 2 *E. D. Smith*, 42.

As to Dealings of banks in receiving and paying money, see **BANKING**.

As to payment of Debts and legacies, see **EXECUTORS AND ADMINISTRATORS**.

For rules of Evidence upon questions of payment, see **EVIDENCE**, 2296-2306.

As to payment of Executions, and payment to Redeem from execution, see **EXECUTION**.

At Common Law.

In Chancery.

As to various modes of **Extinguishing a debt**, see **DEBTOR AND CREDITOR**, tit. *Extinction*.

As to what is **Paying value** for mercantile paper, see **BILLS, NOTES, AND CHECKS**, 510-585.

As to **Presumptions** relative to payment, see **EVIDENCE**, 217-267.

As to the effect of **Receipts**, see **EVIDENCE**, 969-984, 1774-1779; **RECEIPTS**.

As to **Recovering back money paid**, see **MONEY PAID; MONEY RECEIVED**.

PAYMENT INTO COURT.

I. AT COMMON LAW.

II. IN CHANCERY.

III. UNDER THE CODE OF PROCEDURE.

I. AT COMMON LAW.

1. **Tools and implements** not proper articles to be brought into court. *Shotwell v. Wendover*, 1 *Johns.*, 65.

2. **In an action on a policy of insurance**, the defendant was allowed after issue to bring into court what sum he pleased, with costs to the time; but not specifically as the premium on the policy. *Dunlap v. Commercial Ins. Co.*, 1 *Johns.*, 149.

3. **Where in an action on a policy of insurance**, defendant paid the premium into court, and plaintiff's attorney took it out, after informing defendant that plaintiff meant to go for a total loss,—*Held*, that he was not precluded from proceeding for a total loss. *Supreme Ct.*, 1806, *Sleght v. Rhineland*, 1 *Johns.*, 192.

4. **A rule is necessary**. *Supreme Ct.*, 1828, *Baker v. Hunt*, 1 *Wend.*, 108.

5. **A bond conditioned for the payment of money**, by instalments, where only a part has become due, is not within the statute (2 *Rev. Stat.*, 853, § 12), permitting the defendant to bring the amount due into court, with costs, and have a discontinuance; and if he pay in part, the court will render judgment for the penalty, as security for future instalments, and stay execution. [2 *Str.*, 814, 957; 2 *Wm. Bl.*, 706; *Tidd*, 485; 2 *Archb.*, 206; 3 *Burr.*, 1874; *Burns*, 272.] *Supreme Ct.*, 1888, *People v. N. Y. Superior Ct.*, 19 *Wend.*, 104.

6. **Preventing tender**. Where plaintiff in bad faith and for the sake of costs, prevented

defendant from making a tender before suit, for which he was prepared,—*Held*, that defendant might pay the amount into court and have a discontinuance without costs. *Ib.*

7. **Admission**. Payment of the money into court is an admission of the cause of action, as alleged in plaintiff's declaration. *Supreme Ct.*, 1810, *Johnston v. Columbian Ins. Co.*, 7 *Johns.*, 815.

8. It is an admission to the amount paid in only; and beyond that defendant may make his defence. [2 *Archb. Pr.*, 184.] *Supreme Ct.*, 1829, *Spalding v. Vandercook*, 2 *Wend.*, 481.

9. If the amount paid is sufficient to carry costs, defendant cannot recover costs incurred prior to such payment. [2 *Barnes*, 280; 1 *T. R.*, 629, 710; 8 *Id.*, 408.] *Supreme Ct.*, 1829, *Aikins v. Colton*, 8 *Wend.*, 826.

10. **Payment**. Paying money into court is payment *pro tanto*. Though plaintiff has a right to take it out, defendant has not; and the death of the defendant after the payment, and the revival of the action against his executor, or even the commencement of a new suit, does not change the effect of the payment. *Supreme Ct.*, 1828, *Murray v. Bethune*, 1 *Wend.*, 191.

11. That when money is brought into court, the plaintiff is at all events entitled to it. [1 *Saund.*, 88, n. 2; 2 *Archb. Pr.*, 208.] *Supreme Ct.*, 1885, *Slack v. Brown*, 18 *Wend.*, 890.

12. **If defendant pays into court less than is due**, the plaintiff is entitled to a verdict and judgment for the whole amount, and must credit the payment on the judgment; for this preserves his right to costs; but if the payment equals the debt, defendant should have a verdict. *Supreme Ct.*, 1844, *Dakin v. Dunning*, 7 *Hill*, 80.

13. The English practice stated. *Ib.*

14. **The plaintiff made two distinct claims**, and defendant paid into court a sum on each claim, both of which the plaintiff took out and proceeded with the suit; and it proved that the sum paid on one claim was more than the plaintiff was entitled to recover on that claim. *Held*, that the court could not apply the excess to make up a deficiency in the other payment. *N. Y. Superior Ct.*, 1849, *Read v. Mutual Safety Ins. Co.*, 8 *Sandf.*, 54.

II. IN CHANCERY.

15. **A trustee**, defendant, having no interest in the fund in controversy, and being in-

Under the Code of Procedure:

solvent, may be ordered to pay it into court. *Chancery*, 1829, Haggerty v. Duane, 1 *Paige*, 321.

16. Where the right to a debt from a third person is controverted, the nominal creditor will not be ordered to collect it and pay it into court. If necessary to collect it, a receiver must be appointed. *Chancery*, 1829, Mills v. Pittman, 1 *Paige*, 490.

17. On a bill to redeem from a mortgage, if the defendant claims to be absolute owner, the sum admitted to be due by complainant will not be ordered to be paid into court, if the premises are ample security. *Chancery*, 1835, Jenkins v. Hinman, 5 *Paige*, 309.

18. Creditor's suit. After injunction served, rent was paid in money to the defendant's agent, and the complainant issued a new execution upon his judgment at law, and levied upon the money. *Held*, that as the answer denied complainant's right to collect the judgment, the money must be brought into court. *V. Chan. Ct.*, 1840, Price v. Church, *Clarke*, 358.

19. Part of fund. Moneys in court allowed to be paid out pending the suit, where the parties entitled to it needed provision for their maintenance and costs. *Chancery*, 1817, Methodist Episcopal Church v. Jaques, 3 *Johns. Ch.*, 1.

20. The complainant cannot have an order for the payment to him of a part of a fund in court, except in bills of divorce, or where, by defendant's answer, it appears that some part of the fund in court is indisputably due to him. *Chancery*, 1824, Cooke v. Barker, *Hopk.*, 117.

21. Distribution. A fund in court, the owners being dead, allowed to be distributed among the next of kin without taking out letters. *Bogert v. Furman*, 10 *Paige*, 496; *S. P.*, *Elliott v. Lewis*, 3 *Edw.*, 40.

22. A fund in court not to be distributed, if a party interested is not before the court. *De La Vergne v. Everson*, 1 *Paige*, 181.

23. Chancellor's order. A fund paid in upon the order of the chancellor, cannot be paid out of court without his order. *Chancery*, 1884, City Bank v. Bangs, 4 *Paige*, 285.

24. On all applications for payment over of money which has been paid into court, the applicant must produce the certificate of the officer with whom it is deposited, showing the amount and the mode of investment, with the

claims, if any, made thereon. *Chancery*, 1841, Hulbert v. McKay, 8 *Paige*, 651.

25. Loss. Where money is paid into the Court of Chancery by order of the court, on a balance admitted to be due, and the same is paid to the credit of the cause generally, and not in extinguishment or satisfaction of so much of the complainant's demand, and such money is invested in public stocks, on which a loss subsequently happens, the loss must be borne by the defendant, and not by the complainants, especially if the complainants were willing to receive the money as a payment on account, and such appropriation was objected to by the defendant. *Ct. of Errors*, 1828, *De Peyster v. Clarkson*,* 2 *Wend.*, 77.

26. Securities taken by the clerk of the Court of Chancery on investing money brought into court in a partition suit, cannot be impaired by any act of the clerk, without the order of the court [2 *Rev. Stat.*, 328; § 70]; and his unauthorized discharge of a mortgage, on taking another in lieu of it, will not protect a purchaser in good faith of the mortgaged property. But the act of the party in interest in foreclosing the second mortgage, amounts to a ratification of the exchange. *Ct. of Appeals*, 1848, *Farmers' Loan & Trust Co. v. Walworth*, 1 *N. Y. (1 Comst.)*, 433; and 4 *Sandf. Ch.*, 51.

III. UNDER THE CODE OF PROCEDURE.

27. Investment. To direct the clerk of the Court of Appeals in investing money in the custody of the court, the parties in interest may have a reference. *Supreme Ct., Sp. T.*, 1847, *Green v. Ward*, 1 *Barb.*, 21.

28. Where the plaintiff does not accept the amount paid into court, but goes on for the purpose of recovering a larger sum, unless he succeeds he is liable for costs, and defendant is entitled to judgment; but the money so paid into court belongs to the plaintiff, and may be taken by him. [3 *Cow.*, 336; *Imp. Pr.*, 328, 330; 1 *Ohitt. Pr.*, 509.] *N. Y. Com. Pl.*, 1852, *Logue v. Gillick*, 1 *E. D. Smith*, 398.

29. Loss. The appellant from a judgment deposited money in court in lieu of an undertaking, and the judgment was affirmed at general term and by the Court of Appeals; and pending the latter appeal the fund was lost,

* The opinion of the chancellor is also reported in *Hopk.*, 505.

Pedlars.

stolen, or embezzled, without fault of the respondent. *Held*, that, as between the parties, the loss was that of the depositor, not that of the respondent.* *N. Y. Superior Ct., Sp. T., 1856, Parsons v. Travia, 5 Duer, 650.*

30. The fact that the respondent resisted the plaintiff's motion for an order directing the clerk to repay it, after appeal to the Court of Appeals, does not alter the position of the parties. *Id.*

31. Regulations respecting moneys in court. *Rules of 1858, 69-72, 76, 81-88.*

PEDLERS.

Licenses required. 1 *Rev. Stat., 575*; amended by *Laws of 1840, 47, ch. 70.*

PENALTIES.

1. Fines, &c., to be only on reasonable cause, and proportioned to the nature of the offence. 1 *Rev. Stat., 94, § 16.*

2. The words "penalty" and "forfeit," in a statute, used interchangeably. Commissioners of Saratoga v. Doherty, 16 *How. Pr., 48.*

3. The word "penalties,"—*Held*, not to include a disability to sue, imposed by the same act in respect to a contract prohibited by it. *Supreme Ct., 1841, Finch v. Gridley, 25 Wend., 469.*

4. A court of equity will give relief against a penalty or forfeiture, where the case admits of certain compensation. *Ct. of Errors, 1819, Skinner v. White, 17 Johns., 357; and S. C. below, 2 Johns. Ch., 528.*

5. A court of equity will not aid to enforce a penalty or forfeiture. *Chancery, 1888, Baxter v. Lansing, 7 Paige, 350; and see Thompson v. N. Y. & Harlem R. R. Co., 3 Sandf. Ch., 625, 663.*

Even for the protection of a surety. 1837, *Gibbs v. Mennard, 6 Paige, 258; affirming S. C., 2 Edw., 482.*

6. Acts done in good faith, under construction given by Supreme Court to any statute, do not incur penalty or forfeiture, though the decision is afterward reversed. 2 *Rev. Stat., 602, § 66.*

* In *Salter v. Weiner* (6 *Abbotts' Pr., 191*), it was *Held*, that money deposited in lieu of bail, though borrowed for the purpose, belongs to the depositor, and may be attached as his; but the decision was subsequently reversed on appeal.

Penalties.

7. Aiding. The provision of 1 *Rev. Laws of 1813, 437, § 14*,—imposing a penalty upon "any person" who knowingly, &c., shall "aid or assist" a tenant in removing goods, &c.,—being construed strictly, is to be deemed to contemplate physical aid or assistance. Merely advising removal is not within it; nor is one who conceals a part liable for the value of the whole. *Supreme Ct., 1825, Strong v. Stebbins, 5 Cow., 210.*

8. Concealment. Wilfully and knowingly telling the constable having the warrant, that the property is not the tenant's, and thereby preventing a levy, is a concealment within the act; though it is not if the falsehood was told with mere intent to promote the speaker's own convenience. *Supreme Ct., 1884, Crafts v. Plumb, 11 Wend., 143.*

9. Joint action. Under that act, where two or more concur in the act of aiding, but one penalty attaches; and they may be sued jointly. Where an offence is in its nature one and entire, the penalty is one. Several penalties cannot be imposed upon the several offenders. The true inquiry is, can the single offence created by the act be committed by several persons? If this question may be answered in the affirmative, though the offence is in fact committed by several, but one penalty follows; and it may be recovered by a single action against all the offenders jointly. [*Cro. Eliz., 480; F. Moore, 458; Cowp., 610; 2 East, 570.*] *Ct. of Errors, 1825, Warren v. Doolittle, 5 Cow., 678. Compare Marsh v. Shute, 1 Den., 330; Ingersoll v. Skinner, Id., 540; and see Mayor, &c., of N. Y. v. Ordrenan, 12 Johns., 122.*

10. The better test is, what was the legislative intent? Although, in general, offences are several, and each offender is liable to a several punishment; yet, when a statute creating an offence shows by its terms an intention in the Legislature to inflict but a single penalty (as where it is given by way of compensation to the individual injured by the offence, or when the language of the act makes it single), there is a plain positive ground of exception to the general rule, and the offence is single, although several united in its commission. *Supreme Ct., 1847, Palmer v. Conly, 4 Den., 374; affirmed, Ct. of Appeals, 1849, 2 N. Y. (2 Comst.), 182.*

11. Intent. In an action for a statute penalty, intent to violate the law must be shown,

Pendency of Action.**People.****Perjury.**

but a neglect may be so gross as to amount to a criminal intent. *Supreme Ct., N. P.*, 1818, *Sturges v. Maitland, Anth. N. P.*, 808.

12. In an action for a penalty, inadvertence or misapprehension of the law is not a good answer, when the facts show a violation of the law. *N. Y. Com. Pl.* (1842?), *Sherman v. Spencer*, 1 *N. Y. Leg. Obs.*, 172.

13. Actions for, regulated. 2 *Rev. Stat.*, 480; and as to place of trial in, see *Code of Pro.*, § 124.

As to Limitation of actions, see that title.

14. District-attorney to prosecute for penalties. 1 *Rev. Stat.*, 383, § 91.

15. Treble damages may be waived, and an action for single damages for the wrong brought. *Supreme Ct.*, 1840, *Dygart v. Schenck*, 23 *Wend.*, 446. Compare, however, *Warren v. Doolittle*, 5 *Cow.*, 678.

16. Moneys recovered by any public officer, for penalties or forfeiture given by law to the People, and not specially appropriated, are part of the general fund. 1 *Rev. Stat.*, 190, § 4.

17. Prosecutor may receive. Where a statute fixing a penalty gives half to the plaintiff who recovers it, and half to the People, the plaintiff may receive payment of the judgment and discharge it without leave of court; though he has no right to compound it without leave. *Supreme Ct.*, 1818, *Caswell v. Allen*, 10 *Johns.*, 118.

PENDENCY OF ACTION.**NOTICE.****PEOPLE.****ESCHEAT; LIMITATIONS; PARTIES; REAL PROPERTY.****PERJURY.**

1. Defined. Every person who shall wilfully and corruptly swear, testify, or affirm falsely, to any material matter, upon any oath, affirmation, or declaration, legally administered: 1. In any matter, cause, or proceeding, depending in any court of law or equity, or before any officer thereof; 2. In any case where an oath or affirmation is required by law, or is necessary for the prosecution or defence of any private right, or

for the ends of public justice; 3. In any matter or proceeding before any tribunal or officer created by the Constitution or by law, or where any oath may be lawfully required by any judicial, executive, or administrative officer; shall, upon conviction, be adjudged guilty of perjury; and shall not thereafter be received as a witness to be sworn, in any matter or cause whatever, until the judgment against him be reversed. 2 *Rev. Stat.*, 681, § 1.

2. Its punishment. 2 *Rev. Stat.*, 681, § 2.

3. False swearing declared perjury, when committed at elections. *Laws of 1842*, 184, ch. 180; ch. 6, tit. 7, § 1; *Laws of 1839*, 368, ch. 389, § 1.

— in violation of surveyor's oath. 1 *Rev. Stat.*, 199, § 15.

— before members of canal board. *Id.*, 230.

— in any oath required by certain canal regulations. *Laws of 1854*, 703, ch. 332, § 8.

— before committees of municipal bodies. *Laws of 1843*, 87, ch. 57, § 4.

— by person employed at the salt springs. *Laws of 1834*, 850, ch. 201, § 7.

— in oath relating to the accounts of the clerk of Erie county. *Laws of 1849*, 158, ch. 115, § 19.

— as to equipments, services, and exemptions, in militia. *Laws of 1854*, 1024, ch. 398, tit. 8, §§ 3, 6.

— in usury cases. *Laws of 1837*, 487, ch. 430, § 8.

False swearing in or violation of, oath taken under Loan Commissioners' Act. *Id.*, 133, ch. 150, § 42.

4. Perjury can only be assigned of testimony given before a competent tribunal or officer; and the defendant may show that the alleged tribunal or officer was neither *de facto* or *de jure*, such tribunal or officer. *Greene County Ct.*, 1853, *People v. Albertson*, 8 *How. Pr.*, 363.

5. Where the court is not regularly constituted,—as where a judge of the County Court sits in the Court of Sessions in a case not provided by law (2 *Rev. Stat.*, 224, § 3),—an oath administered is not lawful, and the violation is not perjury. *Supreme Ct.*, 1832, *People v. Tracy*, 9 *Wend.*, 265. *S. P.*, *Gen. Sess.*, 1819, *Wood's Case*, 4 *City H. Rec.*, 180.

6. Arbitration. Perjury may be committed by a witness, on a statute arbitration, although the arbitrators were not sworn pursuant to the statute (2 *Rev. Stat.*, 541, §§ 4, 5), their oath being waived by the parties. *Ct. of Appeals*, 1850, *Howard v. Sexton*, 4 *N. Y.* (4 *Comst.*), 157. To the same effect is a previous decision in *S. C.*, 1 *Den.*, 440.

7. If after a witness is sworn before arbitrators, and new parties and subjects of controversy are added by submission, it is a different cause, and it is not perjury, without a

Perjury; of what it may be assigned.**Subornation of Perjury.**

new oath, to testify falsely. *Supreme Ct.*, 1880, *Bullock v. Koon*, 4 *Wend.*, 581.

8. Reference. Informalities in the mode of referring an action,—*Held*, immaterial on an indictment for perjury committed in giving false testimony before the referee. *People v. McGinnis*, 1 *Park. Cr.*, 387.

9. Ineffectual application. Perjury may be committed in an affidavit made for the purpose of procuring a process,—*e. g.*, a certiorari,—though the particular case made is one in which the issue of the process is prohibited. [10 *Johns.*, 187.] *Supreme Ct.*, 1888, *Pratt v. Price*, 11 *Wend.*, 127.

10. Extra-judicial affidavit. Perjury cannot be grounded on an extra-judicial affidavit, even taken in a proceeding authorized by statute, unless the statute so provides. *Gen. Sess.*, 1819, *Wood's Case*, 4 *City H. Rec.*, 130.

11. Under 1 Rev. Laws of 1818, 898,—providing that if defendant, in a justice's court, on the hearing of the trial, prove, by his oath or otherwise, that he has a family, he shall have certain exemption from execution,—where, immediately after judgment was confessed, defendant claimed exemption, and the justice immediately administered the oath;—*Held*, that it must be deemed taken by consent, and, moreover, was practically simultaneous with the confession, so that false swearing was perjury. *Gen. Sess.*, 1816, *Gilbert's Case*, 1 *City H. Rec.*, 168.

12. Examination of bail. Since by common law every justice has a right to take bail on a misdemeanor, he may of necessity examine the bail as to their competency, and their oath is judicial. *Gen. Sess.*, 1819, *Tomlinson's Case*, 4 *City H. Rec.*, 125.

13. Testifying without knowledge. Where a person testifies to what is true in fact, but at the time he testifies does not know it to be true, and has no knowledge or information which would justify him in believing it true, his testimony, if material, and the act wilfully committed, is perjury. *Supreme Ct.*, 1857, *People v. McKinney*, 3 *Park. Cr.*, 511. Compare *Matter of Clark* (9 *N. Y. Leg. Obs.*, 57), where it was said that it must be proved that deponent could not have believed what he swore to.

14. Partial falsity. It is enough if the oath was false in one particular point material. *Gen. Sess.*, 1819, *Tomlinson's Case*, 4 *City H. Rec.*, 125.

15. Materiality. A part of an affidavit may be material, though it may not have influenced the mind of the officer who acted on it. *Gen. Sess.*, 1816, *Elwell's Case*, 1 *City H. Rec.*, 155. Compare *Matter of Clark* (9 *N. Y. Leg. Obs.*, 57), where an allegation of a conclusion of law was deemed immaterial.

16. Incompetent witness. On an oath erroneously taken,—*e. g.*, an oath of a party in interest, where the magistrate should have taken that of some other person,—perjury may be assigned, especially while the proceedings in which it was taken remain unreversed. [1 *Vent.*, 181; 1 *Sid.*, 148.] *Supreme Ct.*, 1813, *Van Steenberg v. Kortz*, 10 *Johns.*, 167.

17. Incompetent evidence. Falsely swearing to a promise within the Statute of Frauds, is perjury, where no objection is made to the competency of such evidence. *Ct. of Appeals*, 1850, *Howard v. Sexton*, 4 *N. Y. (4 Comst.)*, 157.

18. Amendment of statute. Where a statute makes false swearing in an oath prescribed by it, perjury, and another statute merely amends it in respect to the form of the oath, false swearing in the amended form remains perjury. *Supreme Ct.*, 1882, *Campbell v. People*, 8 *Wend.*, 638.

19. That the jurat of an officer authorized to take affidavits, is conclusive evidence of the taking of the affidavit before him. *Gen. Sess.*, 1818, *Pendegrast's Case*, 3 *City H. Rec.*, 11.

20. Witnesses guilty of perjury may be committed by the court, and documents detained. 2 *Rev. Stat.*, 681, §§ 5-7.

21. Subornation of, and inducing perjury, punished. 2 *Rev. Stat.*, 681, §§ 8, 4, 8.

— at town elections. *Laws of 1839*, 863, ch. 889, § 2.

— in oath relating to the accounts of clerk of Erie. *Laws of 1849*, 158, ch. 115, § 19.

22. On trial for subornation of perjury, where the perjurer suborned to swear on the former trial is admitted as a witness and confesses the perjury, it is not necessary either to prove the perjury or subornation by two other witnesses. *Gen. Sess.*, 1816, *Francis' Case*, 1 *City H. Rec.*, 121.

As to what is an Oath, see OATH.

PERSONAL PROPERTY.**ACCUMULATIONS; CHATTELS; DISTRIBUTION.**

Petition.

Pews.

Physicians and Surgeons.

PETITION.

1. Right of petition to the governor or Legislature, protected. 1 *Rev. Stat.*, 94, § 19.
2. Presentation of petitions to the governor. *Laws of 1858*, 129, ch. 64, § 1.
- to the Legislature. *Laws of 1837*, 118, ch. 140.

PEWS.

1. The interest in a church-pew is limited and usufructuary merely. *Supreme Ct.*, 1826, *Freligh v. Platt*, 5 *Cov.*, 494. Followed, *V. Chan. Ct.*, 1836, *Heeney v. St. Peter's Church*, 2 *Edw.*, 608. Compare *Vielie v. Osgood*, 8 *Barb.*, 180; and see *Wheaton v. Gates*, 18 *N. Y.* (4 *Smith*), 395.

2. The sale of a church-pew is the sale of an interest in real estate, within the Statute of Frauds. *Supreme Ct.*, 1849, *Vielie v. Osgood*, 8 *Barb.*, 180; 1858, *Voorhees v. Presbyterian Church*, 17 *Id.*, 108; affirming *S. C.*, 8 *Id.*, 185. To the same effect, 1836, *First Baptist Church v. Bigelow*, 16 *Wend.*, 28 (*q. v.*, *CONTRACTS*, 665).

3. A grantee of a pew takes a limited estate, a usufructuary interest, subject to the general right of the owners of the church. If the church edifice becomes useless by dilapidation, or destroyed by fire or casualty, or has to be rebuilt as to its interior, the right of the pew-holder is gone; though he has a remedy in damages where his pew is destroyed for convenience only, or where the trustees have been guilty of a wanton and malicious abuse of power. *Supreme Ct.*, 1858, *Voorhees v. Presbyterian Church*, 17 *Barb.*, 108; affirming *S. C.*, 8 *Id.*, 185; *Sp. T.*, 1849, *Bronson v. St. Peter's Church*, 7 *N. Y. Leg. Obs.*, 361.

4. A pew-holder has no title to the edifice or freehold, but a mere right of occupancy during divine worship; he cannot compel the corporation to maintain divine service, nor prevent their abandoning the building as a place of worship. [8 *Barb.*, 185; 19 *Pick.*, 361.] *Supreme Ct.*, *Sp. T.*, 1853, *Matter of Reformed Dutch Church*, 16 *Barb.*, 287. *S. P.*, *N. Y. Surr. Ct.*, 1856 [citing 2 *Edw.*, 612; 8 *Id.*, 155], *McNabb v. Pond*, 4 *Bradf.*, 7.

5. That the grantee of a pew in perpetuity is only entitled to its use as a seat during service, and has no greater rights as one of the congregation than any other. *Chancery*,

1832, *First Baptist Church v. Witherell*, 8 *Paige*, 296.

6. Descent. A pew is to be considered as real property, in the settlement of the owner's estate. Although the owner has no absolute interest in the soil on which the edifice is erected, his right to the use of the pew is a right springing out of the land, and in this respect has some of the qualities of realty. The property being indeterminate in duration, and also issuing out of realty, it is therefore an incorporeal hereditament. *N. Y. Surr. Ct.*, 1856, *McNabb v. Pond*, 4 *Bradf.*, 7.

7. Trespass. In this State, the owner of a pew has an exclusive right to its possession and enjoyment, for the purposes of public worship, not as an easement, but by virtue of an individual right of property. [24 *Pick.*, 804.] He may have an action of trespass for a disturbance of his possession. *Supreme Ct.*, 1842, *Shaw v. Beveridge*, 3 *Hill*, 26; and see *First Baptist Church v. Witherell*, 8 *Paige*, 296.

PHYSICIANS AND SURGEONS.

1. License. Under 2 *Rev. L.*, 220, §§ 12 and 20, no person practising without license can sue for services rendered or medicines furnished; but is subject to penalty, unless he proves that he practised gratuitously, or that he administered only domestic roots, &c. *Supreme Ct.*, 1817, *Timmerman v. Morrison*, 14 *Johns.*, 369.

2. Where an unlicensed person acts as physician and apothecary, he cannot, under the statute, recover for the medicines. *Supreme Ct.*, 1828, *Allcott v. Barber*, 1 *Wend.*, 526.

Followed, under similar provisions in 1 *Rev. Stat.*, 455, § 22. *N. Y. Superior Ct.*, 1829, *Smith v. Tracy*, 2 *Hall*, 465.

After the act of 1844 (*q. v.*, *infra*, 5), the same rule still applies as to services, &c., rendered before that act. *Supreme Ct.*, 1847, *Bailey v. Mogg*, 4 *Den.*, 60.

3. Servant. The statute prohibiting the recovery of fees by unlicensed physicians, does not prevent a licensed physician from recovering for the services of his student. *Supreme Ct.*, 1830, *People v. Monroe O. P.*, 4 *Wend.*, 200.

4. Omitting to file a copy of license with the county clerk merely incurs the penalty of

In Civil Actions (under the Code of Procedure).

§25, but does not disable from recovering for services. *Supreme Ct.*, 1841, *Finch v. Gridley*, 25 *Wend.*, 469; and see *Laws of 1844*, 406, ch. 275, § 1.

5. Repeal. Laws prohibiting practice without license repealed. No person liable to criminal prosecution or to indictment, for practising without license, excepting in cases of malpractice, or gross ignorance, or immoral conduct in such practice; but every person liable for damages in cases of malpractice, as if he were licensed. *Laws of 1844*, 406, ch. 275, §§ 3, 4; and see *Corsi v. Maretzek*, 4 *E. D. Smith*, 1.

6. Regulations concerning the practice of physic and surgery. 2 *Rev. Stat.*, 5 ed., 57-67.

7. Dissection legalized in cities exceeding 80,000 population. *Laws of 1854*, ch. 128.

8. Under a contract, authorizing one party to appoint "a doctor," all that he is required to do is to appoint a person who makes it his business to practise physic, and it is immaterial to what school of medicine the person so selected belonged, or whether he belonged to any. *N. Y. Com. Pl.*, 1855, *Corsi v. Maretzek*, 4 *E. D. Smith*, 1.

As to prescribing while **Intoxicated**, see **ADMINISTERING POISON**, 5; **HOMICIDE**, 40.

PILOTS.

1. Rewards. It being by law (*Secs.*, 7, ch. 31) the duty of pilots to aid vessels in distress, for a compensation to be afterwards fixed, an agreement of a pilot to bring in a wrecked vessel for a stipulated reward, is illegal. *Supreme Ct.*, 1808, *Callagan v. Hallett*, 1 *Cai.*, 104; *S. O., Col. & C. Cas.*, 179.

2. Master. A pilot, while on board, in the master's absence, considered master, *pro hac vice*. *Snell v. Rich*, 1 *Johns.*, 805.

3. The situation of the ship at the time the pilot takes charge of her—which by the statute governs the rate of pilotage—may be proved by parol, although the pilot did not then ascertain and enter it in the log-book according to the rules of the master and wardens of the port. *Supreme Ct.*, 1813, *Shepherd v. Mitchell*, 10 *Johns.*, 112.

4. Substitute. The fact that the pilot left the vessel without written permission of the master, as required by the rules of the master and wardens, does not destroy his right of action against the owner for pilotage, if he left a competent substitute on board, and was

unable to perform his duty himself. But he cannot recover his fees as such, if the substitute was not a regular branch or deputy pilot. *Id.*

5. What vessels excepted. Under § 16 of the act of 1811,—requiring certain vessels other than those employed in the coasting trade to report to the port-wardens on arrival,—a vessel actually so employed is exempt, though she has no coasting license. *Supreme Ct.*, 1812, *Griswold v. Master and Wardens of N. Y.*, 9 *Johns.*, 76.

6. Under the act of 1819, as amended April 16, 1830, the master of every vessel except those of less than 100 tons burden, passing through Hurlgate, whether having a coasting license or not, and whether he makes signal for a pilot or not, if he refuses to receive a pilot, is liable for half pilotage. *Supreme Ct.*, 1834, *Nickerson v. Mason*, 13 *Wend.*, 64.

7. For the present statutes relating to pilotage, see 2 *Rev. Stat.*, 5 ed., 421; *Laws of 1860*, 76, ch. 64.

PLACE OF TRIAL.

I. IN CIVIL ACTIONS (UNDER THE CODE OF PROCEDURE).

II. IN CRIMINAL CAUSES.

III. CHANGING PLACE TO SECURE IMPARTIAL TRIAL.

I. IN CIVIL ACTIONS (UNDER THE CODE OF PROCEDURE).

1. The place of trial of civil actions regulated according to the subject; and the mode of changing the place prescribed. *Code of Pro.*, §§ 123-126.

2. All actions transitory. Under the Code, all actions (including actions against public officers) are so far transitory that the plaintiff may lay his venue in any county. If the proper county has not been selected, defendant, to secure the right to have the place of trial changed, must, within the limited time, make the demand prescribed by section 126 of the Code, and then, the demand having been made, unless the change be made by consent of parties, an order of the court directing the change must be obtained. Unless both these requirements are complied with, the plaintiff may bring his action to trial in the

In Civil Actions (under the Code of Procedure).

county selected by him for that purpose. By omitting to make the demand, and "*thereupon*" applying for an order, the defendant waives his right to a change; though it may still be changed by the court, to promote the convenience of witnesses or the ends of justice. *Supreme Ct.*, 1859, *Houck v. Leasher*, 17 *Hov. Pr.*, 520.

3. **Proper party.** On a motion to transfer an equity cause under the Judiciary Act of 1847, from the county where it was brought, in which only one defendant resided, to the county in which all the others resided, the court refused to consider whether the one defendant was a proper party or not. *Supreme Ct.*, 1848, *Jefferson County Bank v. Prime*, 8 *Hov. Pr.*, 278.

4. **Where the defendants were a corporation** whose place of business was in Saratoga county, and the plaintiffs were non-residents, a motion was granted to change the place of trial to Saratoga county. A corporation must be deemed to have a residence, and its residence is its place of business. [Citing many cases.] *Supreme Ct.*, *Sp. T.*, 1855, *Conroe v. National Protection Ins. Co.*, 10 *Hov. Pr.*, 408.

5. For this purpose the residence of a corporation of this State, is the place where, by the provisions of its charter, its office is to be located, and its general business to be carried on. The fact that it has an office in another county, where some of its business is done, does not make it a resident there. The residence is where the general business is transacted. *Supreme Ct.*, *Sp. T.*, 1855, *Hubbard v. National Protection Ins. Co.*, 11 *Hov. Pr.*, 149.

6. The defendants were carriers by their railroad, between New York and Albany. Their principal place of business was in New York, and they transported their passengers out of Albany by a ferry, not a railway-track; but had a place of business where they conducted traffic in Albany. *Held*, that they were residents of Albany within the provisions of the Code respecting the place of trial. *Supreme Ct.*, *Sp. T.*, 1858, *Pond v. Hudson River R. R. Co.*, 17 *Hov. Pr.*, 543.

7. **A wife**, living apart from her husband, may bring her action for divorce in the county in which she resides. The maxim that the wife's domicile follows the husband's, does not apply in such actions, where separation has actually taken place, and the very proceed-

ings are to show that the relation should be dissolved, or modified in respect to domicile. [14 *Pick.*, 185; 14 *Mass.*, 281; 2 *Id.*, 158, 167; 8 *Id.*, 184; 2 *Cow. & H. Notes*, 879; 9 *Greenl.*, 147.] *Supreme Ct.*, *Sp. T.*, 1858, *Vence v. Vence*, 15 *Hov. Pr.*, 497; affirmed, *Gen. T.*, 1858, *Id.*, 576.

8. **Real property.** An action to have defendant's rights to land adjudged subordinate to plaintiff's, and to compel him to give up possession,—*Held*, within § 122, subd. 1, latter clause. *Mairs v. Remsen*, 8 *Code R.*, 188.

9. An action brought to procure the judgment of the court that a conveyance of land made by the defendant was fraudulent, that the defendant holds the land fraudulently, and that he be declared to hold it in trust for the plaintiff, is an action brought for the determination of an interest in real property. The county where the land, or some part thereof, is situated, is the proper place of trial for such an action. *Supreme Ct.*, *Sp. T.*, 1856, *Wood v. Heilister*, 8 *Abbotts' Pr.*, 14. To similar effect, 1854, *Starks v. Bates*, 12 *Hov. Pr.*, 465.

10. In an action brought for the recovery of the title to land, though the complaint omits to ask for possession, the proper place of trial is the county in which the land, or some part of it, lies. [Code, § 122.] *N. Y. Superior Ct.*, 1851, *Ring v. McCoan*, 3 *Sandf.*, 524. Followed, *Supreme Ct.*, *Sp. T.*, 1856, *Wood v. Hollister*, 8 *Abbotts' Pr.*, 14; and see *Newton v. Bronson*, 13 *N. Y. (8 Kern.)*, 587.

11. The provision of section 122,—which declares that actions brought "for the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest," shall be tried in the county in which the subject of the action, or some part thereof, is situated,—has no application to cases where the subject of the action does not lie within any county in this State. The object of the section is to determine the venue in the classes of actions to which it refers, and it does not profess to limit or define the jurisdiction of the court. It cannot be implied from it that where, in the actions enumerated, the subject of the controversy does not lie in some county in this State, no action whatever will lie. *Ct. of Appeals*, 1856, *Newton v. Bronson*, 13 *N. Y. (8 Kern.)*, 587.

12. In a foreclosure-action, the proper county is that where the mortgaged premises are situated, though the mortgage was given

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in another county. *Ot. of Appeals*, 1849, *Miller v. Hull*, 8 *Hov. Pr.*, 825; S. O., 1 *Code R.*, 118.

13. Omission to object. It is no objection to the regularity of the proceedings in a foreclosure-suit, that the place of trial was in a county other than that in which the mortgaged premises are situated, where there has been no motion or demand made to change the place first selected, and a consent to the change, or an order of the court to that effect. A demand to change the place of trial, and a consent or an order of the court thereon, are essential to change the place of trial, even in local causes of action, where the complaint does not state the proper county. *Supreme Ct.*, 1857, *Marsh v. Lowry*, 26 *Barb.*, 197; S. O., 16 *Hov. Pr.*, 41.

14. Issues of law. It is no objection to changing the place of trial, that there are issues of law, if they are immaterial and unavoidable. *Supreme Ct.*, *Sp. T.*, 1851, *Clark v. Van Deusen*, 8 *Code R.*, 219.

15. The provision of sections 122-126 of the Code relate only to issues of fact. The argument of a demurrer may be had at any special term in the district, or in a county adjoining that in which it is triable, though in another district, except in the first judicial district. [Code, § 401.] *Supreme Ct.*, *Sp. T.*, 1851, *Ward v. Davis*, 6 *Hov. Pr.*, 274.

16. Necessity of demand. A motion to change the place of trial (§ 126) cannot be granted, unless a demand has been made in writing. A motion is only requisite or allowable, in the event that the demand is disregarded. If not changed by the voluntary act of the plaintiff, it must be effected by the order of the court, on motion. *Supreme Ct.*, *Sp. T.*, 1851, *Vermont Central R. R. Co. v. Northern R. R. Co.*, 6 *Hov. Pr.*, 106.

17. On a motion to change the place of trial, under subdivisions 2 and 3 of § 126, a previous demand in writing is not necessary. Nor is the right to this motion confined to the defendant, but the court may make the change on application of either party, when an impartial trial cannot be had, or when the convenience of witnesses would be promoted by the change. *Supreme Ct.*, *Sp. T.*, 1852, *Hinchman v. Butler*, 7 *Hov. Pr.*, 462.

18. A demand specifying an improper county, is irregular. *Supreme Ct. (Sp. T. ?)*, 1848, *Beardsley v. Dickerson*, 4 *Hov. Pr.*, 81.

19. The demand may be made at the time

of answering. *Supreme Ct.*, *Sp. T.*, 1850, *Mairs v. Remsen*, 8 *Code R.*, 188.

But not after, even though defendant answered before his time to do so expired. *Milligan v. Brophy*, 2 *Code R.*, 118.

20. Mere service of a demand does not effect the change. There must be an order or a consent. *Supreme Ct.*, *Sp. T.*, 1850, *Hasbrouck v. McAdam*, 4 *Hov. Pr.*, 842; S. O., 8 *Code R.*, 89.

21. "Venue." Though the Code does not use the word "venue," it is no objection that the notice of motion is in the alternative to "change the venue or place of trial." *Supreme Ct.*, *Sp. T.*, 1852, *Hinchman v. Butler*, 7 *Hov. Pr.*, 462.

22. The place of trial should be changed, on motion, to the county in which the transactions occurred, and where it is shown the greatest number of witnesses reside who will probably be required on the trial. *Supreme Ct.*, *Sp. T.*, 1851, *Jordan v. Garrison*, 6 *Hov. Pr.*, 6; and see *Hinchman v. Butler*, 7 *Id.*, 462.

23. The place of trial of a transitory action should be in the county where the principal transactions between the parties occurred, unless the preponderance of witnesses is so great as to warrant the court to retain the place of trial in another county. *Supreme Ct.*, *Sp. T.*, 1852, *Goodrich v. Vanderbilt*, 7 *Hov. Pr.*, 467.

24. Convenience no answer. On a motion by the defendant to change the place of trial, on the ground that the county designated in the complaint is not the proper county, it is no answer that the plaintiff has material witnesses residing in the county where the venue is laid. After the venue is changed to the proper county, the plaintiff can move to change it back to the county originally named in the complaint, if the convenience of witnesses requires; but on the defendant's motion, the convenience of witnesses cannot be taken into account. The defendant has no opportunity to be heard on that question, or, at least, none to present any affidavit on it. *Supreme Ct.*, *Sp. T.*, 1852, *Park v. Oarnley*, 7 *Hov. Pr.*, 355; 1855, *Hubbard v. National Protection Ins. Co.*, 11 *Id.*, 149.

So held, also, before the amendment of 1851, which made a change of the place of trial affect all other proceedings. 1851, *Moore v. Gardner*, 5 *Hov. Pr.*, 243; S. O., 8 *Code R.*, 224.

To the contrary, 1852, *Mason v. Brown*, 6 *Hov. Pr.*, 481.

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25. Amendment. Where a transitory action is laid in a county where neither party resides, and defendant demands a change to his county; if plaintiff amends, changing to his own county instead of to defendant's, this is a complete answer to the demand. *Supreme Ct., Sp. T., 1855, Toll v. Cromwell, 12 How. Pr., 79.*

26. Motion to change—when to be made. Under the Judiciary Act of 1847, and the Code of Procedure, a motion to change the place of trial cannot be made before issue joined.* *Supreme Ct., Sp. T., 1850, Mixer v. Kuhn, 4 How. Pr., 409; S. C., 8 Code R., 106; Sp. T., 1847, Barnard v. Wheeler, 8 How. Pr., 71; 1849, Clark v. Pettibone, 2 Code R., 78; Sp. T., 1850, Hartman v. Spencer, 5 How. Pr., 185.* To similar effect, *Sp. T., 1847, Jefferson County Bank v. Prime, 3 Id., 278.*

To the contrary, *Sp. T., 1849, Schenck v. McKie, 4 Id., 246.* Compare *Myers v. Feeter, Id., 240; Lynch v. Mosher, Id., 86.*

27. Where the answer denied most of the material allegations of the complaint, and the time to reply was past,—*Held*, that the cause was at issue, within this rule. *Supreme Ct., 1848, Beardsley v. Dickerson, 4 How. Pr., 81.*

28. Amending. Though a motion to change for the convenience of witnesses should not be made till after issue, yet, if then made, it is not defeated by an amendment of the complaint made by plaintiff of course. Although the amended complaint destroys the issue, so that, technically, the cause is not at issue when the motion is heard, yet as such amendments are without prejudice to the proceedings already had, the motion is not premature. *Supreme Ct., Sp. T., 1855, Toll v. Cromwell, 12 How. Pr., 79.*

29. The defendant, after demanding that the place of trial be changed to the proper county, may apply to the court for an order directing the change, at any time before plaintiff's time for serving an amended complaint has expired, for plaintiff may make the change by amending. *Supreme Ct., Sp. T., 1855, Conroe v. National Protection Ins. Co., 10 How. Pr., 408.*

30. Where the venue is laid in the wrong county, a motion to change it to the right

county, may be made before issue joined or at any time thereafter before trial is held, or before judgment, if no trial is had. That the defendant is in default for not answering, is no objection; as, in moving, he only does what plaintiff should have done. *Supreme Ct., Sp. T., 1855, Hubbard v. National Ins. Co., 11 How. Pr., 149.*

31. Epidemic. Where cause could not have been tried at the first term,—*e. g.*, on account of an epidemic,—the motion may be made after the first term. *Supreme Ct., Sp. T., 1849, Lynch v. Mosher, 4 How. Pr., 86.*

32. The test. In deciding a motion to change the place of trial, the convenience of witnesses whose attendance it is necessary and proper to secure, is the main consideration; the court looks beyond the affidavits to the cause of action and the defence, to ascertain from a view of the whole case whether a change of the place of trial will really be most convenient for the greatest number of necessary witnesses. *Supreme Ct., 1852, King v. Vanderbilt, 7 How. Pr., 885.*

33. Where witnesses reside within one mile of the place where it is sought to have the trial take place, they are not to be disregarded in determining the place of trial, because they do not reside in the same county. *Supreme Ct., Sp. T., 1852, Mason v. Brown, 6 How. Pr., 481.*

34. Non-residents. The convenience of plaintiff's witnesses residing out of the State is not to be regarded as ground for denying the defendant's application to change the place of trial. *Supreme Ct., Sp. T., 1859, New Jersey Zinc Co. v. Blood, 8 Abbots' Pr., 147.*

35. Probable delay of trial in the county which would otherwise be most convenient, a reason for refusing the change. *King v. Vanderbilt, 7 How. Pr., 885; Goodrich v. Vanderbilt, Id., 467.*

36. An order referring a cause to a referee resident in a different county from that named in the complaint as the place of trial, does not operate to change the place of trial of the action. *Supreme Ct., Sp. T., 1855, Wheeler v. Maitland, 12 How. Pr., 85.*

37. That a change of place of trial leaves all the other proceedings unchanged. *Supreme Ct., Sp. T., 1849, Gould v. Chapin, 4 How. Pr., 185; S. C., 2 Code R., 107.*

Otherwise, now. *Code of Pro., § 126, last clause.*

* That this rule is only applicable to motions made for the convenience of witnesses. *Supreme Ct., Sp. T., 1852, Mason v. Brown, 6 How. Pr., 481.*

In Criminal Causes.

Changing Place to secure Impartial Trial.

38. As to the proper practice in moving to change the place of trial. *Wood v. Hollister*, 8 *Abbotts' Pr.*, 15, *note*.

II. IN CRIMINAL CAUSES.

39. *Certiorari*. When a criminal cause is before the Supreme Court on *certiorari*, the court may send the cause for trial to a county other than where the venue is laid; but will not do it unless it appears that an impartial jury cannot be had in the county where the offence is laid. *Supreme Ct.*, 1827, *People v. Vermilyea*, 7 *Cow.*, 108.

40. On an indictment coming into the Supreme Court by *certiorari*, the court have power to change the venue for special cause, —a *g.*, where it is very doubtful if a fair and impartial trial could be had in the county of venue. [2 *Rev. Stat.*, 2 ed., 614, § 1; 1 *Chitt. Cr. L.*, 201; 4 *East*, 208; 7 *Cow.*, 139.] *Supreme Ct.*, 1841, *People v. Webb*, 1 *Hill*, 179.

41. It is not necessary that a trial first be had in the original county, to authorize the application for a change of place. *Supreme Ct.*, 1858, *People v. Long Island R. R. Co.*, 16 *How. Pr.*, 106.

42. *Convenience*. The place of trial cannot be changed in a criminal case, for convenience of either witnesses or parties. *Supreme Ct.*, 1847, *People v. Harris*, 4 *Den.*, 150.

43. The mode of changing the place of trial in a criminal case is to move on notice on affidavits showing a necessity for the change, for leave to enter the requisite suggestion on the roll [1 *Chitt. Cr. L.*]; and the entry must be made before the record is sent down for trial. *Supreme Ct.*, 1880, *People v. Mather*, 8 *Wend.*, 431.

44. An order, changing the place of trial in a criminal cause, entered in the minutes, but not made by the direction of the court, nor asked for by either party to the suit, may be regarded by the court as a nullity; or, if the parties have disregarded it, may be treated as waived. *Id.*

III. CHANGING PLACE TO SECURE IMPARTIAL TRIAL.

45. *Disqualified judge*. Venue changed on the ground that the judge who was to hold the circuit was disqualified to try the cause. *Van Rensselaer v. Douglas*, 2 *Wend.*, 290.

46. *Party spirit*. The court will not retain the venue on an affidavit that a violent party

spirit prevails in the county to which it is moved to be changed. *So held*, in an action for slander in reference to official acts. *Supreme Ct.*, 1803 *Zobrieskie v. Bauder*, 1 *Cai.*, 487.

47. *Official influence*. In an action against a sheriff, the influence of his office in his county is not a reason for changing the venue. *Supreme Ct.*, 1804, *Baker v. Sleight*, 2 *Cai.*, 46; *S. C.*, *Col. & C. Cas.*, 843.

48. *Municipal corporation*. The venue will not be changed from the city of New York because the corporation are plaintiffs, on the bare allegation that an impartial trial could not be had. *Supreme Ct.*, 1801, *Corporation of N. Y. v. Dawson*, 2 *Johns. Cas.*, 385.

49. *Local prejudice*. In an action by a turnpike company, for running a road parallel to theirs, in order to draw off the toll, the court refused to change the venue on the ground of the prejudices of the county against turnpike-roads. *New Windsor Turnpike Co. v. Wilson*, 3 *Cai.*, 127; *S. C.*, *Col. & C. Cas.*, 467.

50. In an action against the officers of a corporation, to charge them individually with a debt of the corporation on the ground of fraud, the fact that several of the defendants were members of the bar of the county in which the corporation was organized, and one was a justice of the Supreme Court in that district, and resident in that county; and that plaintiff alleged that a fair and impartial trial could not be had there,—*Held*, not sufficient ground for denying the defendants' application to change the place of trial to that county. [5 *How. Pr.*, 23.] *Supreme Ct.*, *Sp. T.*, 1859, *New Jersey Zinc Co. v. Blood*, 8 *Abbotts' Pr.*, 147.

51. A strong excitement pervading the county, though sworn to be likely to prevent a fair trial, is no ground for refusing the motion. *Supreme Ct.*, 1829, *Bowman v. Ely*, 2 *Wend.*, 250. Compare *Messenger v. Holmes*, 12 *Id.*, 203; *People v. Webb*, 1 *Hill*, 179; and see *Udall v. Long Island R. R. Co.*, 2 *How. Pr.*, 138.

52. *When, by actual experiment*, it is found that a fair trial, or even a verdict, cannot be had in the county, the venue may be changed on the ground of public excitement. *Supreme Ct.*, 1884, *Messenger v. Holmes*, 12 *Wend.*, 203.

53. Actual experiment is not the only test. The fact that the opposing party has improp-

Changing Place of Trial.

erly attempted to influence the jurors, and to mislead the public mind, is enough. *Supreme Ct.*, 1841, *People v. Webb*, 1 *Hill*, 179.

54. Although strong evidence of partiality must be shown to induce the court to remove the place of trial on the ground that an impartial trial cannot be had, the general sentiment in the community respecting the merits of an exciting case may be such an obstacle to the administration of justice that a change should be ordered. And though ordinarily, where the place of trial is changed, an adjoining county is selected, a more remote county may be chosen where the same prejudice extends to the adjoining counties. *Supreme Ct.*, *Sp. T.*, 1856, *People v. Baker*, 3 *Park. Cr.*, 181; *S. C.*, 3 *Abbotts' Pr.*, 42.

55. A change was ordered in such a case, where, out of two hundred and thirty-eight jurors summoned, all but sixteen had opinions as to the prisoner's guilt. *Id.*

56. The affidavit must not only set forth a belief that a fair and impartial trial cannot be had in the county where the venue is laid, but also the facts and circumstances on which that belief is grounded; and the difficulty should be clearly established. [8 *Burr.*, 1330; 1 *Bl. R.*, 378; 1 *Ohitt. Cr. L.*, 200; *Rosc. Cr. Ev.*, 236; 7 *Cow.*, 137; 1 *Hill*, 179.] *Supreme Ct.*, 1844, *People v. Bodine*, 7 *Hill*, 147; *Sp. T.*, 1850, *People v. Wright*, 5 *How. Pr.*, 23; *S. C.*, 3 *Code R.*, 75. To similar effect, 1800, *Scott v. Gibbs*, 2 *Johns. Cas.*, 116; *S. C.*, *Col. & C. Cas.*, 128.

As to the Old practice in respect to local and transitory actions, and changing the venue for the convenience of witnesses, consult **VENUE**.

PLANK-ROAD COMPANIES.

1. The general statutes relative to these companies, which are numerous and somewhat complex, will be found in 2 *Rev. Stat.*, 5 ed., 488-516.

2. **Subscription for stock.** Defendant signed an instrument stating that, for value received, he promised to pay two persons named a specified sum for the purpose of building a plank-road between two places, and authorized them to transfer such subscription to a corporation thereafter to be formed for that purpose; and such corpora-

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tion was afterwards formed, and the subscription transferred to it. *Held*, that the defendant was liable on such instrument in an action by the corporation to recover its amount, not strictly as a subscriber for stock, but as on a promise, resting for its consideration upon the object expressed in the instrument, and the equitable right of the company to the benefit of the promise in furtherance of such object, undertaken in so far at the defendant's request. *Ct. of Appeals*, 1856, *Eastern Plank-road Co. v. Vaughan*, 14 *N. Y. (4 Kern.)*, 546; affirming *S. C.*, 20 *Barb.*, 155.

3. A subscription to the articles of association is not an act indispensable to membership of the company. A subscription to any legal and valid instrument by which a party engages to become a member of the company when organized, and to pay a given sum which is to be a part of the capital stock, followed up by an acceptance of a certificate for the stock, will make such subscriber a member of the corporation. The acceptance of the certificate is a waiver of any informality that may have intervened, short of an absolute defect of jurisdiction. [14 *Mass.*, 1722.] *Supreme Ct.*, 1849, *Hamilton & Deansville Plank-road Co. v. Rice*, 7 *Barb.*, 157. Compare *Eastern Plank-road Co. v. Vaughan*, 14 *N. Y. (4 Kern.)*, 546; affirming *S. C.*, 20 *Barb.*, 155.

4. On a subscription for stock, there is an implied promise to pay for it. The remedy for non-payment is not confined to a forfeiture of the stock, though such a remedy is expressly given by the statute. [Laws of 1846, 216, § 89; 3 *Saund.*, 161; 2 *Wend.*, 567; 14 *Id.*, 23; 21 *Id.*, 296; 3 *Ala.*, 660; 2 *Bibb*, 576; 12 *Conn.*, 500.] *Supreme Ct.*, 1855, *Rensselaer & Washington Plank-road Co. v. Wetsel*, 21 *Barb.*, 56; and see **CORPORATION**, tit. *Stockholders*.

5. **Conditions.** The articles of association provided for the construction of a plank-road from E. to M., with the privilege of extending it two and a half miles further, to S.; and a large majority of the stockholders became such by subscribing the articles, leaving such extension optional with the directors. The defendant subsequently subscribed for stock, provided the directors would extend the road to S. *Held*, that this conditional subscription was void by reason of the condition. It would compel the extension of the road, though it might be at a total loss to the company. *Ct.*

Liability of Subscribers for Stock.

Completing Road. Contracts.

of Appeals, 1857, Fort Edward Plank-road Co. v. Payne, 15 N. Y. (1 Smith), 588; reversing S. C., 17 Barb., 587. To the same effect was Butternuts & Oxford Turnpike Co. v. North (Supreme Ct., 1841), 1 Hill, 518.

6. Defences. In an action upon a subscription to stock, it is not an objection to the validity of the incorporation that the proposed road is less than five miles long. Nor that the articles contain a provision in contravention of the statute, for an unauthorized provision is void. *Ct. of Appeals*, 1856, Eastern Plank-road Co. v. Vaughan, 14 N. Y. (4 Kern.), 546; affirming S. C., 20 Barb., 155.

7. Nor is it an objection that individual subscribers have not paid the five per cent., if the aggregate of payments amounts to five per cent. on the whole stock. *Id.*; 1854, Rensselaer & W. Plank-road Co. v. Barton, 16 N. Y. (2 Smith), 457, note; S. P., 1857, Lake Ontario, &c., R. R. Co. v. Mason, *Id.*, 451.

8. — notice of election. Defendant was a subscriber to the stock in a proposed company; was present at the first election, and was there elected a director and acted as one of the board. *Held*, that he could not resist an action to recover his subscription, on the ground that no notice of such election was given to other stockholders, and that some of them did not attend. *Ct. of Appeals*, 1854, Schenectady and Saratoga Plank-road Co. v. Thatcher, 11 N. Y. (1 Kern.), 102. Compare, however, as to the necessity of notice, Eastern Plank-road Co. v. Vaughan, 20 Barb., 155; affirmed, 14 N. Y. (4 Kern.), 546.

9. Alteration of road. Where a company was incorporated in 1848, under the Plank-road Act of 1847, and the defendant then subscribed to its stock; and the company, by virtue of a subsequent act of the Legislature, without his consent, increased its capital, and applied its funds to the construction of a branch road, not authorized by its original organization;—*Held*, that the defendant was not thereby released from his subscription. The Revised Statutes provide that the charter of every corporation thereafter granted shall be subject to alteration, suspension, and repeal, in the discretion of the Legislature; and by the general act of 1847, corporations formed under it are declared subject to those provisions. *Ct. of Appeals*, 1854, Schenectady & Saratoga Plank-road Co. v. Thatcher, 11 N. Y. (1 Kern.), 102; and see Buffalo & N. Y.

City R. R. Co. v. Dudley, 14 N. Y. (4 Kern.), 836, 848.

10. The acts of the directors, after the formation of the company, in extending the main line of the road beyond the point originally specified, and increasing its capital stock, without the written consent of the persons owning two-thirds of the stock, or of a majority of the inspectors, &c., as provided by section 1 of the Plank-road Act, are unauthorized and illegal, and exonerate the original stockholders from all liability to pay their subscriptions. [8 Mass., 268; 10 Id., 384; 5 Hill, 888; 1 Am. L. R., 154.] Nor will the fact that the stockholder participates in proceedings of the company contemplating the extension "if it can legally be done," and retains his stock after the extension has been made, and sells it for value, estop him from denying his liability to pay his subscription. *Supreme Ct.*, 1854, Macedon & Bristol Plank-road Co. v. Lapham, 18 Barb., 812.

11. The whole capital stock need not be subscribed before filing the articles of association in order to constitute the company a corporation, and to enable the board to call for instalments. Under section 1 of the act, it is sufficient that stock to the amount of \$500 for every mile of the proposed road is in good faith subscribed, and five per cent. paid thereon. *Supreme Ct.*, 1849, Hamilton & Deansville Plank-road Co. v. Rice, 7 Barb., 157. *Ct. of Appeals*, 1854, Schenectady & Saratoga Plank-road Co. v. Thatcher, 11 N. Y. (1 Kern.), 102.

12. A plank-road company may go into operation before the whole nominal amount of its stock is subscribed. *Ct. of Appeals*, 1854, Rensselaer & W. Plank-road Co. v. Barton, 16 N. Y. (2 Smith), 457, note.

13. Of the purpose of the certificate of inspectors required by section 84. Town of Fishkill v. Fishkill & Beekman Plank-road Co., 22 Barb., 684.

14. The inspector's certificates must show what part of the road is meant, and that the miles are consecutive miles. *Supreme Ct.*, Sp. T., 1856, Hammondsport & Bath Plank-road Co. v. Brundage, 18 How. Pr., 448.

15. Void contract. An agreement by a plank-road company to purchase its own stock, is against public policy. And the directors have no power to make such purchase and mortgage the road, and make the stockholders

Highways; and acquiring the Right to use them.

personally liable. *Supreme Ct.*, 1854, *Barton v. Port Jackson & Union Falls Plank-road Co.*, 17 *Barb.*, 397.

16. A contract between a plank-road company and directors of the same, for the construction by them of a part of the road, is absolutely void. The statute is not waived by the silence of the stockholders. *Id.*

17. **Width of road.** When a corporation, organized to build a turnpike or plank road, is required by its charter to cause its road to be laid out of a certain width, that is a condition which the corporation must perform to entitle it to a continuance of its franchise. [23 *Wend.*, 193, 222, 254.] The fact that it was laid out upon an ancient highway, furnishes no excuse for the omission to make it of the required width. *Supreme Ct.*, *Sp. T.*, 1857, *People v. Fishkill & Beekman Plank-road Co.*, 27 *Barb.*, 445.

18. **Highway.** Where a plank or turnpike road is constructed along a highway, the company succeed to the rights and powers of the commissioners of highways, and any inconvenience or damage which an owner of land suffers by proper and reasonable repairs or improvements of the highway is *damnum absque injuria*. *Supreme Ct.*, 1848, *Benedict v. Goit*, 8 *Barb.*, 459; 1853, *Dexter v. Broat*, 16 *Id.*, 337.

19. A plank-road company which has acquired a right to use a public highway for the location and construction of their road, under Laws of 1847, 223, § 26, have no right to exclude the public from it or interrupt the enjoyment of their right of way, while the change is making. They are bound, like town officers engaged in repairing roads, to carry on the work with as little inconvenience to the public as is reasonably practicable, and if, through their neglect, a person passing with ordinary care and prudence, suffers damage, the company are liable. *Ct. of Appeals*, 1856, *Ireland v. Oswego, &c.*, *Plank-road Co.*, 18 *N. Y.* (3 *Kern.*), 526.

20. A turnpike company taking a deed of a highway from the commissioners, acquire only an easement. *Supreme Ct.*, *Sp. T.*, 1852, *Northern Turnpike Co. v. Smith*, 15 *Barb.*, 355.

21. **Agreement with highway officers.** By section 26 of the general act, the supervisor and commissioners of a town are authorized to agree with plank-road companies "upon the compensation and damages to be paid by

the company for taking and using any of the highways of the town." By the Laws of 1847 (ch. 398, § 1), such companies are authorized to "procure by agreement" from the same officers "the right to take, and use any part of any public highway necessary for the construction," &c. *Held*, that the latter act does not repeal the former, but is to be construed with it; and under them the only powers conferred upon those officers are to grant the right, and agree upon the compensation. They have no right to grant the right, upon condition as to the location of toll-gates, and without compensation. *Ct. of Appeals*, 1854, *Palmer v. Fort Plain & Cooperstown Plank road Co.*, 11 *N. Y.* (1 *Kern.*), 376.

22. The supervisor and highway officers entered into an agreement with a company, executed by both parties, allowing the taking of a highway without payment of damages, but "in consideration of the public benefit," &c. The agreement contained the following clause: "But this release is executed on the express condition that no gate shall be erected on said road, demanding tolls, within three miles of the court-house, in the village of C., and in case any such gate or gates shall at any time hereafter be erected on said road by said company, then and in such case, and from thereafter this lease to be void and of no effect." The company constructed their road and erected a toll-gate in disregard of the condition.

Held, that the supervisor and the commissioners could not sustain an action to compel a removal of the gate) and a compliance with the condition. Such an agreement, upon condition, was beyond the power of the officers to make.* [4 *Barb.*, 51.] Such a condition could not be distinguished from an agreement fixing the location of a gate, and an agreement of that nature could not be mutually binding, because, by § 27, a change of the location of a gate might be compelled from time to time. There is a direct conflict between the tenure by which the company would hold the road under such condition and that conferred by the general act (§ 8). The condition was a bare naked condition unaccompanied by any words importing an undertaking to abide by or perform it, and therefore could not be en-

* Compare as to this ground of the decision, *People v. Fishkill & Beekman Plank-road Co.*, 27 *Barb.*, 445.

Title.	Location of Gates.	Collection of Tolls.
<p>forced as a covenant. [Co. Litt., 308, b; Com. Dig., tit. Cov., A., 3; Cro. Car., 128; S. C., Bac. Abr., tit. Cov., A; 8 Paige, 402; 11 Id., 414.] There is no statutory authority by which such officers can <i>unite</i> in such an action or bring any action on a contract made by them. The provisions of 2 Rev. Stat., 478, § 92, only apply to actions on contracts made <i>with</i> them, <i>i. e.</i>, contracts taken from others and running in terms to such officers by their names of office, and does not include contracts made virtually by the town, through them. <i>Id.</i></p>	<p>the precise point to be established is, that the <i>public interest</i> is prejudiced. <i>Supreme Ct., Sp. T., 1852, Commissioners of Schroeppe v. Oswego & Syracuse Plank-road Co., 7 How. Pr., 94.</i></p>	<p>28. A gate so placed as to compel persons coming on a converging road to the village to pay half toll for travelling 250 rods upon the plank-road,—<i>Held</i>, unjust to the public interest. <i>Supreme Ct., 1852, McAllister v. Albion Plank-road Co., 11 Barb., 610.</i></p>
<p>23. An agreement by which the officers allowed the company to take and use forever the highway, and the company, in consideration thereof, agreed to keep the road and all bridges, &c., in good repair, according to law, without expense to the town;—<i>Held</i>, not void for excess of authority by the officers. Such officers are not limited to taking money compensation, but a consideration inuring to the benefit of the highways is sufficient. <i>Supreme Ct., Sp. T., 1856, Town of Fishkill v. Fishkill & Beekman Plank-road Co., 22 Barb., 634; 1857, People v. Fishkill & Beekman Plank-road Co., 27 Id., 445.</i></p>	<p>29. The objection that an application for an order to change the location of a gate was made by only two of the three commissioners, cannot be raised on the appeal in the Supreme Court, when not taken in the County Court. <i>Id.</i></p>	<p>30. The action and report of the referees appointed by the Supreme Court under the act of 1851 (<i>Laws of 1851, ch. 487</i>), are analogous to those of referees in an equitable action; and the judgment of the court is one of reversal or affirmance of the order of the County Court. <i>Id.</i></p>
<p>24. The Legislature can revoke or resume the authority to make such agreement, or modify or rescind the contract, with the assent of the other party. <i>Supreme Ct., Sp. T., 1857, People v. Fishkill & Beekman Plank-road Co., 27 Barb., 445.</i></p>	<p>31. The court may order a rehearing before the referees, when there may have been irregularity in their proceedings, or in the admission of evidence. <i>Supreme Ct., Sp. T., 1852, Commissioners of Schroeppe v. Oswego & Syracuse Plank-road Co., 7 How. Pr., 94.</i></p>	<p>32. <i>Costs.</i> Where the report of the referees appointed by the Supreme Court on appeal from an order of the County Court to change the location of a gate, modified the decision of the County Court by changing the location of the gate, but changing it to a different place from that designated by the County Court;—<i>Held</i>, that neither party had succeeded in the appeal, and the costs were to be awarded as seemed equitable under the circumstances of the case. <i>Supreme Ct., 1853, Matter of Commissioners of Lewiston, 15 Barb., 186.</i></p>
<p>25. <i>Trespass.</i> Proof that a plank-road company, duly incorporated and organized, has built its road, and had it inspected, and has erected toll-gates, and is in the actual use of the road, is sufficient to enable them to maintain an action of trespass for an entry upon the road, against any persons who do not show a better right to the possession of it in themselves. <i>Supreme Ct., 1855, Ellicottville, &c., Plank-road Co. v. Buffalo, &c., R. Co., 20 Barb., 644.</i></p>	<p>33. <i>Collection of tolls.</i> Under the Laws of 1847, 226, § 85, a plank-road company may demand and receive toll at a gate, for the whole distance between it and the next gate in the direction from which the traveller has come, without reference to the fact that he may not have travelled the whole distance upon the road. [1 Cai., 182; 28 Wend., 198.] <i>Supreme Ct., 1850, Mallory v. Austin, 7 Barb., 626.</i> To similar effect, 1852, <i>McAllister v. Albion Plank-road Co., 11 Id., 610.</i></p>	
<p>26. <i>Erection and removal of gates.</i> The provision of the Laws of 1851, relative to gates, &c., thereafter located, refers to those thereafter erected or put up, although the spot was fixed on before the act. <i>Ontario County Ct. (1851?), Moule v. Macedon & Bristol Plank-road Co., 6 How. Pr., 87.</i></p> <p>27. In proceedings to remove a toll-gate, under the provisions of § 87, ch. 210, Laws of 1847, amended in § 1, ch. 487, Laws of 1851,</p>		

Tolls.	Exemptions.	Evasions.	Forfeiture.
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34. The toll-gatherer has a right to exact payment in advance, of toll from his gate to the next, or for the distance between them, which the traveller admits he is about to travel. *Supreme Ct.*, 1853, *Kenyon v. Seeley*, 14 *Barb.*, 681.

35. A covered stage constructed for carrying six passengers within, and with a place under the driver's seat to carry the mail, and used daily for carrying passengers and the mail, and drawn by two horses, is within the provision of Laws of 1853, 535, ch. 245. *Supreme Ct.*, 1856, *Marsells v. Seaman*, 21 *Barb.*, 319.

36. **Exemptions.** Where the statute (*Laws of 1849*, 874, § 2) exempted "persons going to or from religious meetings,"—*Held*, that a clergyman was exempt as well as laymen; and (the distance not being restricted by that act, as it is now by *Laws of 1851*, ch. 107, § 1) he was entitled to travel any distance—*e. g.*, 18 miles—for the purpose of holding such meeting. *Supreme Ct.*, 1852, *Skinner v. Anderson*, 13 *Barb.*, 648.

37. The act of 1850 repealed the exemptions contained in the turnpike act, so far as it was applicable to plank-roads. *Supreme Ct.*, 1852, *Dexter & Limerick Plank-road Co. v. Allen*, 16 *Barb.*, 15.

38. **Wife of toll-gatherer may collect.** In the absence of the toll-gatherer his wife must be deemed to be his agent, and if she exacts more than lawful toll, he is liable to the penalty. [4 *Wend.*, 405; 10 *Johns.*, 247; see, also, 4 *Barb.*, 222.] *Supreme Ct.*, 1856, *Marsells v. Seaman*, 21 *Barb.*, 319.

39. **Penalty for exacting.** Section 50 of the Revised Statutes,—which inflicts a penalty on every toll-gatherer at any turnpike-gate, who shall exact, &c.,—is by *Laws of 1847*, ch. 210, § 47, as amended by ch. 237, applied to toll-gatherers at plank-road gates. [12 *Barb.*, 648.] *Id.*

As to **Avoiding payment**, see TURNPIKE COMPANIES.

40. **Providing a way to avoid.** The defendant's land was bounded by a plank-road, and he moved back his fence on both sides of the toll-gate, and graded a track there in such a way that travellers, if disposed, could evade the gate by driving around it. *Held*, that the company could not, on alleging that it was done with intent to injure and defraud them, maintain an action for injunction and damages.

1. Loss or damage arising to one person from the use which another makes of his own property, is *damnum abeque injuria*, and forms no cause of action. It is only where the plaintiff has acquired an easement in the tenement of the defendant, that is, a right extending beyond his own premises, and rendering the defendant's tenement subservient to his, that the defendant's right to deal with his own is limited by the maxim *sic utere tuo ut alienum non laedas*. [*Wheat.*, 181; 1 *Vent.*, 239; 1 *Lev.*, 122; 12 *Mass.*, 157, 220; 13 *Wend.*, 261; 3 *Barn. & A.*, 871; 3 *M. & W.*, 220; 4 *Paige*, 169.]

2. The defendant could not be restrained in such dealing with his own property, on the ground that he was actuated by malice. [13 *Wend.*, 261; and see 5 *Johns. Oh.*, 101.]

3. An exclusive right to maintain a road is not conferred by the general act, and cannot be implied. A corporation is strictly confined to the privileges conferred by its charter, and can take no implied rights as against the law-making power. [11 *Pet.*, 420; 11 *Leigh*, 42; 17 *Conn.*, 454; 1 *Barb. Oh.*, 547; 8 *Sandf. Oh.*, 625; overruling 1 *Johns. Oh.*, 611; 5 *Id.*, 101.] And *a fortiori*, a corporation should not be permitted to encroach, by implication, upon the rights of individuals who are in no respect parties to the compact between it and the Legislature. The restriction attempted to be asserted by the plaintiffs, would be an easement on the defendant's land, which had not been expressly granted, and could not be inferred. *Ct. of Appeals*, 1854, *Auburn & Oate Plank-road Co. v. Douglass*, 9 *N. Y. (5 Seld.)*, 444; reversing *S. C.*, 12 *Barb.*, 553.

41. **Abandoning road.** Where the capital stock of a plank-road company has been reduced, by forfeitures of stock, by the company, for the non-payment of calls, if proceedings to abandon portions of the road, under the general plank-road law, are signed or consented to by stockholders holding or representing two-thirds of the capital as thus reduced, this is a sufficient compliance with the requisition of the statute. *Supreme Ct., Sp. T.*, 1857, *People v. Fishkill & Beekman Plank-road Co.*, 27 *Barb.*, 445.

42. Where a plank-road company suffers portions of its road to become impassable and dangerous, and thereby incurs a forfeiture of its charter, proceedings subsequently taken and perfected by the company, for abandon-

Analysis.

ing those portions of the road, under the general plank-road act, will not cure the difficulty. Nor will subsequent repairs. *Id.*

43. **Forfeiture.** Acts, on the part of a plank-road company, which are wilful, and done with an intention which is contrary to its duty, and forbidden by its charter, are not waived by Laws of 1854, 167, ch. 87, § 6— which declares that no act or omission on the part of any such company, or of its stockholders or officers, shall work a forfeiture of its corporate power or franchises, unless the same was wilful and malicious. *Id.*

44. The certificate of the inspectors, or an act of the Legislature, authorizing the defendants to terminate their road at the point then reached, is not conclusive upon the State in a direct proceeding to test the manner in which the road has been constructed. *Id.*

For Further cases applicable to these corporations, see CORPORATIONS, and TURNPIKE COMPANIES.

PLEADING, AT COMMON LAW.

[Under this title are presented the cases upon the form, sufficiency, and effect of pleadings in actions at law in courts of record, previous to the changes introduced by the Code of Procedure. The rules of pleading in Special Proceedings will be found under the titles of those several proceedings. The subjects of VARIANCE and AMENDMENT form separate articles. For convenient reference in practice under the present system, much that relates to the substance of statement in pleading, has been arranged in a subdivision under the names of the various subjects, causes of action, and defences. Further discussions of the substance which is necessary to be presented in making out each cause of action or defence, will be found under its appropriate title elsewhere.]

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I. GENERAL RULES.

1. What Matters are to be stated in Pleading; and how.

1. Pleadings must disclose the claim fully. A chief object of formal written pleadings is to apprise the opposite party of the real cause of complaint against him, so that he may, in like manner, interpose the proper answer on his part, and that on the trial he may not be taken by surprise. This requires that the injury complained of should be stated with such fulness and certainty in the declaration as to leave no reasonable doubt of the particular transaction on which the plaintiff relies, and which he intends to prove, to establish his right of action. [1 Chitt. Pl., 244.] *Supreme Ct.*, 1845, *Relyea v. Drew*, 1 *Den.*, 561; S. P., 1846, *Wilbur v. Brown*, 3 *Id.*, 356; 1847, *Walker v. Moseley*, 5 *Id.*, 102.

2. Equivocal pleading to be taken most strongly against the pleader. *Supreme Ct.*, 1842, *Slocum v. Clark*, 2 *Hill*, 475; and see

Ferriss v. North American Fire Ins. Co., 1 *Id.*, 71.

3. Argument. Conclusions of law. That whatever facts are necessary to constitute the cause of action must be directly and distinctly stated in the declaration. Arguments, inferences, and matters of law are to be excluded. *Supreme Ct.*, 1845, *Lipe v. Becker*, 1 *Den.*, 568 To similar effect, *N. Y. Superior Ct.*, 1828, *McKeon v. Lane*, 1 *Hall*, 819.

4. A party to a deed who means to deny it, must plead *non est factum*, and cannot, in pleading, deny its operation by averring that he did not grant, or did not release. [1 Chitt. Pl., 438.] *Supreme Ct.*, 1848, *Denniston v. Mudge*, 4 *Barb.*, 248.

5. Averring that the defendant "had good reason to believe that the plaintiff well knew" a certain fact, charges the plaintiff, argumentatively, with knowledge; and an argumentative plea is good on general demurrer. *Supreme Ct.*, 1812, *Spencer v. Southwick*, 9 *Johns.*, 814.

6. Evidence. A pleading must set forth, not the evidence of facts, but the facts themselves. *Supreme Ct.*, 1838, *Fidler v. Delavan*, 20 *Wend.*, 57; 1845, *Benjamin v. De Groot*, 1 *Den.*, 151; 1844, *Gaffney v. Colvill*, 6 *Hill*, 567; 1845, *Pattison v. Adams*, 7 *Id.*, 126.

7. Mere plea of evidence, plenary in its details, available upon its merits, if not specially demurred to. *Colvin v. Burnet*, 17 *Wend.*, 564.

8. Generality. The general rule that wherever a subject comprehends a multiplicity of matters, generality of pleading is allowed, is to be taken with the qualification that, where there is any thing specific in the subject, though consisting in a number of particulars, they must all be enumerated. [11 *Johns.*, 573; 1 T. R., 748.] *So held*, of a justification of a defamation. *Supreme Ct.*, 1822, *Van Ness v. Hamilton*, 19 *Johns.*, 349. Followed, 1845, *Cooper v. Greeley*, 1 *Den.*, 347.

So held, of pleading the grounds on which a forfeiture of a charter was sought. 1832, *People v. Manhattan Co.*, 9 *Wend.*, 351.

9. Certainty. In general, whatever is alleged in pleading, must be alleged with reasonable certainty; and he who pleads a contract must set it out, if he is a party to it. *Ct. of Appeals*, 1847, *Curtis v. Jones*, 1 *How. App. Cas.*, 187; affirming S. C., 3 *Den.*, 590.

10. Certainty to a common intent, enough in pleading. *Supreme Ct.*, 1801, *Hilldreth v. Becker*, 2 *Johns. Cas.*, 339; 1802, *Riggs v.*

General Rules;—Duplicity.

Denniston, 8 *Id.*, 198; 1812, *Spencer v. Southwick*, 9 *Johns.*, 814; 1848, *Burdick v. Worrall*, 4 *Barb.*, 596; and see *Van Ness v. Hamilton*, 19 *Johns.*, 849.

11. That both time and place, of every traversable fact, should be stated. *Supreme Ct.*, 1847, *Gillet v. Fairchild*, 4 *Den.*, 80; 1849, *Barnes v. Matteson*, 5 *Barb.*, 375.

12. An express averment of material facts is only necessary to be made when it creates an obligation that would not otherwise exist of proving upon the trial the facts that it embraces. [8 *Cranch.*, 74; 10 *Johns.*, 464; 8 *Mass.*, 271; 16 *Pick.*, 869.] *N. Y. Superior Ct.*, 1849, *Ford v. Babcock*, 7 *N. Y. Leg. Obs.*, 270; S. C., less fully reported, 2 *Sandf.*, 518. Approved and followed, *Ct. of Appeals*, 1854, *Cole v. Jessup*, 10 *N. Y. (6 Seld.)*, 96; S. C., 10 *How. Pr.*, 515; reversing S. C., 2 *Barb.*, 809. Compare *Frary v. Dakin*, 7 *Johns.*, 75.

13. Hypothetical. A pleading of new facts in avoidance, must admit the truth of the matter avoided. An hypothetical form of admission is not sufficient. [1 *B. & P.*, 418; 1 *O. M. & R.*, 254; 10 *M. & W.*, 865; 1 *N. Y. Leg. Obs.*, 229; 4 *Adol. & E.*, 489; 10 *B. & O.*, 288; 1 *Oh. Pl.*, 272, 556; *Staph. Pl.*, 200.] *Supreme Ct.*, 1846, *Commercial Bank v. Sparrow*, 2 *Den.*, 97.

14. In an action upon a bond, after a plea of *non est factum*, the defendant pleaded a bankrupt discharge, averring that the bond, "if any such were made," was made before the presenting of the petition in bankruptcy;—*Held*, sufficient, on special demurrer. *Ct. of Appeals*, 1850, *McCormick v. Pickering*, 4 *N. Y. (4 Comst.)*, 276.

15. Where a material point alleged by one party, is fully confessed and avoided,—that is, when the other party sets up a matter consistent with such allegation, but which, if true, is an answer to it, then he cannot also traverse it. [1 *Saund.*, 22, n. 2.] *N. Y. Superior Ct.*, 1829, *Wheelwright v. Beers*, 2 *Hall*, 891.

16. The validity of records, among which are recognizances of bail, cannot, in pleading, be impeached or affected by any supposed defect or illegality in the transaction, on which they were founded; nor can there be any allegation against the validity of a record. [1 *Ohitt. Pl.*, 854.] If the record is untruly stated, the defendants can avail themselves of such defect, only by pleading *nul tiel record*. This

rule applies to recognizance of bail. *Supreme Ct.*, 1819, *Green v. Orington*, 16 *Johns.*, 55.

17. This rule extends only to parties and privies, who can bring error, and not to strangers. [*Oro. Eliz.*, 199; 1 *Ld. Raym.*, 669; 2 *Mod.*, 808.] *Supreme Ct.*, 1825, *Griswold v. Stewart*,* 4 *Cow.*, 457.

18. Nor is the rule applicable to a case of want of jurisdiction. The want of jurisdiction is a matter that may always be set up against a judgment, when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose. [15 *Johns.*, 141; 19 *Id.*, 38.] *Supreme Ct.*, 1828, *Latham v. Edgerton*, 9 *Cow.*, 227.

Consult, also, JURISDICTION.

19. Established precedents not to be disregarded in pleading, even in a matter of mere form. *Anstice v. Holmes*, 8 *Den.*, 244; *Titus v. Follet*, 2 *Hill*, 818; *Bond v. Mitchell*, 8 *Barb.*, 804.

2. Duplicity.

20. A pleading is not double because it states the effect which was produced by the act complained of; nor for the reason that several words or phrases are used to express the same thing. *Supreme Ct.*, 1844, *Gaffney v. Colvill*, 6 *Hill*, 587.

21. A plea may contain as many facts as are necessary to constitute one defence, and it is not, on that account, double. [8 *Cai.*, 160; 1 *Burr.*, 816.] *Supreme Ct.*, 1807, *Patcher v. Sprague*, 2 *Johns.*, 462; 1827, *Tucker v. Ladd*, 7 *Cow.*, 450; S. P., 1807, *Currie v. Henry*, 2 *Johns.*, 488.

22. In a purchaser's suit against a vendor, for breach of the agreement to convey, a plea that defendant had not refused to convey, nor had he been requested, is bad for duplicity, for both are not necessary to make out a defence. *Supreme Ct.*, 1831, *Connelly v. Pierce*, 7 *Wend.*, 129.

23. So in the vendor's suit for the purchase-money, a plea setting up both an offer to perform on defendant's part, and a want of title in the plaintiff, and also an incumbrance by mortgage, is bad. *Supreme Ct.*, 1848, *Camp v. Morse*, 5 *Den.*, 161.

24. If a plea is of two distinct matters, both

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

General Rules;—Videlicet;—Surplusage.

of which are necessary to its validity, a replication denying both is bad for duplicity. The traverse must be confined to a single point. Such point, however, may consist of several facts. *Ct. of Errors*, 1881, *Tubbs v. Casewell*, 8 *Wend.*, 129; S. P., 1828, *Satterlee v. Sterling*, 8 *Cow.*, 233; 1833, *Tuttle v. Smith*, 10 *Wend.*, 886, *N. Y. Superior Ct.*, 1847, *Monulty v. Frame*, 1 *Sandf.*, 128. Compare *Ford v. Babcock*, 7 *N. Y. Leg. Obs.*, 270; S. C., less fully, 2 *Sandf.*, 518.

25. A traverse can be taken to a single point only, yet as that point may consist of a number of facts, the traverse need not be confined to a single fact, but may deny them all. [1 *Burr.*, 316.] *Supreme Ct.*, 1805, *Strong v. Smith*,* 3 *Cal.*, 160; 1807, *Patcher v. Sprague*, 2 *Johns.*, 462; S. P., 1824, *McClure v. Erwin*, 3 *Cow.*, 313; 1827, *Tucker v. Ladd*,* 7 *Id.*, 450.

26. A replication attempting to avoid a plea is not liable to the charge of duplicity, if it contain no more facts than are necessary to make out one point. *Supreme Ct.*, 1836, *Russell v. Rogers*, 15 *Wend.*, 351.

27. Unnecessary statements in a replication all tending to the point in issue, are mere surplusage, and do not vitiate a replication concluding to the contrary. [3 *Hill*, 547; 1 *Den.*, 427.] *Supreme Ct.*, 1848, *Nelson v. Lounsbury*, 3 *Barb.*, 125; and see *Livingston v. Ostrander*, 9 *Wend.*, 806.

28. A plea is not rendered double by an express averment of facts which, without such an averment, would be implied. *N. Y. Superior Ct.*, 1849, *Ford v. Babcock*, 7 *N. Y. Leg. Obs.*, 270; S. C., less fully, 2 *Sandf.*, 518.

29. Distinct matters cannot be put in issue by a replication, unless they are necessary to constitute one point. In such case, the facts must have a relation to each other, and be so dependent and connected, as to render it necessary to state them all, in order to make out the point. *Supreme Ct.*, 1808, *Cooper v. Heermance*, 3 *Johns.*, 215.

30. A plea in trover, admitting the receipt of the property as factor of the plaintiff, and alleging a sale by his order, and also averring that the defendant was discharged under the insolvent act, is bad, for duplicity. *Supreme Ct.*, 1818, *Kennedy v. Strong*, 10 *Johns.*, 289.

31. In an action for an escape, a plea of an

involuntary escape, and the return of the prisoner into custody, before action brought, and, also, that the prisoner was discharged from imprisonment, under the act for the relief of debtors, is not bad for duplicity. *Supreme Ct.*, 1807, *Currie v. Henry*, 2 *Johns.*, 433.

32. To an assignment of breach averring the cutting and carrying away of standing timber, a plea denying cutting and carrying it away, is bad. *Supreme Ct.*, 1850, *Beach v. Barons*, 18 *Barb.*, 305.

33. Duplicity is a defect of form merely, which cannot be noticed except upon a special demurrer. *N. Y. Superior Ct.*, 1829, *Roberts v. Kelly*, 2 *Hall*, 307.

3. Videlicet.

34. When an averment is material, the addition of a videlicet does not render it immaterial. *Supreme Ct.*, 1809, *Vail v. Lewis*, 4 *Johns.*, 450; 1827, *Gleason v. McVickar*, 7 *Cow.*, 42.

35. Thus where a declaration averred that defendant warranted that a farm contained 80 acres, and averred that it did not contain more than 50, and the plea was that it did contain more than 50, to wit, 80 acres. *Held*, that the issue was on the 80 acres. [8 *Burr.*, 1730; 2 *Saund.*, 291, n. 1.] *Supreme Ct.*, 1827, *Gleason v. McVickar*, 7 *Cow.*, 42.

36. But where any thing which is not material is laid under a videlicet, the party is not concluded by it; though he is where there is no videlicet. *Supreme Ct.*, 1824, *Jansen v. Ostrander*, 1 *Cow.*, 670.

37. In a declaration on a bond to indemnify plaintiff against being compelled to make payments, an allegation that the plaintiff, "afterwards, to wit, on" a day specified, paid certain moneys, does not confine plaintiff's proof to that day. *Ct. of Appeals*, 1853, *Lyon v. Clark*, 9 *N. Y. (4 Seld.)*, 148; S. P., 1854, *Lester v. Jewett*, 11 *N. Y. (1 Kern.)*, 453.

38. An averment of offer of performance on the day fixed by the contract, adding under a videlicet a wrong day, is good, for the error may be rejected as surplusage. [1 *Bing.*, 23.] *Ct. of Appeals*, 1854, *Lester v. Jewett*, 11 *N. Y. (1 Kern.)*, 453; reversing S. C., 12 *Barb.*, 502.

4. Surplusage.

39. Description of plaintiffs. The declaration described the plaintiffs "as trustees" of

* As to the application of the rule in these cases, see *Tuttle v. Smith*, 10 *Wend.*, 336.

General Rules:—Venue:—Profert and Oyer.

an association not shown to be incorporated, and alleged that the promise declared on, was made to them "as such trustees aforesaid." *Held*, that the contract was nevertheless in legal effect made to them as individuals, and the phrase "as such trustees," &c., might be rejected as surplusage. *Ct. of Appeals*, 1851, *Davis v. Garr*, 6 *N. Y.* (2 *Seld.*), 124.

40. *Nili debet to debt on bond*, is bad on demurrer, and cannot be regarded as surplusage when inserted in a plea of *non est factum*. *Supreme Ct.*, 1845, *Muzzy v. Shattuck*, 1 *Den.*, 288.

41. *Effect*. An idle, repugnant, or inconsistent *protestando*, is surplusage, and does not affect the pleading. *Supreme Ct.*, 1846, *Commercial Bank v. Sparrow*, 2 *Den.*, 97.

42. Mere surplusage does not vitiate. [1 *Chitt. Pl.*, 282; 4 *East*, 400; 2 *Saund.*, 806, n. 14.] *Supreme Ct.*, 1850, *Polly v. Saratoga & Washington R. R. Co.*, 9 *Barb.*, 449.

43. That new matter stated in an innuendo, but not necessary to support the action, may be rejected as surplusage. [1 *Chitt.*, 388; 9 *East*, 98.] *Supreme Ct.*, 1810, *Thomas v. Crosswell*, 7 *Johns.*, 264.

44. A declaration on a sheriff's bond alleged his deputy's neglect to sell under plaintiff's execution, which was before the sheriff gave a new bond with new sureties; and further alleged that another deputy subsequently sold the property, on another execution, and paid over the proceeds. *Held*, that the latter allegation was mere surplusage, and did not vitiate the pleading on general demurrer. *Supreme Ct.*, 1835, *People v. Ten Eyck*, 13 *Wend.*, 448.

45. *Need not be proved*. What may be rejected as surplusage, and might have been struck out on motion, need not be proved. *Supreme Ct.*, 1800, *Allaire v. Ouland*, 2 *Johns. Cas.*, 52.

5. Venue.

46. *Where no venue is laid* in the body of the declaration, the venue in the margin is sufficient. [Barnes, 488; 3 *T. R.*, 887; *Tidd's K. B. Pr.*, 875; 3 *Wils.*, 389; 1 *Chitt. Pl.*, 279.] *Supreme Ct.*, 1812, *Slate v. Post*, 9 *Johns.*, 81. *N. Y. Superior Ct.*, 1829, *Tappan v. Powers*, 2 *Hall*, 277.

47. In a declaration upon a deed, a venue stated in the margin,—*Held*, not to refer to the place at which the instrument was exe-

cuted. *Supreme Ct.*, 1816, *Alder v. Griner*, 18 *Johns.*, 449.

48. *Personal actions*, whether sounding in tort or in contract, are in general transitory; and the matter may be laid to have taken place in the county where the action is to be tried, without any reference to the place where the thing really happened; except where the place is matter of description. *Supreme Ct.*, 1842, *Lister v. Wright*, 3 *Hill*, 820.

49. *If the matters alleged are local* in their nature, the truth of the venue is material, and of the substance of the issue. [*Steph. Pl.*, 288.] And if, in such case, it appears upon the face of the pleading that the venue is untrue, a demurrer lies. *Supreme Ct.*, 1848, *Vermilya v. Beatty*, 6 *Barb.*, 429. To similar effect, 1834, *Rightmyer v. Raymond*, 12 *Wend.*, 51; *Morgan v. Lyon*, *Id.*, 265; 1844, *Chapman v. Wilber*, 6 *Hill*, 475.

50. *Records*. A venue is not necessary in pleading matter of record. *Supreme Ct.*, 1837, *Thomas v. Cameron*, 17 *Wend.*, 59.

51. *A venue is not necessary in a plea*, unless defendant justifies at a different place. The venue in the declaration draws to itself the trial of every thing that is transitory. [1 *H. Bl.*, 161; 1 *Saund.*, 8, a. 247, n. 1; 2 *Id.*, 5, n. 8.] *Supreme Ct.*, 1810, *Thomas v. Rumsey*, 6 *Johns.*, 26; 1821, *Davis v. Tyler*, 18 *Id.*, 490; *S. P.*, 1805, *Furman v. Haskin*, 2 *Cai.*, 869.

52. *In an action in an inferior court*, the cause of the action must appear to be within its jurisdiction; and therefore the consideration as well as the promise must be laid to have arisen within the jurisdiction, or it is error. But, a declaration averring an indebtedness "at, &c., and within the jurisdiction of this court," for goods sold, &c., is good after judgment, there being no special demurrer. *Supreme Ct.*, 1838, *Grover v. Gould*, 20 *Wend.*, 227.

6. Profert and Oyer.

53. *When necessary*. Proceedings of court, except letters testamentary and of administration, are never pleaded with a profert *in curiam*. [1 *Chitt. Pl.*, 397, 464; *Steph. Pl.*, 61-72, 487.] *Supreme Ct.*, 1846, *Commercial Bank v. Sparrow*, 2 *Den.*, 97.

54. Where an instrument, which must have been under seal, was pleaded without a profert,—*Held*, bad on special demurrer. *Id.*

General Rules;—Assigning Breaches.

55. In an action on an arbitration bond, profert need not be made of the award. *Supreme Ct.*, 1805, *Weed v. Ellis*, 3 *Cai.*, 253.

56. It is not a sufficient excuse for not making profert of the deed on which the action is founded, that it was delivered when made to a third person, for the benefit of the parties, without an allegation that it remains in his hands and plaintiff cannot produce it. *Supreme Ct.*, 1846, *Wheeler v. Miller*, 2 *Den.*, 172.

57. Transcript. Profert may be made of the transcript of a recorded deed, as well as of the original. (2 *Rev. Stat.*, 48, § 20.) *Supreme Ct.*, 1848, *Clark v. Nixon*, 5 *Hill*, 86.

58. Volunteering. If one is not bound to give oyer, his making profert will not raise the obligation. A stranger to a deed is not bound to give oyer; it is only a party or privy to the deed, or to some estate or interest affected by it, or one coming in and claiming in right of another who is party or privy, who must do so. [Shep. Touch., 73.] *Supreme Ct.*, 1840, *Van Rensselaer v. Poucher*, 24 *Wend.*, 816.

59. Successive letters. Where letters of administration had been granted to a previous administrator, the profert should set forth that fact, and that such letters had been revoked. *N. Y. Com. Pl.* (1848 ?), *Ketchum v. Morrell*, 2 *N. Y. Leg. Obs.*, 58.

60. Oyer can only be demanded when a deed is pleaded with profert. If profert is omitted, the remedy is a demurrer. *Supreme Ct.*, 1846, *Van Rensselaer v. Saunders*, 2 *How. Pr.*, 250.

61. The oyer must precede any matter of defence, whether that is set up by plea or demurrer. *Supreme Ct.*, 1841, *Dufau v. Wright*, 25 *Wend.*, 636.

62. Copy must be complete. On oyer demanded, the party making profert must furnish a copy of the whole deed, including the attestation clause, witnesses, memoranda written at the bottom, and the like. *Supreme Ct.*, 1840, *Van Rensselaer v. Poucher*, 24 *Wend.*, 816. To the same effect, 1821, *Smith v. Alworth*, 18 *Johns.*, 445.

63. But if defendant elects to plead without it, he waives it. *Supreme Ct.*, 1821, *Smith v. Alworth*, 18 *Johns.*, 445.

64. Where the oyer varies from the instrument declared on, the defendant may set it forth in his plea and demur, or he may

plead *non est factum*, and avail himself of the variance on the trial. *Supreme Ct.*, 1831, *Ehle v. Purdy*, 6 *Wend.*, 629; and see *Henry v. Cleland*, 14 *Johns.*, 400; but compare *James v. Walruth*, 8 *Johns.*, 410; *Jansen v. Ostrander*, 1 *Cow.*, 670.

65. Condition of bond. If the defendant seeks to avail himself of the condition of a bond, after oyer given, he must set it forth in his plea, otherwise it is no part of the record. [Gould's Pl., 439; 1 *Saund. Pl. & Ev.*, 9, n. 1; 1 *Tidd*, 531.] *Supreme Ct.*, 1841, *Allen v. Bishop*, 25 *Wend.*, 414.

66. On amending the declaration, new oyer need not be given, if the first was correct. *Supreme Ct.*, 1800, *Lefferts v. Byron*, 1 *Johns. Cas.*, 415; *S. C.*, *Col. & C. Cas.*, 112.

7. Assigning Breaches.

67. The assignment of two breaches of the same specific covenant, or stipulation, in the same count, is bad. [Com. Dig., Pl. C., 38; 1 *Chitt.*, 381.] *Supreme Ct.*, 1828, *Patton v. Foote*, 1 *Wend.*, 207.

68. In an action by the supervisors on a treasurer's bond, plaintiffs assigned an accounting and balance in defendant's hands, the subsequent receipt of a further sum, and his refusal to pay plaintiffs' orders. *Held*, that these facts constituted one breach, and that a rejoinder taking issue upon the accounting and receipt of the further sums, and then setting up payment of some and non-presentment of others of the orders, was bad as presenting immaterial issues, and for duplicity. *Supreme Ct.*, 1832, *Supervisors of Monroe v. Beach*, 9 *Wend.*, 143.

69. Debt and covenant. A declaration on a bond conditioned for the performance of covenants, commencing in debt, and concluding in assigning breaches in covenant, is good on general demurrer. *Supreme Ct.*, 1816, *Gale v. O'Brian*, 18 *Johns.*, 189; and see 12 *Id.*, 216.

70. In debt on bond plaintiff may assign several breaches; and may do so either in the declaration or in his replication; and it seems that the statute need not be expressly referred to. *Supreme Ct.*, 1805, *Munro v. Alaire*, 2 *Cai.*, 320; 1807, *Postmaster-general v. Cochran*, 2 *Johns.*, 413.

71. Performance. Where the breaches are assigned in the declaration, a general plea of performance is bad. *Supreme Ct.*, 1807, *Post-*

General Rules;—Assigning Breaches.

master-general v. Cochran, 2 *Johns.*, 418. To the same effect, *N. Y. Superior Ct.*, 1848, Hart v. Brady, 1 *Sandf.*, 626.

72. A bond for the payment of money only is not within the statute, and plaintiff cannot assign more than one breach. Assigning non-payment of two several sums is bad, on special demurrer, for duplicity. *Supreme Ct.*, 1812, Taft v. Brewster, 9 *Johns.*, 334.

73. The provision of 2 Rev. Stat., 378, § 5,—that plaintiff shall assign breaches when the action is upon a bond “for the breach of any condition other than for the payment of money,”—extends to every kind of condition, excepting one that the obligor will pay a certain sum of money at a particular time, or in specified instalments. A bond conditioned that a third person shall pay, in a certain contingency, or on demand, or an uncertain sum, is not a bond for payment of money within the statute; and breaches must be assigned. *Supreme Ct.*, 1843, Nelson v. Bostwick, 5 *Hill*, 37.

74. If breaches are not assigned, plaintiff's verdict cannot be sustained by amendment. *Id.*

75. That provision does not apply to a bond for the payment of money by instalments. *Supreme Ct.*, 1848, Harmon v. Dedrick, 8 *Barb.*, 192; and see Spaulding v. Millard, 17 *Wend.*, 381.

76. Under 2 Rev. Stat., 378, § 5, the assignment of breaches of the condition of a bond other than for the payment of money, must be in the declaration; and disregard of this is a defect not of form merely. *Supreme Ct.*, 1831, Reed v. Drake, 7 *Wend.*, 345.

Without it, plaintiff cannot have judgment for nominal damages. 1838, Barnard v. Darling, 11 *Wend.*, 28.

77. A bond given on a plea of title before a justice, conditioned to appear in the Common Pleas, is within 2 Rev. Stat., 237, § 60,—requiring specific breaches to be assigned. *Supreme Ct.*, 1842, Patterson v. Parker, 2 *Hill*, 598.

78. An assignment in the words of the covenant is good, if it necessarily shows a breach. *Supreme Ct.*, 1805, Treadwell v. Steele, 3 *Cal.*, 169; 1809, Hughes v. Smith, 5 *Johns.*, 168; 1811, Smith v. Jansen, 8 *Id.*, 111; 1817, Abbott v. Allen, 14 *Id.*, 248; 1843, Brown v. Stebbins, 4 *Hill*, 154. *N. Y. Superior Ct.*, 1828, McGeehan v. McLaughlin,

1 *Hall*, 33. Compare People v. Russell, 4 *Wend.*, 570.

79. Unless such an assignment necessarily amounts to a breach, it is insufficient. Thus, on covenant “to free land from all incumbrances,” the assignment should show an incumbrance. *Supreme Ct.*, 1814, Julliard v. Burgott, 11 *Johns.*, 6; S. P., 1830, Thomas v. Van Ness, 4 *Wend.*, 549. Compare People v. Russell, *Id.*, 570.

80. In assigning breaches of an official bond, it is enough to say generally that the defendant had collected or embezzled, &c., such a sum, which he had refused, &c., without setting forth the particular items, which would lead to prolixity. *Supreme Ct.*, 1807, Postmaster-general v. Cochran, 2 *Johns.*, 418; 1809, Hughes v. Smith, 5 *Id.*, 168.

81. So, to say that plaintiff has been obliged to pay to the amount of, &c., in consequence of the negligence and acts of the defendant in his office of under-sheriff, is good, at least on general demurrer. *Supreme Ct.*, 1809, Hughes v. Smith, 5 *Johns.*, 168.

82. So, declaring on a sheriff's official bond, for the non-payment of money received by him for military fines, it is not necessary to name who paid the money to him, or issued the warrants on which it was collected; a reference to the act of 1818 makes the breach certain enough. *Supreme Ct.*, 1831, People v. Brush, 6 *Wend.*, 454.

83. Where the doing of a single act will be a compliance with the covenant, or condition, the breach is well assigned if it be in the words of the contract, or in words of the same substantial import; but where there are several things necessary to the performance of it, a particular breach must be assigned. Thus, in an action on a sheriff's bond, assigning as a breach that he did not well and faithfully execute, &c., is not enough. He should not be required to come prepared to justify his whole official conduct. *Id.*

84. Upon a covenant to pay money in certain instalments at different times, an allegation that the said sum (naming the amount of an instalment) has not been paid, is bad on demurrer, although it might be inferred which of the two the pleader intended. A material fact must be alleged with precision and certainty, and not be left to inference and deduction. *Supreme Ct.*, 1812, Carpenter v. Alexander, 9 *Johns.*, 291.

The Declaration;—Form of the Action. Variance from the Writ.

85. In assigning breaches on the covenants of seizin and of good right to convey, it is sufficient to negative the words of the covenant; but the covenants for quiet and enjoyment, and of general warranty, require the specification of an eviction by paramount legal title. Alleging that A., having superior title at the time of the execution of the deed, entered by virtue of due process of law, and evicted the plaintiff, is sufficient. [4 Kent's Com., 479.] *Supreme Ct.*, 1832, *Rickart v. Snyder*, 9 Wend., 416.

86. The condition of a treasurer's bond was, that he "should keep a separate account in the bank of A., as such treasurer, of all moneys," &c. Held, that a breach might be assigned by negating the words of the condition, though only nominal damages could be recovered under it. *Supreme Ct.*, 1835, *Albany Dutch Church v. Vedder*, 14 Wend., 165.

87. Where a bond is conditioned to do one thing or another, the declaration must negative both. *Supreme Ct.*, 1835, *People v. Tilton*, 13 Wend., 597.

88. On a contract to honor draft drawn on several persons, a breach that the defendant did not honor a draft on one of them, is bad. *Supreme Ct.*, 1841, *Glover v. Tuck*, 1 Hill, 66.

89. Under a covenant to sell land, using diligence to do so to the best advantage, and pay over the proceeds, assigning as a breach that the defendant did not pay over the proceeds of the sale, is bad on special demurrer. There must be a direct averment of a sale and the receipt of money. *Supreme Ct.*, 1843, *Brown v. Stebbins*, 4 Hill, 154.

90. Assigning as a breach that defendant did not sell for the best price that could be obtained, is also bad; for it is uncertain whether the breach be for not selling, or for selling at other than the best price; and when the pleader undertakes to assign a breach coming within the substance, intent, or effect of the covenant, he is held to a more strict rule than when he follows its words. *Id.*

91. Against surety. In an action for breach of a contract to build according to a plan and specifications, an averment merely negating the performance in the words of the contract is insufficient. Enough of the plan and specifications should be stated to show, in connection with proper averments, in what particular the contract was broken or departed from. *So held*, in an action against the builder's

surety. *Supreme Ct.*, 1838, *Cooney v. Winants*, 13 Wend., 504.

92. In assigning breaches of a covenant to pay certain accounts, which the plaintiff had paid, &c., it is not necessary to set out the accounts so paid, thereby producing great prolixity. *N. Y. Com. Pl.*, 1846, *Jones ads. Hurbaugh*, 5 *N. Y. Leg. Obs.*, 19.

93. Substance. An assignment of the breach, if according to the sense and meaning of the covenant, though not in the very words, is sufficient. [Com. Dig., tit. Pl., C., 45.] *Ct. of Errors*, 1820, *Jackson v. Port*, 17 Johns., 479; affirming *S. C.*, *Id.*, 239.

Especially after verdict. *Supreme Ct.*, 1829, *Potter v. Bacon*, 2 Wend., 583.

H. THE DECLARATION.

1. Form of the Action. Variance from the Writ.

94. The form of an action is determined by the matter of the declaration, and a wrong name given to the action in the commencement of the declaration, may be disregarded as surplusage. *Supreme Ct.*, 1843, *Seneca Road Co. v. Auburn & Rochester R. R. Co.*, 5 Hill, 170; 1843, *Burdick v. Worrall*, 4 Barb., 596. *Ct. of Appeals*, 1848 [citing also 9 Bing., 678; 11 East, 62; 2 Chitt. Pl., 19; Grah. Fr., 202], *Cornes v. Harris*, 1 *N. Y. (1 Comst.)*, 223.

95. In an action for breach of a contract, a count stating that defendant made false representations to plaintiff to prevent him from being ready to perform by reason whereof plaintiff was not ready. Held, a count upon the contract, not for the false representations. *Supreme Ct.*, 1853, *Clarke v. Crandall*, 27 Barb., 78.

96. Variance. Where the defendant has been held to bail, the declaration must pursue the *ac etiam* clause. If plaintiff varies the nature of his action, defendant may have the proceedings set aside for irregularity, on motion. *Supreme Ct.*, 1809, *Rogers v. Rogers*, 4 Johns., 485.

Followed, though the English practice is different, 1823, *Durfee ads. Heem-street*, 1 Wend., 305.

97. Defendant cannot take advantage of a variance between the original writ and the declaration, except where he has been arrested and held to bail. [4 Johns., 485; 6 Cow., 70; 1 Wend., 305; 2 Wils., 393; 1

The Declaration;—Caption. Naming the Parties.

Saund., 818, n. 8; 1 Chitt. Pl., 488; Steph. on Pl., 69, 421.] *Supreme Ct.*, 1887, *McFarlan v. Townsend*, 17 *Wend.*, 440.

98. Under a writ for a taking and detention, plaintiff cannot declare for a mere detention. *Supreme Ct.*, 1884, *Nichols v. Nichols*, 10 *Wend.*, 680.

99. A declaration for breach of duty, as an auctioneer, in omitting to pay over money, &c., with a count in trover, is not such a variance from a writ in case, for money received in a fiduciary capacity, as to warrant setting aside the declaration on motion. *N. Y. Superior Ct.*, 1847, *Haviland v. Tuttle*, 1 *Sandf.*, 668.

100. The first writ was in the name of the plaintiff as executor, and the subsequent proceedings were in his own right,—*Held*, after verdict, an immaterial variance. *Supreme Ct.*, 1826 *Beekman v. Satterlee*, 5 *Cow.*, 519.

2. Caption. Naming the Parties.

101. The declaration defined and its requisites and the form of reference to the writ, stated. *Smith v. Fowle*, 12 *Wend.*, 9.

102. Premature action. If the cause of action appears to have accrued after the commencement of the action, the declaration is bad on demurrer; and the issuing of the writ is the commencement of the action for this purpose. *Supreme Ct.*, 1808, *Lowry v. Lawrence*, 1 *Cai.*, 69; 1808, *Cheetham v. Lewis*, 8 *Johns.*, 42; 1818, *Fowler v. Sharp*, 15 *Id.*, 323; 1828, *Hogan v. Oyler*, 8 *Cow.*, 208; S. P., 1802, *Carpenter v. Butterfield*, 3 *Johns. Cas.*, 145; 1807, *Bird v. Caritat*, 2 *Johns.*, 342. Compare *Sabin v. Wood*, 10 *Id.*, 218.

103. Date. The declaration must be captioned of the term when the writ is returned served. [8 D. & E., 624.] *Supreme Ct.*, 1808, *Lowry v. Lawrence*, 1 *Cai.*, 69.

104. A declaration in a suit commenced by *capias* must be entitled of the term in which the writ is returnable. *Supreme Ct.*, 1834, *Craig v. Murdock*, 12 *Wend.*, 293. Followed, 1846, *Van Alen v. Reynolds*, 2 *How. Pr.*, 158. Compare *Hinman v. Mambrat*, *Id.*, 158.

105. When necessary, the declaration, by which suit is commenced, must be specially entitled, so as to show suit commenced after action accrued. *Supreme Ct.*, 1880, *Paul v. Graves*, 5 *Wend.*, 76; 1832, *Nichols v. Nichols*, 9 *Id.*, 263. To similar effect, 1813, *Waring v. Yates*, 10 *Johns.*, 119.

106. The title of the court should appear in a declaration, but an omission is amendable. *Supreme Ct.*, 1846, *Teal v. Tinney*, 2 *How. Pr.*, 94.

107. Naming plaintiffs. A declaration by A. and B., stating that A., B. & Co. complain, &c., is bad on general demurrer; for it appears on the face of it that there are others who ought to be joined as plaintiffs. *Supreme Ct.*, 1805, *Bentley v. Smith*, 3 *Cai.*, 170.

108. The declaration must conform to the process in the name of the plaintiff. *Supreme Ct.*, 1828, *Willard v. Missani*, 1 *Cow.*, 37.

109. — defendants. Where the process is not bailable, or the cause of action is not specified in the writ, plaintiff may join any number of defendants in the writ, and declare against them severally. *Supreme Ct.*, 1808, *Montgomery v. Hasbrouck*, 3 *Johns.*, 538.

110. But if the process be bailable, he must declare against all. *Supreme Ct.*, 1819, *Roosevelt v. Soulden*, 16 *Johns.*, 44.

Whether bail was in fact required or not, 1823, *Bell v. Carrell*, 1 *Cow.*, 193.

111. If the defendant's name in the declaration varies from that in the writ, a default will be set aside. *Supreme Ct.*, 1825, *Henderson v. Ballantine*, 4 *Cow.*, 549.

112. Fictitious name. The statute (3 Rev. Stat., 347, § 8),—allowing process to be issued against a defendant by a fictitious name,—is not available to excuse a misnomer, unless an averment that his name was not known to the plaintiff, is contained in the declaration, or is alleged by way of replication to a plea of misnomer. *Supreme Ct.*, 1837, *Waterbury v. Mather*, 16 *Wend.*, 611.

If so alleged it is available. 1838, *Donnelly v. Foote*, 19 *Wend.*, 148.

113. In an action against joint-debtors, if the one misnamed in the declaration is not brought in, it is ground of nonsuit. *Supreme Ct.*, 1837, *Waterbury v. Mather*, 16 *Wend.*, 611.

114. Joinder of defendants. A declaration in case against several defendants for a tort, some of whom have not been served, is bad on special demurrer. *Supreme Ct.*, 1831, *Mumford v. Fitzhugh*, 18 *Johns.*, 457.

Otherwise after verdict, 1807, *Rose v. Oliver*, 3 *Johns.*, 365.

115. In tort, one defendant served can be declared against alone, if the other is returned not found. *Supreme Ct.*, 1845, *Hull v. Joesbury*, 1 *How. Pr.*, 192.

The Declaration;—Statement of the Cause of Action;—What may be recovered on the Common Counts.**3. Statement of the Cause of Action.**

116. Certainty. A declaration against directors of a company, charging them with having knowingly loaned the funds upon inadequate security, without any specification of time, persons, or circumstances, is bad. *Supreme Ct.*, 1829, *Franklin Ins. Co. v. Jenkins*, 8 *Wend.*, 180.

117. A declaration alleged in substance, that the defendants and their servants, in managing their cars in which plaintiff was a passenger, were so careless and negligent that it was unsafe for him to remain in one of them, and that, in order to free himself from the danger, he jumped from the car and thus received an injury,—*Held*, sufficiently certain without stating all the circumstances that produced the peril. *N. Y. Superior Ct.*, 1847, *Eldridge v. Long Island R. R. Co.*, 1 *Sandf.*, 89.

118. If a plaintiff have the same Christian name as the defendant, and after stating the names of each party correctly, and at full length, plaintiff use the Christian name only, as "the said James being in custody," it is certain to a common intent, and good on special demurrer. *Supreme Ct.*, 1801, *Hilldreth v. Becker*, 2 *Johns. Cas.*, 339.

119. Matter of record needs to be pleaded with a *prout patet per recordum*, only where it is the very foundation of the action, not when referred to only by way of inducement. [*Co. Litt.*, 808; 3 *Barn. & Cr.*, 2.] *Supreme Ct.*, 1846, *Commercial Bank v. Sparrow*, 2 *Den.*, 97.

120. Written instruments. In general, it is not enough to plead a deed according to its terms, especially if its terms are inappropriate; but it should be pleaded according to its legal effect. *Supreme Ct.*, 1842, *Willard v. Tillman*, 2 *Hill*, 274. To the contrary is *Bayley v. Onondaga County Mutual Ins. Co.* (1844), 6 *Id.*, 476. Compare *Scott v. Leiber*, 2 *Wend.*, 479.

121. It is sufficient to set forth an instrument according to its legal effect, and if the day of the month is blank in the date, it may be filled in the declaration. *Supreme Ct.*, 1827, *Grannis v. Clark*, 8 *Cow.*, 36.

So where the date was erroneous,—*Held*, that the true date might be stated without any averment of the mistake. *Phoenix Ins. Co. v. Walden*, *Anth. N. P.*, 172.

122. A contract must be proved as laid in

the declaration. The plaintiff cannot give in evidence an entire contract, relating to two subjects, when he declares for one. [1 *Ld. Raym.*, 735; 1 *T. R.*, 240; 1 *East*, 1; 1 *Campb. N. P.*, 361.] *Supreme Ct.*, 1811, *Crawford v. Morrell*, 8 *Johns.*, 253.

123. That claiming more damages than, on the face of the declaration, appears to be due, will not vitiate. *Supreme Ct.*, 1800, *Van Rensselaer v. Platner*, 2 *Johns. Cas.*, 17.

4. What may be recovered on the Common Counts; and what must be Specially declared for.

124. In an action of debt against a stockholder to recover on his statute liability for the indebtedness of the corporation, a general *indebitatus* count is sufficient, alleging that the company was indebted, &c., for, &c., and payment had been refused, although the debt of the company arose under a special contract. *Supreme Ct.*, 1836, *Simonson v. Spencer*, 15 *Wend.*, 548.

125. Surety. That where seamen deliver their wages to the one who becomes surety that they will not desert, for his indemnity, he is not liable on a count for money had and received, to the owner of the vessel, on the desertion of the seamen. The remedy, if any, must be on his special undertaking. *Supreme Ct.*, 1816, *Dodge v. Lean*, 13 *Johns.*, 508.

126. Money received. In an action against a broker for the proceeds of a note left with him for collection,—*Held*, that plaintiff could not recover under the money counts, unless it appeared that the money had been received by the defendant; but payment of the note to a stranger was deemed enough to throw the burden on him. *N. Y. Com. Pl.* (1846?), *Peck v. Taylor*, 4 *N. Y. Leg. Obs.*, 141.

127. That where money is received upon a contract utterly void,—*e. g.*, an illegal wager,—the general count for money received is sufficient, in an action to recover it back. *Supreme Ct.*, 1849, *O'Maley v. Reese*, 6 *Barb.*, 658.

As to the action by **Husband and wife** for money received, see *Thorne v. Dillingham*, 1 *Den.*, 254.

128. Gaming. In an action to recover back money lost at play, plaintiff may declare generally in debt for money had and received. *Supreme Ct.*, 1818, *Collins v. Ragrew*, 15 *Johns.*, 5.

The Declaration;—What may be recovered on the Common Counts.

Otherwise, in an action by a common informer. 1809, *Cole v. Smith*, 4 *Johns.*, 198.

129. Goods sold. Evidence of a sale of goods, a subsequent presentment of an account, and a promise to pay the balance,—*Held*, sufficient to enable plaintiff to recover on the *insimul computassent* count, although there was no count for goods sold. *N. Y. Com. Pl.*, 1848, *Geery v. Bucknor*, 4 *N. Y. Leg. Obs.*, 344.

130. Bills and notes. A bill of exchange may be given in evidence under the money counts, in an action against the maker by the payee; or, if it is payable to bearer, in an action by the holder. [1 *Salk.*, 288; *Str.*, 725; *Burt.*, 1516; 6 *T. R.*, 123; *Chitt.*, 199, 191, 197.] *Supreme Ct.*, 1802, *Cruger v. Armstrong*, 8 *Johns. Cas.*, 5; and see *Arnold v. Orana*, 8 *Johns.*, 79.

131. In declaring upon bank-bills, though a special demand and refusal be necessary, the common counts are sufficient. *Supreme Ct.*, 1888, *People v. New York C. P.*, 19 *Wend.*, 118; 1889, *Stowits v. Bank of Troy*, 21 *Id.*, 186.

132. A note for a sum named, payable in land or in chattels, is admissible in evidence under the money counts. *Supreme Ct.*, 1807, *Smith v. Smith*, 2 *Johns.*, 235; 1881, *Crandal v. Bradley*, 7 *Wend.*, 311.

So a note payable to bearer may be given in evidence under the money counts, in an action by the indorsee or bearer against the maker. 1815, *Pierce v. Crafts*,* 12 *Johns.*, 90. Followed, 1819, *Throop v. Cheeseman*, 16 *Id.*, 264.

So of a note payable to either of two payees in the alternative. 1830, *Walrad v. Petrie*, 4 *Wend.*, 575.

Otherwise of a note not negotiable, and not expressed to be for value received. 1813, *Saxton v. Johnson*, 10 *Johns.*, 418.

133. A written promise to deliver to some forwarding merchant, with directions to forward a certain sum in specified merchandise, directed to T., for value received, is a note payable in property which may be given in evidence under the common counts in an action by T. *Supreme Ct.*, 1850, *Taplin v. Packard*, 8 *Barb.*, 220.

134. A note made by a firm is competent

under the count for money lent, although the defendants are not expressly charged by the declaration to be partners. *Supreme Ct.*, 1830, *Mack v. Spencer*, 4 *Wend.*, 411.

135. A special agreement for the exchange of notes, with warranty, cannot be given in evidence under the money counts. *Supreme Ct.*, 1811, *Richardson v. Smith*, 8 *Johns.*, 489.

136. A note payable on a contingency must be declared on as a special agreement, and the consideration must be set forth. *Supreme Ct.*, 1803, *Union Turnpike Co. v. Jenkins*, *Col. & C. Cas.*, 264, 279.

137. A guaranty of a note is a special contract, and must be declared on as such. *Supreme Ct.*, 1849, *Ellis v. Brown*, 6 *Barb.*, 292.

So of any collateral promise to pay the debt of a third person. 1841, *Beers v. Culver*, 1 *Hill*, 589; 1843, *Mason v. Munger*, 5 *Id.*, 618. To similar effect see *Quin v. Hanford*, 1 *Id.*, 82; and see *Northrup v. Jackson*, 18 *Wend.*, 85.

138. There can be no recovery against a surety, where his character appears on the face of the instrument, without declaring specially on the contract; and an action against the makers of a promissory note, which one of them has signed as a surety for the other, is no exception to the rule. [8 *Taunt.*, 737.] *Supreme Ct.*, 1845, *Butler v. Rawson*, 1 *Den.*, 105. Approved and followed, 1849, *Baloom v. Woodruff*, 7 *Barb.*, 18.

139. Executory and executed contracts. That so long as a contract is executory, the party must declare specially; but when it is executed, he may declare generally. *Supreme Ct.*, 1840, *Clark v. Fairchild*, 22 *Wend.*, 576. Compare *Underhill v. Pomeroy*, 2 *Hill*, 603; 7 *Id.*, 388; *Peltier v. Sewall*, 12 *Wend.*, 386.

140. Where the special agreement is entire and subsists in full force, the plaintiff cannot abandon it and recover under the money counts, but the remedy is on the contract. *Supreme Ct.*, 1816, *Jennings v. Camp*, 13 *Johns.*, 94; 1817, *Clarke v. Smith*, 14 *Id.*, 326; 1821, *Wood v. Edwards*, 19 *Id.*, 205; and see *Raymond v. Bearnard*, 12 *Id.*, 274.

141. Where a contract to transfer goods is partly an exchange and partly a sale, and every thing relating to the exchange has been executed, there is no objection against declaring generally for a sale as to the residue. [2 *Chitt.*, 85, n. e.; 2 *Binn.*, 4; *Fitz.*, 302; 1

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

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Wils., 117; Bull. N. P., 189; 4 Bos. & P., 380.] *Supreme Ct.*, 1823, Porter v. Talcott, 1 Cow., 859.

142. So, for goods sold on a credit, after the credit expires, the price may be recovered on the common counts. *Supreme Ct.*, 1825, Reynolds v. Cleveland, 4 Cow., 282.

143. Where payment is to be made in the notes of a debtor, and the notes being given are unpaid at maturity, the creditor may declare as for so much money actually due, without referring to the notes. [4 Bos. & P., 380; 6 East, 564.] *Supreme Ct.*, 1823, Porter v. Talcott, 1 Cow., 859.

144. A party may recover under the common counts, in assumpsit, for the stipulated price due on a special contract, not under seal, where such contract has been executed. [12 East, 1; 5 Dow & Ry., 277; 10 Mass., 287; 4 Cow., 564; 7 Oranch, 299.] *Ct. of Errors*, 1838, Feeter v. Heath, 11 Wend., 477.

145. Where there has been no absolute delivery of goods sold, the declaration must be special. *Supreme Ct.*, 1827, Outwater v. Dodge, 7 Cow., 85.

146. Where a special count on a note omitted the words, "or order,"—*Held*, that plaintiff might recover on the money count. *N. Y. Com. Pl.*, 1842, Van Saun v. Doremus, 1 *N. Y. Leg. Obs.*, 27.

147. Effect of failure to sustain the special count. Where a party declares on a special agreement, seeking to recover thereon, but fails altogether, he may recover on a general count, if the case be such that, supposing there had been no special contract, he might still have recovered. [1 Bos. & P., N. S., 355.] *Supreme Ct.*, 1810, Tuttle v. Mayo, 7 Johns., 132.

148. The plaintiff may recover on the general count, whether he has attempted to prove the special agreement or not. *Supreme Ct.*, 1813, Linningdale v. Livingston, 10 Johns., 86. Compare Jennings v. Camp, 18 *Id.*, 94.

149. If a special contract is proved, the plaintiff must recover upon that, or fail. If he has no special count adapted to it, he must be nonsuited. *Supreme Ct.*, 1828, Norris v. Durham, 9 Cow., 151.

150. The fact that the plaintiff has made a mistake in declaring according to the real contract, is no reason why he should be permitted to resort to his general counts. *Supreme Ct.*, 1821, Robertson v. Lynch, 18 Johns., 451.

5. Alleging Special Damages.

151. Whenever the damages sustained do not necessarily arise from the act complained of, and consequently are not implied by law, plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. [1 Chitt. Pl., 886.] *Supreme Ct.*, 1819, De Forest v. Leete, 16 Johns., 122; 1835 [citing Chitt. Pl., 885], Squier v. Gould, 14 Wend., 159; Slack v. Brown, 18 *Id.*, 390; 1848, Bogert v. Burkhalter, 2 Barb., 525. *Ct. of Appeals*, 1850, Vanderslice v. Newton, 4 *N. Y. (4 Comst.)*, 130.

152. So held of the expenses of counsel, made necessary by a malicious prosecution. *Supreme Ct.*, 1834, Strang v. Whitehead, 12 Wend., 64.

153. In an action by a mortgagee, to recover damages from defendant for removing buildings from the mortgaged premises so as to render them inadequate to satisfy the mortgage, it must be averred that the mortgagor was insolvent, and had no property other than the mortgaged premises, out of which the debt could be paid, or these facts cannot be proved. *Supreme Ct.*, 1817, Lane v. Hitchcock, 14 Johns., 218. Compare Yates v. Joyce, 11 *Id.*, 186.

154. In an action for the breach of the usual covenant against nuisances in a deed of lands, the plaintiff must show how the alleged nuisance has injured him. *Supreme Ct.*, 1848, Bogert v. Burkhalter, 2 Barb., 525.

155. Contract of exchange. Under a contract by defendant to build a house for the plaintiff and receive his pay in land, the difference in value between the house and the land is the natural and necessary measure of damages; and no statement of special damages is necessary to entitle the plaintiff to give evidence thereof. *Ct. of Appeals*, 1852, Laraway v. Perkins, 10 *N. Y. (6 Seld.)*, 371.

156. In cases of tort, or misfeasance, the particular damage for which plaintiff proceeds must be the legal and natural consequence of the wrongful act, and, in such case, the special damages must be particularly stated in the declaration. [1 Chitt. Pl., 888; 8 East, 3; 1 Saund., 248, n. 5; 8 T. R., 182.] *Supreme Ct.*, 1821, Butler v. Kent, 19 Johns., 223.

157. In a private action for obstructing a public way, special damage must be laid and

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proven; though it is otherwise in respect to a private way. *Supreme Ct.*, 1848, *Lansing v. Wiswall*, 5 *Den.*, 218.

158. Slander. Where the words of a slander are not actionable in themselves, some pecuniary damage must be alleged, and it must be laid as the direct and immediate, and not as the secondary consequences of the slander. *Supreme Ct.*, 1842, *Beach v. Ranney*, 2 *Hill*, 309.

159. In an action of slander, a general averment of loss of customers is not a sufficient allegation of special damage. [Bull. N. P., 71; Saund., 248, n. 5; 1 Str., 666.] *Supreme Ct.*, 1880, *Tobias v. Harland*, 4 *Wend.*, 587.

160. In an action for slander of title, damage to the plaintiff must be specially alleged in the declaration, and substantially proven on the trial. *Ct. of Appeals*, 1851, *Kendall v. Stone*, 5 *N. Y.* (1 *Seld.*), 14; reversing S. C., 2 *Sandf.*, 269. *Supreme Ct.*, 1848, *Bailey v. Dean*, 5 *Barb.*, 297.

161. In an action for breach of a contract to give a lease, proof of expenses incurred in removing to and preparing to occupy the premises, is admissible under the general allegation of damage. [11 Price, 19.] *Supreme Ct.*, 1887, *Driggs v. Dwight*, 17 *Wend.*, 71.

162. Liability of directors. In an action by a creditor or stockholder of a corporation against directors, to recover for a breach of the general statute relating to corporations, the declaration sufficiently shows the plaintiff's loss, if after stating the wrongful acts it alleges whereby the plaintiff's stock became depreciated, and of less value than it would otherwise have been, and the plaintiff thereby, and in consequence of such violation of the act, lost a large sum of money, to wit, &c. *Supreme Ct.*, 1844, *Gaffney v. Colvill*, 6 *Hill*, 587.

6. Several Counts.

A. When necessary or proper. Defects in one or more.

163. Distinct causes of action must be set forth by separate counts. Thus a count setting forth a lease reserving \$500 rent, and a separate agreement indorsed on the lease to pay \$200 additional rent, and averring a breach in the non-payment of \$700, is bad for duplicity. *Supreme Ct.*, 1840, *Hardy v. Chatfield*, 23 *Wend.*, 85.

164. A count alleging grievances to have

been committed, in part by want of care and attention, and also by the corrupt and wilful mismanagement of the defendants, is bad, as containing two distinct charges, requiring separate and different answers, and leading to different issues. *Supreme Ct.*, 1829, *Franklin Ins. Co. v. Jenkins*, 3 *Wend.*, 180.

165. In an action for violations of a statute, numerous violations of a single subdivision of the section of the statute may be alleged in one count. Where the plaintiff is a stranger to the transactions, and the defendant may be presumed to be cognizant of them, great generality of pleading is permitted. But there should be a separate count for violations of a distinct subdivision. *Supreme Ct.*, 1844, *Gaffney v. Colvill*, 6 *Hill*, 587.

166. Defamation. Different sets of words, importing the same charge, laid as spoken at the same time, may be included in the same count, and the count for that cause is not bad. *Supreme Ct.*, 1831, *Rathbun v. Emigh*, 6 *Wend.*, 407; *Milligan v. Thorn*, *Id.*, 413.

167. Each count in a declaration is supposed to contain a distinct cause of action; and must be answered as such. *Supreme Ct.*, 1828, *Frets v. Frets*, 1 *Cow.*, 385.

168. Plaintiff should not be compelled to elect between different counts for the same cause of action; for defendant may require that the jury find for the plaintiff upon the counts sustained by the evidence, and for himself on the others. *Supreme Ct.*, 1848, *Lansing v. Wiswall*, 5 *Den.*, 218.

169. The plaintiff may refer in one count to preceding parts of the declaration, and so support it. *Supreme Ct.*, 1845, *Freeland v. McCullough*, 1 *Den.*, 414. To similar effect, 1828, *Crookshank v. Gray*, 20 *Johns.*, 344; 1824, *Griswold v. National Ins. Co.*, 3 *Cow.*, 96; 1829, *Loomis v. Swick*, 8 *Wend.*, 205; and see, as to money counts, *Porter v. Cummings*, 7 *Id.*, 172.

170. One bad count, fatal on general verdict. The rule that where one of several counts is bad, and the verdict is general, judgment must be arrested, does not apply where from the peculiar nature of the case it is obvious that all the counts refer to one and the same cause of action. *Ct. of Errors*, 1807, *Bayard v. Malcolm*, 2 *Johns.*, 550; reversing S. C., 1 *Id.*, 453.

171. Abandoning one count. That if there are two counts for the same cause of ac-

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tion, and defendant pleads the general issue to both, and a special plea to the first, plaintiff cannot abandon that count, and rely on the other. *Ct. of Errors*, 1833, *Driggs v. Rockwell*, 11 *Wend.*, 504.

172. Two demands. Where, in an action of debt, two several sums are demanded as due and owing in two separate counts,—*e. g.*, \$600 each,—the declaration should, in the commencement, demand the aggregate amount, the first count should demand \$600, parcel, &c., and the second count should be for \$600, the residue, &c. *Supreme Ct.*, 1830, *People v. Van Eps*, 4 *Wend.*, 887.

173. A specific averment of damage contained in the counts may be rejected as surplusage, where each count contains a proper breach, and the conclusion of the declaration contains a general averment of damage. *N. Y. Superior Ct.*, 1829, *White v. Demilt*, 2 *Hall*, 405.

B. Joinder of Counts.

174. Counts admitting of the same plea and judgment may be joined,—*e. g.*, debt on judgment and on simple contract. *Supreme Ct.*, 1816, *Union Cotton Manufactory v. Lobdell*, 18 *Johns.*, 462. Compare *Lovett v. Pell*, 22 *Wend.*, 369.

175. In an action for deceit or misfeasance in a sale, a count on a warranty and a count in assumpsit may be joined, for the same plea of not guilty may be pleaded. *So held*, in support of the verdict. *Supreme Ct.*, 1804, *Hallock v. Powell*,* 2 *Cai.*, 216.

The contrary held, on demurrer to joinder of a money count with a count for deceit, there being no warranty. 1806, *Wilson v. Marsh*, 1 *Johns.*, 508.

176. Count for trespass damage-feasant, and for a pound breach or rescous, may be joined. [2 *Chitt. Pl.*, 297.] *Supreme Ct.*, 1813, *Baker v. Dumbolton*, 10 *Johns.*, 240.

177. Counts in trespass *vi et armis*, and in trover, since they require different judgments, cannot be joined. *Supreme Ct.*, 1819, *Cooper v. Bissell*, 16 *Johns.*, 146.

178. Counts in tort and contract cannot be joined; but a declaration in an action

against an agent or attorney, which contains several counts, each containing allegations sufficient to support it, either in tort or assumpsit, is good. *Supreme Ct.*, 1814, *Church v. Mumford*, 11 *Johns.*, 479.

179. At common law and on statute. If the plaintiff counts both at common law and on a statute which gives treble damages, and has a general verdict, he cannot have treble damages. *Supreme Ct.*, 1823, *Benton v. Dale*, 1 *Cow.*, 160; 1829, *Mooers v. Allen*, 2 *Wend.*, 247.

180. In an action by husband and wife, for a personal injury to the wife, a declaration containing also a cause of action for which the husband alone could sue, though bad on demurrer, is good after verdict. *Supreme Ct.*, 1821, *Lewis v. Babcock*, 18 *Johns.*, 443.

181. Assumpsit and trover cannot be joined. It is not enough that the counts may all relate to the same subject-matter; the form of action must be the same in all. [1 *T. R.*, 274; 1 *Chitt. Pl.*, 196.] *Supreme Ct.*, 1839, *Howe v. Cook*, 21 *Wend.*, 29.

182. A count for mere breach of contract to sell and deliver goods for an agreed price, although in form sufficient as a count in case, is, in substance, in assumpsit, and cannot be joined with a count in trover. *N. Y. Com. Pl.*, 1845, *Bennett v. Taintor*, 8 *Am. Law R.*, 533.

183. Such a defect may be reached by a general demurrer for misjoinder. [6 *B. & C.*, 268; 4 *Ad. & E.*, *N. S.*, 123.] *Id.*

184. Covenant and assumpsit cannot be joined. *Supreme Ct.*, 1839, *Pell v. Lovett*, 19 *Wend.*, 546.

But the joinder is a mispleading that, under the Revised Statutes, is cured by verdict. *Ct. of Errors*, 1839, *Lovett v. Pell*, 22 *Wend.*, 369; reversing *S. C.*, 19 *Id.*, 546.

185. That a count for obstructing a private way, may be joined with one for obstructing a public way. *Supreme Ct.*, 1843, *Lansing v. Wiswall*, 5 *Den.*, 213.

186. In actions by and against executors. A count on a promise made by the representative, as such, may be joined with a count on the decedent's promise. Whether in one or in distinct counts is not material. [1 *H. Bl.*, 102; 7 *Bro. Parl. Cas.*, 550; 6 *Johns.*, 116; 1 *Chitt. Pl.*, 205, b; 2 *Id.*, 61.] *Supreme Ct.*, 1811, *Carter v. Phelps*, 8 *Johns.*, 440.

187. A count on a cause of action, arising

* But see explanations of this case in *Lovett v. Pell*, 22 *Wend.*, 369; reversing *S. C.*, 19 *Id.*, 546; *Evertson v. Miles*, 6 *Johns.*, 138; and *Howe v. Cook*, 21 *Wend.*, 29.

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after the death of a testator, cannot be joined with a cause of action arising in his lifetime. *Supreme Ct.*, 1815, *Myer v. Cole*,* 12 *Johns.*, 849; 1827, *Demott v. Field*, 7 *Cow.*, 58; 1829, *Reynolds v. Reynolds*, 8 *Wend.*, 244; 1840, *Gillet v. Hutchinson*, 24 *Id.*, 184.

188. A count upon an account stated with the representative may be joined, if the accounting is of moneys alleged to be due from the intestate in his lifetime. *Supreme Ct.*, 1829, *Reynolds v. Reynolds*, 8 *Wend.*, 244; 1840, *Gillet v. Hutchinson*, 24 *Id.*, 124.

189. In an action by an executor or administrator, counts on promises to himself, as such, and also on promises to the decedent, may be joined in one declaration, whenever the money recovered will be assets in the hands of the executor or administrator. *Supreme Ct.*, 1832, *Fry v. Evans*, 8 *Wend.*, 580.

190. An accounting with the plaintiff by the defendant, as administrator, without saying for the indebtedness of the intestate, creates a cause of action against the administrator personally; but an accounting of and concerning money due and owing to the plaintiff by the intestate, in his lifetime, creates no personal responsibility in the administrator; it raises no new duty on his part; and a promise by him upon such accounting may be joined in the same declaration containing promises by the intestate. *Supreme Ct.*, 1829, *Reynolds v. Reynolds*, 8 *Wend.*, 244. Compare *Worden v. Worthington*, 2 *Barb.*, 368.

191. If the declaration shows a contract made by the testator only, and not by the executor, a promise by the executor, as such, may be joined in the same or different counts. But if the declaration sets up a contract made by the testator, it cannot be joined with a contract made by the executor. The reason of the rule is, that in the one case the executor would be liable only so far as he had assets, and in the other case he would be liable personally, whether he had assets or not. *Supreme Ct.*, 1851, *Benjamin v. Taylor*, 12 *Barb.*, 828.

192. A count alleged that defendant was employed by the decedent under a contract which was to continue, until terminated by the parties, or death, and a final accounting between them; and that on the death of the

employer the executor and executrix continued his business for the purpose of completion and settlement, and that the executor promised, as such, to pay the plaintiff, and that the executrix (who was subsequently appointed) subsequently promised, &c., and also that both of them promised, &c. *Held*, good; for the contract is by the testator, solely upon considerations arising before his death, and a promise by the representatives may be joined. *Ib.*

193. The common money counts may be included in one count, and the plaintiff may recover *pro tanto*, on proving any one or more of the causes of action. *Supreme Ct.*, 1809, *Bailey v. Freeman*, 4 *Johns.*, 290.

194. The common money counts cannot be joined in one with a count generally for certain lands sold and conveyed. *Supreme Ct.*, 1816, *Nelson v. Swan*, 18 *Johns.*, 483.

195. A misjoinder of counts is a fatal defect in error. *Supreme Ct.*, 1819, *Cooper v. Bissell*, 16 *Johns.*, 146.

III. PLEAS.

1. In General.

196. A dilatory plea is one that only delays the suit by questioning the propriety of the remedy, rather than by denying the injury. *Supreme Ct.*, 1805, *Robinson v. Fisher*, 3 *Cai.*, 99; *S. O., Col. & C. Cas.*, 452.

197. Every plea must answer the whole declaration or count. [5 T. R., 553.] *Supreme Ct.*, 1830, *Dutton v. Holden*, 4 *Wend.*, 648; 1834 [citing 20 *Johns.*, 204], *Etheridge v. Osborn*, 12 *Wend.*, 399.

198. A plea answering only part of a count, is bad. *Supreme Ct.*, 1810, *Nevins v. Keeler*, 6 *Johns.*, 63. *Ct. of Errors*, 1814, *Spencer v. Southwick*, 11 *Id.*, 578. *Supreme Ct.*, 1820, *Hallett v. Holmes*, 18 *Id.*, 28; 1822, *Van Ness v. Hamilton*, 19 *Id.*, 349; *Hooker v. Cummings*, 20 *Id.*, 90; *Sterling v. Sherwood*, *Id.*, 204; 1829, *Hickok v. Coates*, 2 *Wend.*, 419; *Jackson v. McClaskey*, *Id.*, 541; 1832, *Slocum v. Despard*, 8 *Id.*, 615; 1834, *Loder v. Phelps*, 18 *Id.*, 46; 1838, *Phelps v. Sowles*, 19 *Id.*, 547; 1840, *Sterry v. Schuyler*, 23 *Id.*, 497.

199. The remedy is to demur. *Supreme Ct.*, 1822, *Sterling v. Sherwood*, 20 *Johns.*, 204; 1829, *Hickok v. Coates*, 2 *Wend.*, 419; 1832, *Slocum v. Despard*, 8 *Id.*, 615.

200. Each plea must contain in itself an answer to the whole declaration or to one

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

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count, whichever it proposes to answer. [20 Johns., 204; 2 Wend., 419.] A part may be denied and a part justified, but this object is not answered by putting in first the general issue, and afterwards justifying a part. *Supreme Ct.*, 1834, *Underwood v. Campbell*, 18 Wend., 78.

201. A plea answering a part of a cause of action only, is bad. *Supreme Ct.*, 1842, *Wilmarth v. Babcock*, 2 Hill, 194; but compare *Root v. Woodruff*, 6 Hill, 418, where other cases are cited, and exceptions to this rule stated.

202. Every plea in bar must answer the whole declaration or count to which it is pleaded, even although the charge be severable in its nature. [6 Hill, 421.] *Supreme Ct.*, 1845, *Cooper v. Greeley*, 1 Den., 347.

203. A plea which is an answer to only part of a count, is bad, although there are other pleas which go to the whole action. *Supreme Ct.*, 1858, *Phelps v. Sowles*, 19 Wend., 547.

204. A plea in an action for libel which undertakes to justify the whole, must answer every part that is material, or the omission is fatal. *Ct. of Errors*, 1814, *Spencer v. Southwick*, 11 Johns., 578; reversing S. C., 10 Id., 259.

205. To a declaration on an agreement to pay for land which the defendant occupied or claimed, a plea that the defendant did not occupy the land, is bad. *Supreme Ct.*, 1817, *Macomb v. Thompson*, 14 Johns., 207.

206. A plea to several counts is bad, unless it is a legal answer to all. *Supreme Ct.*, 1850, *Foster v. Hazen*, 12 Barb., 547.

207. In trespass, the plaintiff, in each of two counts, charged the taking of a gig; and defendant set forth a justification for the taking of "the said gig, in the several counts of the declaration mentioned." Held, an answer to the whole declaration. *Supreme Ct.*, 1838, *Beckman v. Traver*, 20 Wend., 67.

208. *Alleging identity of counts.* Where the declaration contains several counts, it is not allowable, after pleading to one, to allege that the others refer to the same causes of action. *Supreme Ct.*, 1810, *Nevins v. Keeler*, 6 Johns., 68. Followed, 1840, *Sterry v. Schuyler*, 28 Wend., 487; 1843, *Seneca Road Co. v. Auburn & Rochester R. R. Co.*, 5 Hill, 170; overruling *Case v. Boughton*, 11 Wend., 106.

209. Pleas pleaded under leave of the

court, must contain, in each of them, sufficient matter in law to bar the plaintiff's action, and they cannot be made to depend on facts stated in other pleas. *Supreme Ct.*, 1807, *Currie v. Henry*, 2 Johns., 438.

210. *Bad in part.* If an entire plea is bad in part, it is bad for the whole. [Com. Dig., Pl. (E. 86); 1 Saund., 337, n. 1; 3 T. R., 376; 1 Ohitt. Pl., 528.] *Supreme Ct.*, 1817, *Miller v. Merrill*, 14 Johns., 348; 1827, *Ten Eyck v. Watterbury*, 7 Cow., 51.

211. This rule has no application where the objection is merely on account of surplusage; and if the plea states sufficient matter in bar, even if it states something afterwards which is inaccurate, yet that will not vitiate the whole. [3 T. R., 376.] *Supreme Ct.*, 1814, *Douglass v. Satterlee*, 11 Johns., 16.

212. *A protestation*, in effect, admits the allegation protested against in the suit in which it is made. *Supreme Ct.*, 1821, *Briggs v. Dorr*, 19 Johns., 95.

213. *Color.* Every plea in confession and avoidance must give color, by expressly or impliedly confessing that, but for the matter of avoidance contained in the plea, the action could be maintained. *Supreme Ct.*, 1841, *Brown v. Archer*, 1 Hill, 266; 1844, *Van Etten v. Hurst*, 6 Id., 811; 1846, *Conger v. Johnston*, 2 Den., 96; S. P., *Commercial Bank v. Sparrow*, Id., 97.

214. In an action of trespass by one claiming under a sale from a defendant in an attachment, a plea that the pretended sale was void, and that the goods were the property of the debtor, is bad, as giving no color to the action; but if it admits that the property was taken from the possession of the plaintiff, it plainly gives color. *Supreme Ct.*, 1844, *Van Etten v. Hurst*, 6 Hill, 811.

215. A plea to a bond of indemnity, which avers payment of all that the plaintiff has expended, instead of admitting the breaches alleged, and avoiding them by the fact of payment, is bad. *N. Y. Superior Ct.*, 1848, *Hart v. Meeker*, 1 Sandf., 628.

216. *If one of several pleas of a defendant going to the whole cause of action is sustained, it bars recovery by the plaintiff, notwithstanding some other issues may have been found in favor of the plaintiff.* *Ct. of Appeals*, 1847, *Curtis v. Jones*, 1 How. App. Cas., 137; affirming S. C., 3 Den., 590.

217. A plea to the damages, not to the

Pleas;—In Abatement.

breach, is technically bad. *N. Y. Superior Ct.*, 1848, *Hart v. Brady*, 1 *Sandf.*, 626.

218. There cannot be a demurrer and a plea to the same part of the declaration. [1 *Ohitt.*, 280.] *Supreme Ct.*, 1880, *Rickert v. Snyder*, 5 *Wend.*, 104; 1846, *Snyder v. Hearman*, 2 *How. Pr.*, 279. Compare *People v. Ten Eyck*, 13 *Wend.*, 448.

219. In assumpsit, the defendant cannot demur to one and plead to another of several breaches assigned in the same count. *Supreme Ct.*, 1848, *Pettibone v. Stevens*, 6 *Hill*, 258.

220. To a count in covenant assigning a single breach, the defendant cannot plead *non est factum*, and also demur. *Supreme Ct., Sp. T.*, 1847, *Angell v. Kelsey*, 1 *Barb.*, 16.

221. A special plea which amounts to the general issue, is bad. *Supreme Ct.*, 1818, *Kennedy v. Strong*, 10 *Johns.*, 289.

But not unless it clearly does. *N. Y. Superior Ct.*, 1829, *Richards v. Cuyler*, 2 *Hall*, 201.

222. When a party answers in chief a pleading of his adversary, he is generally precluded from availing himself of any extrinsic objections to its validity, both in civil and criminal cases, except in the discretion of the court. [1 *Leach Crown Cases*, 11, 420; 1 *Ohitt. Cr. L.*, 808.] (*Supreme Ct., Sp. T.*, 1852?), *Carter v. Newbold*, 7 *How. Pr.*, 166.

223. After a plea in bar, it is too late to object to the jurisdiction. [*Cowp.*, 72; *Co. Lit.*, 127; *O. T. Raym.*, 84; 2 *Vern.*, 484.] *Supreme Ct.*, 1808, *Smith v. Elder*, 3 *Johns.*, 105.

224. A foreign corporation, by appearing and pleading in chief, concedes the court's jurisdiction of it. *Supreme Ct.*, 1845, *Cooke v. Champlain Transportation Co.*, 1 *Den.*, 91.

225. Equitable matters. A plea which seeks to draw partnership accounts into a court of law, for investigation and settlement, is bad upon demurrer. *N. Y. Superior Ct.*, 1828, *Rogers v. Rogers*, 1 *Hall*, 391; *Id.*, 394.

2. Pleas in Abatement.

226. Misnomer of defendant must be pleaded in abatement. *Supreme Ct.*, 1825, *Mann v. Carley*, 4 *Cow.*, 148; *Rule of 1825, Id.*, 157.

Even in case of a corporation. [1 *Ohitt. Pl.*, 440; 1 *Boa. & P.*, 40; 3 *Anstr.*, 985; *Com. Dig., Abat.* (3 E.); 5 *Mass.*, 97.] *Supreme Ct.*, 1824, *Bank of Utica v. Smalley*,* 2

Cow., 770; 1845, *Methodist Episcopal Church v. Tryon*, 1 *Den.*, 451.

227. A plea of misnomer commencing, "And the said A.," admits defendant to be the person sued, and is bad on special demurrer. *Supreme Ct.*, 1845, *Hyde v. Watson*, 1 *Den.*, 670.

228. A mistake in the Christian name of a plaintiff can be taken advantage of only by plea in abatement. [1 *Ohitt. Pl.*, 460; 2 *Brod. & Bing.*, 84.] *N. Y. Superior Ct.*, 1829, *Collman v. Collins*, 2 *Hall*, 569.

229. Alias. A defendant cannot plead in abatement because an *alias dictus* is subjoined to his name, where the true name is that which precedes it. *Supreme Ct.*, 1809, *Reid v. Lord*, 4 *Johns.*, 118.

230. If the plaintiff is a fictitious person, it may be pleaded in abatement. *Supreme Ct.*, 1822, *Doe v. Penfield*, 19 *Johns.*, 308.

231. Infancy of the plaintiff must be pleaded in abatement to be available. [1 *Ohitt. Pl.*, 436.] *Supreme Ct.*, 1811, *Schemerhorn v. Jenkins*, 7 *Johns.*, 373.

232. Pendency of another suit cannot be pleaded in abatement, unless both were commenced at the same time. *Supreme Ct.*, 1829, *Haight v. Holley*, 3 *Wend.*, 258.

233. The pendency of a suit in the circuit court of the United States, of another circuit or State, is not pleadable in abatement. *Supreme Ct.*, 1815, *Walsh v. Durkin*, 12 *Johns.*, 99.

234. The non-joinder of members of a corporation, in an action to which they are made individually liable by their charter, must be pleaded in abatement. *Supreme Ct.*, 1829, *Allen v. Sewall*,* 2 *Wend.*, 327.

So held, of pleading in justice's court. 1823, *Palmer v. Evertson*, 2 *Cow.*, 417.

235. — of defendant on contract. The fact that other persons jointly responsible, have not been made defendants, must be pleaded in abatement; and cannot be taken advantage of on the trial. [5 *Burr.*, 2617; 2 *Bl.*, 947.] The rule applies to all joint contracts, as well as to those arising particularly from mercantile partnerships. *Supreme Ct.*, 1801, *Ziele v. Campbell*, 2 *Johns. Cas.*, 382; 1827, *Williams v. Allen*, 7 *Cow.*, 316; *S. P.*, 1821, *Robertson v. Smith*,† 18 *Johns.*, 459.

* Reversed on the merits, *Ct. of Errors*, 1830, 3 *Wend.*, 335.

† See this case in table of CASES CRITICIZED, Vol. I., *Ante*.

* Affirmed on other points, *sub nom.* *Bank of Utica v. Wagar*, 3 *Cow.*, 336.

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To the same effect, 1828, *Le Page v. McCrea*, 1 *Wend.*, 164; but compare *Gay v. Cary*, 9 *Cow.*, 44.

236. A plea of non-joinder of a dormant partner of defendant is not sustained without proof that the plaintiffs knew that he was a partner at the time of the contract. *Supreme Ct.*, 1888, *N. Y. Dry Dock Co. v. Treadwell*, 19 *Wend.*, 525; *S. P.*, 1845, *Peck v. Cowing*, 1 *Den.*, 222.

237. If a firm and an individual give a joint and several note, the members of the firm are considered as one maker; and non-joinder of the individual cannot be pleaded in abatement of a suit against them. *Supreme Ct.*, 1828, *Van Tine v. Crane*, 1 *Wend.*, 524.

238. — of plaintiffs. The rule that where one of several administrators or executors sues alone, the non-joinder can be taken advantage of only by plea in abatement, does not apply where the plaintiff sues not in his representative capacity, but as bearer of a note. *Supreme Ct.*, 1886, *Packer v. Wilson*, 15 *Wend.*, 843.

239. Landlord's action for injury by third person. Where mills were worked on shares for a time, and then for another period by the same occupant on a lease, and the owner sued a third party for damages for interfering with the supply of water during both periods, claiming merely as possessor;—*Held*, that non-joinder of the occupant not having been pleaded in abatement, the owner was entitled to recover for the first period; but he could not recover for the second period under his declaration, he not being then in possession. *Supreme Ct.*, 1828, *Rich v. Penfield*, 1 *Wend.*, 880.

240. In the former case title need not be averred; lawful occupation is sufficient. But to sue as reversioner, that character must be set forth, and also the tenancy. *Id.*

241. Names must be given. A plea in abatement, of non-joinder of defendants, must give the names truly, so that the plaintiff may have a good writ or declaration the second time. If it appear on the trial that another not named by the plea was also a joint-contractor, the proof fails, and there must be a verdict for the plaintiff. [3 *Chitt. Pl.*, 899, n. (F.); 2 *Bl.*, 951; 2 *Marsh*, 302; 1 *Keny.*, 366.] *Supreme Ct.*, 1840, *Mechanics & Farmers' Bank v. Dakin*, 24 *Wend.*, 411; 1842, *Hawks v. Munger*, 2 *Hill*, 200.

242. A variance between the writ and

declaration cannot be pleaded in abatement. *Supreme Ct.*, 1884, *Oronly v. Brown*, 12 *Wend.*, 271.

243. Matter relating to one defendant. A plea in abatement of the whole suit, for a cause personal to one of the defendants only, is bad. *Supreme Ct.*, 1839, *Shannon v. Comstock*, 21 *Wend.*, 457. *N. Y. Superior Ct.*, 1828, *De Forest v. Jewett*, 1 *Hall*, 187.

244. Great strictness is required in pleas in abatement. They cannot be helped by indentment. *Supreme Ct.*, 1885, *Haywood v. Chestney*, 18 *Wend.*, 495; 1888, *Shaw v. Dutcher*, 19 *Id.*, 216; 1841, *Burgess v. Abbott*, 1 *Hill*, 476; *S. P.*, 1848, *Harkness v. Harkness*, 5 *Id.*, 218.

245. Leave to amend a plea in abatement should not be granted. *Supreme Ct.*, 1830, *Trinder v. Durant*, 5 *Wend.*, 72.

3. Pleas in Bar.

246. Matter in abatement, pleaded in bar, is bad on general demurrer. *Supreme Ct.*, 1849, *Stone v. Miller*, 7 *Barb.*, 368.

247. That the action is improper in form, cannot be pleaded in bar. *Supreme Ct.*, 1848, *Seneca Road Co. v. Auburn & Rochester R. R. Co.*, 5 *Hill*, 170.

248. A defence arising subsequent to the declaration must be pleaded in bar of the farther continuance of the suit, and not in bar of the action generally. Such a defence, therefore, cannot be given in evidence under the general issue, but must be specially pleaded. [4 *East*, 502; 4 *Barn. & Cr.*, 90.] And if the defence has arisen subsequent to the time when the defendant has pleaded generally to the action, he should set up the defence by a plea *puis darrein continuance*. *Ct. of Errors*, 1845, *Boyd v. Weeks*, 2 *Den.*, 321. To similar effect, *Supreme Ct.*, 1823, *Covell v. Weston*, 20 *Johns.*, 414; 1834, *Towns v. Wilcox*,* 12 *Wend.*, 503; 1848, *Kunzler v. Kohaus*, 5 *Hill*, 317. Compare *Wells v. Lain*, 15 *Wend.*, 99.

249. A submission to arbitration is merely a discontinuance, and cannot be pleaded in bar. *Supreme Ct.*, 1842, *Smith v. Barse*, 2 *Hill*, 387; explaining *Towns v. Wilcox*, 12 *Wend.*, 503, and *Green v. Patchen*, 13 *Id.*, 293. Compare *Wells v. Lain*, 15 *Id.*, 99.

* But see *Smith v. Barse* (2 *Hill*, 387), where it was said that this case decided nothing more than that the plea showed an arbitration which was a discontinuance.

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But it may be pleaded in abatement, *puis darrein continuance*. 1849, Resseque v. Brownson, 4 Barb., 541.

250. Non damnificatus is good only where the condition is to indemnify. [1 Saund., 157, n. 1; Oro. Jac., 868, 684; 2 Wils., 126; 2 Co., 4; 5 Johns., 42; 20 Id., 153.] *Supreme Ct.*, 1824, McClure v. Erwin, 8 Cow., 818; S. P., 1817, Douglass v. Clark, 14 Johns., 177.

Thus it is not a good plea to an action on a bond for the liberties. 1809, Woods v. Rowan, 5 Johns., 42.

251. It is not good where the action is sustainable without showing that plaintiff has been made liable to third persons. *Supreme Ct.*, 1822, Andrus v. Waring, 20 Johns., 153. *Ct. of Errors*, 1820, Jackson v. Port, 17 Id., 479; affirming S. C., Id., 269.

252. Nul tiel record. In assumpsit against a corporation for damages assessed for land taken for a street, a plea of *nul tiel record* forms an immaterial issue; and as it concludes to the court, a replader should be awarded. *Supreme Ct.*, 1810, Stafford v. Mayor, &c., of Albany, 6 Johns., 1.

253. Nul tiel record is not a good plea in an action on a judgment of the N. Y. Marine Court. *N. Y. Com. Pl.*, 1846, Fisher v. Bylandth, 4 N. Y. Leg. Obs., 384.

254. Non infregit conventionem is bad on demurrer, but cured by a verdict. It puts in issue every thing necessary to charge the defendant to perform, including the delivery of the covenant. *Supreme Ct.*, 1827, Roosevelt v. Fulton, 7 Cow., 71.

255. Nil debet, in debt on a record or specialty, is not a good plea, except where the record or specialty is merely matter of inducement. [1 Saund., 89, n. 8; 2 Ld. Raym., 15; 2 Str., 778; 8 Mod., 107, n.] *Supreme Ct.*, 1811, Bullis v. Giddens, 8 Johns., 82; 1814, Minton v. Woodworth, 11 Id., 474. *Ct. of Errors*, 1830, Clark v. Niblo, 6 Wend., 286; affirming S. C., 8 Id., 24. *Supreme Ct.*, 1840, Wheaton v. Fellows, 23 Wend., 875; 1848, Sackett v. Andross, 5 Hill, 327; S. C., 3 N. Y. Leg. Obs., 11. *N. Y. Superior Ct.*, 1848, Hart v. Brady, 1 Sandf., 626; and compare Blydenburgh v. Carpenter, Hill & D. Supp., 169; and People v. Jenkins, 4 N. Y. Leg. Obs., 423. See, also, Jansen v. Ostrander, 1 Cow., 670; Andrews v. Montgomery, 19 Johns., 162.

256. Nil debet in debt for rent on an indenture, is an exception. The application of the

rule in various cases, stated. *Supreme Ct.*, 1842, Gates v. Wheeler, 2 Hill, 282.

257. Nil debet is not a good plea to a declaration in debt, on a money bond under seal, stating no condition. But it is otherwise, where the condition of the bond is to indemnify, &c., and is set forth; for here the bond is not the foundation, but only matter of inducement. *N. Y. Com. Pl.* (1844?), Jenkins v. Stephens, 8 N. Y. Leg. Obs., 87.

258. The provision of 2 Rev. Stat., 352, § 10, —authorizing notice of matter intended to be proved on the trial to be given with the plea in certain cases, does not allow *nil debet* to be interposed in cases where theretofore it had not been permitted. *Supreme Ct.*, 1838, White v. Converse, 20 Wend., 266. Followed, 1840, Wheaton v. Fellows, 23 Id., 875. *N. Y. Com. Pl.* (1844?), Jenkins v. Stephens, 8 N. Y. Leg. Obs., 87.

259. But going to trial admits the validity of *nil debet* as a general issue. *Supreme Ct.*, 1806, Meyer v. McLean, 1 Johns., 509; 1807, The same v. The same, 2 Id., 183; 1811, Bullis v. Giddens, 8 Id., 82.

260. Non est factum, in covenant or debt on a specialty, admits every thing material averred in the declaration except the execution of the deed. *Ct. of Errors*, 1827, Dale v. Roosevelt, 9 Cow., 307. *Supreme Ct.*, 1817, Kane v. Sanger, 14 Johns., 89; 1825, Thomas v. Woods, 4 Cow., 178; 1827, Roosevelt v. Fulton, 7 Id., 71; 1838, Cooper v. Watson, 10 Wend., 202; 1849, People v. Rowland, 5 Barb., 449; N. P., 1818, Denton v. Boars, Anth. N. P., 241. *N. Y. Superior Ct.*, 1829, Higgins v. Solomon, 2 Hall, 432. To similar effect, *Supreme Ct.*, 1813, Gardner v. Gardner, 10 Johns., 47; 1834, People v. Haddock, 12 Wend., 475. *Ct. of Appeals*, 1851, Haggart v. Morgan, 5 N. Y. (1 Seld.), 422; affirming S. C., 4 Sandf., 198.

261. Even a notice of special matter, or a stipulation to allow such matter in evidence, will not enlarge the operation of this plea. *Supreme Ct.*, 1837, Norman v. Wells, 17 Wend., 186. To the same effect, 1842, Goulding v. Hewitt, 2 Hill, 644; and see Kane v. Sanger, 14 Johns., 89; Dale v. Roosevelt, 9 Cow., 307.

262. Under the plea of *non est factum*, in action of covenant, a mutual abandonment of the contract, or non-performance by the plaintiff, is not available. *Ct. of Appeals*, 1852, Laraway v. Perkins, 10 N. Y. (6 Seld.), 371.

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263. *Totum tempus prout, &c.*, is a proper plea in an action of dower. *Supreme Ct.*, 1807, *Humphrey v. Phinney*, 2 *Johns.*, 494.

264. *Non infregit conventionem*, in an action of covenant, is bad. *N. Y. Com. Pl.*, 1846, *Davis v. Olajton*, 5 *N. Y. Leg. Obs.*, 100.

265. *Nulliter manus impositus* is no answer to a charge of beating, wounding, and knocking down. *Supreme Ct.*, 1828, *Gates v. Lounsbury*, 20 *Johns.*, 427.

266. A plea of tender before suit, must be in bar of damages only, and with a proferit *in curia*. *Supreme Ct.*, 1834, *Ayres v. Pease*, 12 *Wend.*, 398.

267. A plea of tender may be disregarded if not accompanied with notice that the money is paid into court. [Tidd's Pr., 566; 1 Arch. Pr., 137; 2 Id., 101; 1 Burr. Pr., 407.] But the omission to pay in the money is but an irregularity, which the plaintiff waives by accepting a plea and taking issue upon it. *Supreme Ct.*, 1842, *Sheridan v. Smith*, 2 *Hill*, 588.

268. Since in case of a tender before suit the defendant must plead tender and refusal, with an *uncore prout*, and must bring the money into court, his bringing it in is not a waiver of his tender. *Supreme Ct.*, 1850, *Wilder v. Seelye*, 8 *Barb.*, 408.

4. Plea Puis Darrein Continuance.

269. What is to be so pleaded. Facts arising after issue can only be pleaded *puis*. [5 *Hill*, 398; 2 *Den.*, 321.] *N. Y. Superior Ct.*, 1848, *Hart v. Meeker*, 1 *Sandf.*, 628.

270. An executor or administrator, after plea of the general issue and *plene administravit prout*, may plead *puis* a confession of judgment to another creditor. [5 *Taunt.*, 338, 665.] *Supreme Ct.*, 1829, *Lawrence v. Bush*, 8 *Wend.*, 305.

271. A release from the defendant to the plaintiff in replevin, cannot be pleaded *puis* to the sheriff's action on the replevin bond. *Supreme Ct.*, 1834, *Armstrong v. Burrell*, 12 *Wend.*, 802.

272. The indorser, in a suit against himself alone, cannot plead payment by the maker *puis*. *Supreme Ct.*, 1838, *Commercial Bank v. Love*, 19 *Wend.*, 98.

273. Judgment and satisfaction in one action may be pleaded *puis* in another action for the same tort. *Supreme Ct.*, 1810, *Thomas v.*

Rumsey, 6 *Johns.*, 26; and see *Bowne v. Joy*, 9 *Id.*, 221.

274. That on an appeal defendant may plead matter arising since the last continuance. The plaintiff may not interpose a plea in bar of the defence. *Supreme Ct.*, 1837, *Schenck v. Lincoln*, 17 *Wend.*, 506.

275. After verdict, or report of referees, or *relitum* and *cognovit*, matter which abates the writ cannot be so pleaded. [1 *Com. Dig.*, 102; *Abat.*, 1, 34; *Oro. Car.*, 282.] *Supreme Ct.*, 1815, *Alexander v. Fink*, 12 *Johns.*, 218; 1823, *Palmer v. Hutchins*, 1 *Cow.*, 42.

276. A plea *puis* is of right, and the judge at *nisi prius* is bound to admit it if verified [2 *Wils.*, 188]; and this even after the jury are called. *Supreme Ct.*, 1805, *Broome v. Beardsley*, 8 *Cai.*, 172; *S. C.*, *Col. & C. Cas.*, 498.

277. It need not be verified unless tendered at the circuit. *Supreme Ct.*, 1812, *Banker v. Ash*, 9 *Johns.*, 250.

Nor then, if the judge is satisfied of its truth. 1828, *La Farge v. Carrier*, 1 *Wend.*, 89. Compare *West v. Stanley*, 1 *Hill*, 69.

278. It is in the discretion of the court whether it will be received, if a term has intervened since the happening of the matter of it. *Supreme Ct.*, 1812, *Morgan v. Dyer*, 9 *Johns.*, 255; and 10 *Id.*, 161; 1828, *Ludlow v. McOrea*, 1 *Wend.*, 228; and see *Merchants' Bank v. Moore*, 2 *Johns.*, 294; *Tuffs v. Gibbons*, 19 *Wend.*, 689.

279. The defendant allowed to plead his discharge *puis* after a lapse of more than one continuance, on payment of costs. *Shawe v. Wilmersden*, 2 *Cai.*, 380; *S. C.*, *Col. & C. Cas.*, 424.

280. Matter arising intermediate the term and the circuit should be pleaded at the circuit. *Supreme Ct.*, 1829, *Field v. Goodman*, 8 *Wend.*, 810.

281. A plea *puis* should be pleaded on the first day of the term next after the matter of it arose, unless there was a circuit in the mean time. When it comes in due time, it is a matter of right, and cannot be rejected. If not pleaded in time, the plaintiff, or, at circuit, the judge, may refuse to receive it. *Supreme Ct.*, 1846, *Sandford v. Sinclair*, 8 *Den.*, 269.

282. Service. Where it is filed in term time, a copy must be served; but not where the matter of the plea arises in vacation, so that it can only be offered at circuit to prevent

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a trial. *Supreme Ct.*, 1816, Barhydt v. Clow, 18 *Johns.*, 157.

283. Right to plead a discharge *puis*, waived by delay, under peculiar circumstances. *Sandford v. Sinclair*, 8 *Den.*, 269.

284. A plea *puis* waives all former pleas. [6 *Bac. Abr.*, 479; *Cro. Eliz.*, 49; 1 *Ld. Raym.*, 698; *Bull. N. P.*, 309; 1 *Salk.*, 178; 2 *Wend.*, 800.] *Supreme Ct.*, 1838, Kimball v. Huntington, 10 *Wend.*, 675; 1835, Culver v. Barney, 14 *Id.*, 161; (1846?), Dauchy v. Van Alstyne, 8 *How. Pr.*, 100.

So held, of a plea setting up a partial payment pending suit. *N. Y. Com. Pl.*, 1843, Lambert v. Hyatt, 2 *N. Y. Leg. Obs.*, 288.

285. Otherwise, if it merely affects the remedy,—e. g., a discharge exempting the body from imprisonment. *Supreme Ct.*, 1829, Rayner v. Dyett, 2 *Wend.*, 800; 1835, Culver v. Barney, 14 *Id.*, 161.

286. A plea *puis* of a matter in abatement, is not a waiver of the preceding pleas to the merits. *Supreme Ct.*, *N. P.*, 1810, Wood v. White, *Anth. N. P.*, 806.

287. A plea *puis* which goes to a part only of the claim, or to one count only, is a waiver of prior pleas only *pro tanto*. *Supreme Ct.*, 1839, Morris v. Cook, 19 *Wend.*, 699.

5. Double Pleas.

288. Useless plea. Where of two pleas, every matter of defence that can be admitted under the first, may be given in evidence under the second, the first is useless, and should be struck out on motion. Where the defence is complicated, and the propriety of the pleas demands a close investigation, the court will not interfere. *Supreme Ct.*, 1799, Thayer v. Rogers, 1 *Johns. Cas.*, 152.

289. What pleas may be joined. When there are several pleas, *nul tiel* record can never be one of them. The statute allowing several pleas does not apply to a defence which the party may reduce to absolute certainty. *Supreme Ct.*, 1795, Carnes v. Duncan, *Col. & C. Cas.*, 41.

290. In an action of debt, on a judgment obtained in another State, defendant was ordered to elect between his pleas of *nul tiel* record and *nil debet*. *Le Conte v. Pendleton*, 1 *Johns. Cas.*, 104; *S. O., Col. & C. Cas.*, 76.

291. *Nul tiel* record, no judgment, and no *ca. sa.*, not incompatible in an action on re-

cognizance against bail. *Supreme Ct.*, 1829, Shiland v. Corey, 2 *Wend.*, 246.

292. Pleas of an insolvent discharge and *nul tiel* record, cannot be joined, but the objection cannot be taken on general demurrer. *N. Y. Superior Ct.*, 1829, Delavan v. Stanton, 2 *Hall*, 190.

293. In replevin, plaintiff may plead both *non cepit*, and property in himself or a stranger. *Supreme Ct.*, 1814, Shuter v. Page, 11 *Johns.*, 196.

294. In a cause removed from a justice's court on a plea of title, the defendant cannot put in the general issue with his plea of title. *Supreme Ct.*, 1804, Strong v. Smith, 2 *Cal.*, 28; *S. O., Col. & C. Cas.*, 840.

295. Defendant in replevin cannot, by giving his justification the form of a plea instead of an avowry, deprive the plaintiff of his right to put in several pleas thereto. *Supreme Ct.*, 1839, McPherson v. Melhinch, 20 *Wend.*, 671.

296. Signature. Special or double pleas must be signed, by counsel, as such. *Supreme Ct.*, 1809, Dubois v. Phillips, 5 *Johns.*, 235; 1811, Satterlee v. Satterlee, 8 *Id.*, 327. *N. Y. Superior Ct.*, 1829, Barrow v. Sabbaton, 2 *Hall*, 348.

297. Pleas *administravit* alone, need not be. *Supreme Ct.*, 1811, Satterlee v. Satterlee, 8 *Johns.*, 327.

298. Counsel's indorsement sufficient. *Manhattan Co. v. Miller*, 2 *Cal.*, 60; *S. O., Col. & C. Cas.*, 845.

299. Election. After the plaintiff has demurred, he cannot move to compel the defendant to elect between his pleas. *Supreme Ct.*, 1800, Doyle v. Moulton, 1 *Johns. Cas.*, 246; *S. O., Col. & C. Cas.*, 91.

6. The Conclusion.

300. Averment. A plea introducing new matter, must conclude with an averment. [Dong., 60; 2 *T. R.*, 576.] *Supreme Ct.*, 1806, Service v. Heermance, 1 *Johns.*, 91; 1815, Coan v. Whitmore, 12 *Id.*, 358.

301. To the country. A plea of *nul tiel* record to a judgment recovered in the Circuit Court of the United States, since that court is to be regarded as a court of another government, must conclude to the country. *Supreme Ct.*, 1820, Baldwin v. Hale, 17 *Johns.*, 272.

302. Where a plea contains matter of fact and matter of record, it may conclude to the

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country. [5 Johns., 114.] *Supreme Ct.*, 1810, Thomas v. Rumsey, 6 Johns., 26; 1827, Allen v. Crofoot, 7 Cow., 46.

303. At the close of a plea concluding to the country, the addition of "&c." is a sufficient *similiter*. *Supreme Ct.*, 1828, Everitt v. De Groff, 1 Cow., 218.

304. In abatement or bar. A plea of alien enemy may conclude in abatement, or in bar; though the former may be more proper, as the disability is temporary. *Supreme Ct.*, 1818, Bell v. Chapman, 10 Johns., 188; and see Jackson v. Decker, 11 Id., 418.

305. The prayer of a plea of revocation, in answer to a declaration setting forth a bond and award, may be in bar of the action. *Supreme Ct.*, 1828, Frets v. Frets, 1 Cow., 885.

306. A plea which concludes in bar, though it begins in abatement, is to be taken as a plea in bar. [1 Id. Raym., 598.] *Supreme Ct.*, 1818, Schoonmaker v. Elmendorf, 10 Johns., 49; and see Jenkins v. Pepoon, 2 Johns. Cas., 812.

7. Verifications.

307. In an action for escape, if a plea of a voluntary return is not verified by affidavit, as required by 1 Rev. L., 426, plaintiff, if he accepts the plea, without affidavit, cannot make the objection at the trial. He should treat the plea as a nullity, or move the court to set it aside. *Ct. of Errors*, 1819, Richmond v. Tallmadge, 16 Johns., 807.

308. A plea or notice of a voluntary return, is within the equity of 1 Rev. L. of 1813, 426,—which requires that on a plea or notice of retaking on fresh suit, defendant shall file an affidavit that the escape was without his knowledge, privity, &c. *Supreme Ct.*, 1827, Gould v. Bruce, 6 Cow., 601.

309. A plea of privilege by an attorney need not be verified, and may be put in after special bail filed. Its concluding to the jurisdiction of the court does not make it a nullity. *Supreme Ct.*, 1800, Brooks v. Patterson, 1 Johns. Cas., 328.

310. Abatement. An unverified plea in abatement may be treated as a nullity. *Supreme Ct.*, 1805, Robinson v. Fisher, 8 Cal., 99; S. C., *Col. & C. Cas.*, 452; and see Marton v. Lawrence, 1 Johns. Cas., 397; Richmond v. Tallmadge, 16 Johns., 807; Kingsland v. Cowman, 5 Hill, 608.

311. Plea of usury. Under the act of 1837,

—allowing a defendant who verifies the truth of his plea of usury to examine the plaintiff,—the affidavit must be that it is true in substance and matter of fact, not merely that he verily believes it to be true. *So held*, where there were two defendants, and the facts of the defence were peculiarly within the knowledge of one, but the affidavit was made by the other alone. *Supreme Ct.*, 1843, Kingsland v. Cowman, 5 Hill, 608.

312. A defective affidavit served with the plea or notice, cannot be aided by one made at the trial. *Id.*

313. Plea to action on written instrument or record. The rule of 1840—requiring an affidavit of merits to accompany a plea in bar, in actions upon contracts of any written instrument or record—does not apply where the action is even partly on a parol agreement,—*e. g.*, an action on an award founded upon an oral submission. *Supreme Ct.*, 1841, Oalder v. Lansing, 1 Hill, 212.

314. A justice's judgment is not a written instrument or record, within this rule. *Supreme Ct.*, 1843, Merrill v. Williams, 6 Hill, 263.

315. The rule applies where a bill of particulars, served before plea, states that a note is the only cause of action. *Supreme Ct.*, 1841, Comstock v. Merritt, 1 Hill, 869.

316. It does not apply, unless the declaration or bill of particulars shows that the instrument is the only cause of action. *Supreme Ct.*, 1840, Garrett v. Teller, 22 Wend., 643; 1841, Carr v. Richardson, 1 Hill, 372.

317. Where a plea consists of two branches, the chief of which concludes with a verification, an affidavit of its truth, without adding a general affidavit of merits, is enough. *Supreme Ct.*, 1843, Lewis v. Watkins, 6 Hill, 280.

318. The original affidavit accompanying the plea must be served. A copy is not enough. *Supreme Ct.*, 1845, McCartney v. Betts, 1 How. Pr., 78. To the same effect is Robinson v. Sinclair, *Id.*, 106.

IV. WHAT TO BE PROVED UNDER THE GENERAL ISSUE, AND WHAT TO BE SPECIALLY PLEADED.

319. In *assumpsit*. Any matter which shows that the plaintiff never had a cause of action, may be proved under the general issue; and most matters in discharge of the action,

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which show that at the commencement of the suit there was no subsisting cause of action, may be taken advantage of under this issue. [1 Chitt. Pl., 472.] *Supreme Ct.*, 1816, Wilt v. Ogden, 18 *Johns.*, 56; 1827, Edson v. Weston, 7 *Cow.*, 278; 1831, Brown v. Littlefield,* 7 *Wend.*, 454; 1834, Wheeler v. Curtis, 11 *Id.*, 654; 1841, Sisson v. Willard, 25 *Id.*, 373.

320. The defendant, under the general issue in assumpsit, may prove that the cause of action had passed to statutory assignees of the plaintiff, and payment to them. *Supreme Ct.*, 1834, Clark v. Yale, 12 *Wend.*, 470; 1836, Hubbell v. Ames, 15 *Id.*, 372.

321. A total failure of the consideration of a note, may be proved under the general issue, but to show a partial failure notice must be given. *Supreme Ct.*, 1834, People v. Niagara O. P., 12 *Wend.*, 246; 1835, Payne v. Cutler, 18 *Id.*, 605. S. P., 2 *N. Y.*, 157.

322. In an action by the indorsee against the maker of a promissory note, evidence that the note had been artfully obtained by the debtor of the maker, under the pretence of raising money for him, who never returned the note or produced the money, is admissible under the general issue, and throws the burden on the plaintiff to show his title thereto. [Gr. Pr., 232.] *N. Y. Com. Pl.*, 1848, Many v. Disbrow, 2 *N. Y. Leg. Obs.*, 88.

323. Alien enemy. The fact that plaintiff's lessor, in ejectment was an alien enemy, since it may be pleaded in bar, may be given in evidence under the general issue, if it existed at the commencement of the action. *Supreme Ct.*, 1814, Jackson v. Decker, 11 *Johns.*, 418.

324. If it arose by the breaking out of the war, pending the action, it must be pleaded *quis darrien continuance*. *Supreme Ct.*, 1814, Jackson v. McConnell, 11 *Johns.*, 424.

325. Incorporation of plaintiffs. *Nul tiel* corporation is not to be allowed to be pleaded to an action in a corporate name. Any matter of defence, which denies what the plaintiff, on the general issue, would be bound to prove, may and ought to be given in evidence, under the general issue; and a plea setting up, negatively, such facts, is bad on special demurrer. [10 *Johns.*, 291.] *Supreme Ct.*, 1822, Bank of Auburn v. Weed, 19 *Johns.*, 300; overruling

a previous decision in S. C., *sub nom.* Bank of Auburn v. Aikin, 18 *Id.*, 137. Followed, 1833, Hartford Bank v. Murrell, 1 *Wend.*, 87; 1832, Welland Canal Co. v. Hathaway, 8 *Id.*, 480; S. P., 1823, Wood v. Jefferson County Bank, 9 *Cow.*, 194.

This rule applies to foreign corporations. *N. Y. Superior Ct.*, 1829, Farmers & Mechanics' Bank v. Rayner, 2 *Hall*, 195.

326. Under 2 Rev. Stat., 458, § 8, to a suit by a corporation a plea in bar that the plaintiffs were not at the commencement of the suit, and are not now, a body politic and corporate, and have no right as such to commence or prosecute said suit, is not merely equivalent to the general issue, but it goes much further. It requires the plaintiffs to prove what the general issue now virtually concedes—that is, the corporate existence of the plaintiffs; and is, therefore, upon the principles of sound pleading, a good plea in bar. [A. & Ames on Corp., 502.] *Supreme Ct.*, 1845, Methodist Episcopal Church v. Tryon, 1 *Den.*, 451.

327. In suits or proceedings by or against any corporation, a mistake in the naming of such corporation is waived if not pleaded in abatement. 2 *Rev. Stat.*, 459, § 14.

328. Plaintiff's negligence. In assumpsit by an attorney for his fees, the negligence of the plaintiff in conducting the suit is not admissible under the general issue, but if available at all, must be pleaded, or notice of it given. It would be unreasonably harsh to try such a question without apprising the defendant of it.* *Supreme Ct.*, 1814, Runyan v. Nichols, 11 *Johns.*, 547.

329. A former recovery may be proved under the general issue in assumpsit. Any bar arising by the act or assent of the plaintiff, may be so given in evidence. *Supreme Ct.*, 1842, Young v. Rummell, 2 *Hill*, 478. *Ct. of Errors*, 1843, Miller v. Manice, 6 *Id.*, 114. Followed, *Supreme Ct.*, 1848, Niles v. Totman, 8 *Barb.*, 594; overruling Fowler v. Hait, 10 *Johns.*, 111; and dicta in Dexter v. Hazen, *Id.*, 246; and Brown v. Wilde, 12 *Id.*, 455. Compare Miller v. Manice, 6 *Hill*, 114.

* But see Sill v. Rood (15 *Johns.*, 230), where it was said that this case turned on the fact that the defence went only to reduce the damages; and Gleason v. Clark (9 *Cow.*, 57), where it is said that if the defence goes to destroy the plaintiff's claim entirely, it is admissible under the general issue.

* Affirmed, *Ct. of Errors*, 1833, 11 *Wend.*, 467, but only a dissenting opinion is reported.

What to be proved under the General Issue, and what to be Specially Plead.

The contrary held in trespass. [Citing 14 Johns., 511; 10 Id., 111, 246; 12 Id., 455; 1 Chitt. Pl., 472, 475, 496; 8 Burr., 1353.] *Supreme Ct.*, 1827, *Coles v. Carter*, 6 Cow., 691.

330. Misjoinder. In assumption, the joinder of persons as defendants who did not unite in the promise,—*e. g.*, the joinder of a deceased copartner of defendants,—may be taken advantage of under the general issue. A plea in abatement is unnecessary. *Supreme Ct.*, 1807, *Tom v. Goodrich*, 2 Johns., 218.

331. A set-off cannot, under our statute, be pleaded, but must be taken advantage of under the general issue, by way of notice. *Supreme Ct.*, 1818, *Alsop v. Caines*, 10 Johns., 296; 1826, *Williams v. Orary*, 5 Cow., 368. *Ct. of Errors*, 1827, *Raymond v. Wheeler*, 9 Id., 295; affirming S. C., 5 Id., 281. S. P., *Supreme Ct.*, 1822, *Bank of Auburn v. Weed*, 19 Johns., 800; and see *Caines v. Brisbane*, 18 Id., 9.

332. The notice need not claim a balance in terms. *Ct. of Errors*, 1825, *People v. Judges of Onondaga C. P.*, 4 Cow., 21.

333. Recoupment is in the nature of cross-action, and should not be pleaded in bar. *Ct. of Appeals*, 1849, *Nichols v. Dusenbury*, 2 N. Y. (2 Comst.), 288. S. P., *Supreme Ct.*, 1849, *McOnkough v. Cox*, 6 Barb., 826.

334. A direct payment of the demand may be proved under the general issue. *Supreme Ct.*, 1814, *Drake v. Drake*, 11 Johns., 531.

335. The promissory note of the debtor, though negotiable, is not an extinguishment of the debt, and should not be pleaded specially, but be proved under the general issue. [1 Johns., 84; 8 Id., 149; 10 Id., 105; 15 Id., 247.] *Supreme Ct.*, 1827, *Hughes v. Wheeler*, 8 Cow., 77.

336. Under the plea of no award, a demand and refusal of the award by the arbitrators cannot be given in evidence; it must be specially pleaded. [8 Mod., 381; 6 Id., 176; 1 Lutw., 524.] *Supreme Ct.*, 1818, *Perkins v. Wing*, 10 Johns., 143.

337. If a debtor discharged from imprisonment, under the act of 1813, is sued upon the original judgment, he must plead his exemption, or he waives it. *Supreme Ct.*, 1818, *Cable v. Cooper*, 15 Johns., 152.

338. A discharge pleaded, though materially misdescribed, may be given in evidence under the general issue. *Supreme Ct.*, 1829, *Bradley v. Field*, 8 Wend., 272.

339. In an action on the case, plaintiff is bound, under the general issue, to prove the whole charge in the declaration. [1 Chitt., 486.] *Supreme Ct.*, 1817, *Green v. Ferguson*, 14 Johns., 389.

340. Excuse for breach of covenant. To entitle defendant to prove, in defence of an action for breach of covenant to buy land, that plaintiff had parted with his title, and was unable to fulfil, he should plead or give notice of such defence. *Supreme Ct.*, 1848, *Van Rensselaer v. Miller*, *Hill & D. Supp.*, 287.

341. Justification in trespass to lands. In trespass to lands, possession by defendant may be proved under the plea of not guilty; but when the act appears to be, *prima facie*, a trespass, any matter of justification, by virtue of any authority or easement, must be pleaded, or notice given of it. [Co. Litt., 288, a; 1 Chitt. Pl., 492; 2 Saund., 403, n.; 11 Johns., 182; 7 Mass., 887.] *Supreme Ct.*, 1828, *Babcock v. Lamb*, 1 Cow., 288; 1836, *Saunders v. Wilson*, 15 Wend., 388.

342. Where defendant, in trespass for entering plaintiff's dwelling, sets up that he came to demand a debt due him, this amounts to a claim of license, which must be specially pleaded. *Supreme Ct.*, 1827, *Van Buskirk v. Irving*, 7 Cow., 35.

343. Joinder. When several trespassers, sued together, all join in one plea of not guilty, their fates cannot be separated, and a separate justification of one is gone. *Supreme Ct.*, 1804, *Schermerhorn v. Tripp*, 2 Cai., 106; S. C., *Col. & C. Cas.*, 371; S. P., in the case of defendants jointly liable on a bond, *Andrus v. Waring*, 20 Johns., 153.

So held, where an officer and another attempted to justify under the general issue authorized by the statute for more easy pleading in suits against officers. (1 Rev. L., 155.) 1827, *Bradley v. Powers*, 7 Cow., 380.

344. This rule is not confined to a technical plea of justification, but extends to the plea of not guilty, which, under the provisions of our statute, is equivalent to a plea of justification. [2 Cai., 106; 2 Cow., 426; 7 Id., 380.] *Supreme Ct.*, 1830, *Merrill v. Near*, 5 Wend., 287.

345. Where several join in a plea of the general issue in trespass, one who is not proved guilty must be acquitted, though the others be proved guilty. *Supreme Ct.*, 1817, *Drake v. Barrymore*, 14 Johns., 166; 1828, *Gold v. Bisel*, 1 Wend., 210.

What to be proved under the General Issue, and what to be Specially Plead.

346. In trespass to persons, a justification under civil process, meane or final, must be pleaded specially by the party in whose favor it is issued. Such a justification does not sustain the plea of not guilty. *Ot. of Appeals*, 1849, *Coats v. Darby*, 2 *N. Y. (2 Comst.)*, 517; overruling *Herriek v. Manly*, 1 *Cal.*, 258.

347. In an action of trespass, if defendant gives notice, under the general issue, of *son assault demesne*, instead of pleading it, the plaintiff may prove a justification, and the defendant may rebut or mitigate it. *Supreme Ct.*, 1810, *Collier v. Moulton*, 7 *Johns.*, 109.

348. When, in fact, the plaintiff made the first assault, and he relies upon new matter in answer to the defendant's plea of *son assault demesne*, he must state such new matter specially. [2 *W. Bl.*, 1165; *Carter*, 280; 2 *Ohitt. Pl.*, 648, n. (t), (u); 5 *Com. Dig.*, Pl. (F. 18); 7 *Johns.*, 111.] *Supreme Ct.*, 1826, *Brown v. Bennett*, 5 *Cow.*, 181.

349. A right of way set forth in the declaration in an action of trespass on the case, is put in issue by the plea of not guilty. *N. Y. Com. Pl.*, 1847, *Wattripont v. Ohesterman*, 5 *N. Y. Leg. Obs.*, 880.

350. In an action for libel, any thing in mitigation which does not tend to a justification, but which falls short of that, is admissible under the general issue. [6 *Barb.*, 48.] *Supreme Ct.*, 1855, *Stanley v. Webb*, 21 *Barb.*, 148.

351. In an action for an escape, a voluntary return is not admissible under the general issue. *Supreme Ct.*, 1828, *Howland v. Squier*, 9 *Cow.*, 91.

352. What may be specially pleaded. Any ground of defence which admits the facts alleged in the declaration, and avoids the action, by matter which the plaintiff would not be bound to prove or dispute, in the first instance, may be specially pleaded. [1 *Ld. Raym.*, 87.] Thus, where a declaration on a policy containing the rotten clause, set forth no facts showing the vessel unseaworthy, but alleged that, on the voyage, she sustained injuries whereby she became leaky, &c., that she could not repair nor safely proceed, and was therefore condemned and sold; and the plea, without controverting the facts set up in the declaration, set forth the survey more fully, relying upon the facts therein stated, as amounting to a declaration of the surveyors that she was unseaworthy by reason of her

being rotten and unsound, and so within the clause, which made the survey conclusive between them;—*Held*, that the plea was good, as raising a question of law upon the new matter. *Supreme Ct.*, 1822, *Brandegge v. National Ins. Co.*, 20 *Johns.*, 828.

353. A party is not prohibited from pleading specially all matters that are admissible under a plea of the general issue, but only such as constitute a mere denial of what the plaintiff is bound to prove in the first instance. Thus, to debt on an award, the defendant may plead a condition of the submission, and non-compliance therewith by the arbitrators. *Supreme Ct.*, 1848, *Ott v. Schroepel*, 8 *Barb.*, 56.

354. Statute of Frauds. To a declaration on an agreement to answer for the debt, &c., of another, defendant may plead the Statute of Frauds specially in bar. In an action of assumpsit, matter which shows that no such contract was made, cannot be pleaded; but matter which admits the contract as laid, but shows that it was not binding in point of law, may be pleaded, because, it being matter of law, it is proper to show it to the court. [1 *Ohitt. Pl.*, 497; *Bac. Abr.*, Pl. G; 8 *Gilb. C. P.*, 62, 66.] *Supreme Ct.*, 1818, *Myers v. Morse*, 15 *Johns.*, 425.

355. Non-joinder of plaintiff, in tort. In actions for torts, the plaintiff may sue separately for his aliquot share or proportion of interest in a chattel, or of injury to real property, and the defendant may give the joint interest of others in evidence, in mitigation of damages; but he cannot avail himself of the omission of the plaintiff to unite the other tenants in common with him in the suit, otherwise than by pleading it in abatement. He cannot take advantage of it at the trial [Skinn., 640; 6 *T. R.*, 766; 7 *Id.*, 280; 5 *East*, 420; 1 *Bos. & P.*, 70-75], except by way of apportionment of damages. *Supreme Ct.*, 1806, *Wheelwright v. Depeyster*, 1 *Johns.*, 471; 1810 [citing, also, 1 *Saund.*, 251], *Brotherson v. Hodges*, 6 *Johns.*, 108; 1811, *Bradish v. Schenok*, 8 *Id.*, 151; 1828, *Rich v. Penfield*, 1 *Wend.*, 880; 1831, *Gilbert v. Dickerson*, 7 *Id.*, 449.

356. Matter arising after issue joined, good by way of *puis darrein continuance*, must be pleaded, or cannot be given in evidence. *Supreme Ct.*, 1810, *Jackson v. Rich*, 7 *Johns.*, 194; 1814, *Jackson v. McConnell*, 11 *Id.*, 424.

Notice of Special Matter.

357. This rule applies to ejectment. [7 Johns., 194; 9 Id., 55; 11 Id., 424; 19 Id., 168.] But a sheriff's deed, after issue, on a sale made before the suit was brought, relates back to the sale, and need not be so pleaded. *Supreme Ct.*, 1824, Jackson v. Ramsay, 8 Ckw., 75.

358. That a fact which ought to have been pleaded, but is admitted in evidence by consent, is effectual. *Supreme Ct.*, 1812, Jackson v. Demont, 9 Johns., 55.

359. That a release must be pleaded. *Supreme Ct.*, 1812, Hitchcock v. Carpenter, 9 Johns., 344.

360. When a corporation sues, they must, at the trial, under the general issue, show that they are a corporation, or be nonsuited. [Hob., 21; 2 Ld. Raym., 1585; 1 Kyd on Corp., 292; Bull. N. P., 107.] *Supreme Ct.*, 1811, Jackson v. Plumb, 8 Johns., 378; 1822, Bank of Auburn v. Weed, 19 Id., 800; 1824 [citing, also, 8 Johns., 378; 14 Id., 245; 19 Id., 300], Bank of Utica v. Smalley, 2 Cow., 770; 1828, Wood v. Jefferson County Bank, 9 Id., 194; 1880, Bank of Michigan v. Williams, 5 Wend., 478.

361. Officers. The statute authorizing a public officer to give the special matter in evidence, under the general issue, without notice, applies only to actions for affirmative acts done by virtue of his office, and not to omissions of duty. Hence it does not extend to the defence of the limitation of actions against sheriffs and other officers, for official acts, for three years. *Supreme Ct.*, 1840, Fairchild v. Case, 24 Wend., 881; 1848, Persons v. Parker, 8 Barb., 249.

362. That school-officers are not within the act allowing evidence of justification to be given under the general issue. *Supreme Ct.*, 1817, Drake v. Barrymore, 14 Johns., 166.

V. NOTICE OF SPECIAL MATTER.

363. When allowed. A notice of special matter can only be given with the general issue. *Supreme Ct.*, 1805, Beadle v. Hopkins, 8 Cai., 150.

364. *Non est factum* is the general issue for this purpose. *Supreme Ct.*, 1829, Provost v. Calder, 2 Wend., 517; 1880, Beach v. Springer, 4 Id., 519.

365. So is *nul tiel* record, since by 2 Rev. Stat., 409, § 4, it is tried by jury. [28 Wend., 801; 2 Hill, 195.] *N. Y. Superior Ct.*, 1849, Gassner v. Sandford, 2 Sandf., 440.

Otherwise before the Revised Statutes. *Supreme Ct.*, 1816, Raymond v. Smith, 18 Johns., 329; 1828, Barheydt ads. Haverley, 1 Wend., 70.

366. The statute allowing public officers, &c., when sued for or concerning any act done by virtue of their offices, &c., to plead the general issue, and give the special matter in evidence without notice (2 Rev. Stat., 353, §§ 14, 15), applies to all actions, including replevin. *Supreme Ct.*, 1835, Seymour v. Billings, 12 Wend., 285; 1834, Ooon v. Congden, Id., 496.

367. Under 2 Rev. Stat., 352, § 10, a notice in a case of a former recovery or like defences, is equivalent to a plea. *N. Y. Com. Pl.*, 1843, Smith v. Pettit, 2 *N. Y. Leg. Obs.*, 257.

368. Requisites. A notice must state truly the facts intended, but immaterial variances will be overlooked. *Supreme Ct.*, 1817, Kane v. Sanger, 14 Johns., 89.

369. A notice, though not required to be in the form of a plea, must contain all the facts necessary to make a special plea good on general demurrer. *Supreme Ct.*, 1816, Shepard v. Merrill, 18 Johns., 475. To similar effect, 1813, Lawrence v. Knies, 10 Id., 140; 1832, Mitchell v. Borden, 8 Wend., 570.

370. It is not regarded with the same criticism and nicety as a special plea. *Supreme Ct.*, 1811, Brooks v. Bemiss, 8 Johns., 455. Followed, *Ct. of Errors*, 1823, Chamberlain v. Gorham, 20 Id., 746; reversing S. O., Id., 144.

371. It must be deemed sufficient, if it is so certain that the plaintiff is not taken by surprise. *Ct. of Errors*, 1823, Chamberlain v. Gorham, 20 Johns., 746; reversing S. O., Id., 144. *Supreme Ct.*, 1840, Edwards v. Olemong, 24 Wend., 480; 1842, Fuller v. Rood, 3 Hill, 258.

372. Sufficiency. In a notice of mesne process, under which plaintiff will justify, the cause of action for which it issued, need not be stated. *Supreme Ct.*, 1809, Linsley v. Keys, 5 Johns., 128.

373. In a notice subjoined to the general issue, of a discharge under the insolvent act of 1811, the proceedings previous to the discharge, that the defendant was imprisoned or impleaded, and a resident, need not be stated. It is sufficient if the notice states that the defendant had been discharged, the commissioner's name, and the date of the discharge.

Replications.

The facts may be proved by the proceedings on file. *Supreme Ct.*, 1814, *Hines v. Ballard*, 11 *Johns.*, 491.

374. In a notice that defendant offers to set off a demand against the plaintiff which accrued more than six years before the bringing of the suit, it is not necessary to state a new promise on which he relies to meet the objection to it, arising from the Statute of Limitations. *Supreme Ct.*, 1820, *Martin v. Williams*, 17 *Johns.*, 330.

375. In an action on a note given for the price of land, defendant gave notice that plaintiff, on conveying, covenanted to deduct from the note, judgments outstanding against him, that should be a lien upon the land, and paid by defendant; and that there were divers such judgments which defendant had been obliged to pay. *Held*, sufficient to let in proof of any such judgment, &c., though no judgment was specified or described in the notice. Under such a covenant, plaintiff could not be supposed to be surprised. *Ct. of Errors*, 1823, *Chamberlain v. Gorham*, 20 *Johns.*, 746; reversing *S. C.*, *Id.*, 144.

376. A breach of warranty or fraud in a sale, not admissible under a notice stating merely false representations. *Supreme Ct.*, 1844, *Stever v. Lamoure*, *Hill & D. Supp.*, 352.

377. Under a notice of matters "in defence and in bar," matters of mitigation merely, are admissible. *Supreme Ct.*, 1845, *Van Epps v. Harrison*, 1 *Den.*, 246.

378. Although it is a general practice to plead a discharge under the bankrupt act of 1841, yet a plea of the general issue and notice of the discharge is sufficient to admit the certificate in evidence. *Ct. of Appeals*, 1853, *Campbell v. Perkins*, 8 *N. Y.* (4 *Seld.*), 430.

379. The notice must be served with the plea. [2 *Rev. Stat.*, 277.] If defendant would add to his notice or serve a new one, he must obtain leave. *N. Y. Com. Pl.* (1843?), *Many v. Disbrow*, 2 *N. Y. Leg. Obs.*, 88.

380. It forms no part of the record; and an admission in it does not help a defect in the declaration. *Supreme Ct.*, 1811, *Vaughan v. Havens*, 8 *Johns.*, 109.

381. Where a defendant pleads and gives notice of the same matter, the court will on motion order one or the other to be stricken out. *Supreme Ct.*, 1842, *Ripley v. Burgess*, 2 *Hill*, 860. *N. Y. Com. Pl.*, 1844, *Williams v. Wardrop*, 2 *N. Y. Leg. Obs.*, 410.

VI. REPLICATIONS.

382. To a plea of privilege by an attorney, it is a good replication that for a year he had ceased to practise. *Supreme Ct.*, 1800, *Brooks v. Patterson*, *Col. & C. Cas.*, 133.

383. To a plea of misnomer, a replication that defendant is known as well by one name as the other, is good. *Supreme Ct.*, 1805, *Petrie v. Woodworth*, 3 *Cai.*, 219.

384. In an action on a note the plea was that the note was given by the defendant to the plaintiff in payment for land, which the defendant had been induced to buy of him, by his false and fraudulent representations that he was the owner, whereas he was not the owner of it. *Held*, that fraud was the material allegation, and a replication denying the fraudulent representation was a perfect answer. *Supreme Ct.*, 1823, *Bradner v. Demick*, 20 *Johns.*, 404.

385. If the maker of a note pleads a set-off, and that the paper was fraudulently transferred to the plaintiff to prevent the set-off, a replication merely alleging legal title admits the fraudulent transfer, and the set-off. *Supreme Ct.*, 1831, *Savage v. Davis*, 7 *Wend.*, 223.

386. To plea of justification. A replication neither answering nor avoiding the matters of a special plea of justification, is bad. *Supreme Ct.*, 1842, *Foshay v. Riche*, 2 *Hill*, 247.

387. To a plea in trespass that plaintiff was making a noise and disturbance in defendant's inn, and being requested to depart, refused to do so, and continued the noise, &c., whereupon the plaintiff gently removed him, a replication attempting to excuse continuing in the house, but giving no reason for continuing the noise, &c., and alleging that he did not wholly refuse to depart, is bad. *Supreme Ct.*, 1839, *Hanna v. Rust*, 21 *Wend.*, 149.

388. In trespass, where the defendant pleads in justification a simple reference to a statute under 1 *Rev. L.* of 1813, § 153, the plaintiff must reply *de injuria propria*, &c., and conclude to the country. *Supreme Ct.*, 1818, *Comly v. Lookwood*, 15 *Johns.*, 188.

389. The general replication *de injuria sua propria absque tali causa*, is bad when the defendant insists on a right, and is good only when he insists on matter of excuse. [8 *Co.*, 66; *Will.*, 54; 1 *Bos. & P.*, 76.] *Supreme Ct.*, 1809, *Lytle v. Lee*, 5 *Johns.*, 112; 1815,

Rejoinders. Surrejoinders.

Plumb v. McCrea, 12 *Id.*, 491; 1827, Allen v. Crofoot, 7 *Cow.*, 46; 1828, Griswold v. Sedgwick, 1 *Wend.*, 126; 1830, Coburn v. Hopkins, 4 *Id.*, 577; and see Tubbs v. Caswell, 8 *Id.*, 129.

390. But the defect is cured by verdict. *Supreme Ct.*, 1809, Lytle v. Lee, 5 *Johns.*, 112.

391. In a plea justifying an arrest under process, an allegation of its loss by way of excuse for not producing it, does not turn the justification into matter of excuse. *Supreme Ct.*, 1830, Coburn v. Hopkins, 4 *Wend.*, 577.

392. A replication may protest the warrant or process, &c., set up by the plea, and conclude *de injuria*, &c. *Supreme Ct.*, 1841, Stickle v. Richmond, 1 *Hill*, 77.

393. The general replication *de injuria*, to a plea of *molitor manus imposuit*, puts in issue every material allegation including the reasonableness of the force; and the plaintiff may recover if an excess of force is shown. *Supreme Ct.*, 1841, Bennett v. Appleton, 25 *Wend.*, 371.

394. To the plea of a discharge in insolvency, a replication setting forth, in the words of the act, all the grounds on which a discharge would be void by the act, is bad. It must specify the particular fraud relied on. *Supreme Ct.*, 1806, Service v. Heermance, 2 *Johns.*, 96.

395. To a plea of a former recovery, plaintiff replied, *protestando*, that in a former action two trespasses had been joined in the same count, and that the court, on motion, compelled him to elect for which he would proceed, and that he should not go for both, and the jury found damages accordingly. *Held*, that the former recovery was no bar; but the replication was bad as being argumentative, instead of traversing and denying the former recovery. *Supreme Ct.*, 1807, Snider v. Croy, 2 *Johns.*, 227.

396. To a plea of the statute of usury the plaintiff may reply, that it was not corruptly agreed in manner and form, &c., without a traverse, and with a conclusion to the country. [2 *Str.*, 871.] *Supreme Ct.*, 1810, Waterman v. Haskin, 7 *Johns.*, 283.

397. A replication in an action of covenant, on an agreement to build,—*Held*, to be bad, for traversing immaterial time and place, and introducing averments of performance before made in the declaration. *Supreme Ct.*, 1818, Rogers v. Burk, 10 *Johns.*, 400.

398. To a declaration on a contract to let

the whole tonnage of a vessel, describing it as of about 107 tons, and averring performance, defendant pleaded that she was capable of safely and prudently carrying 150 tons, but that plaintiff refused to let her carry more than 107 tons, and did not permit the defendant to have the use of the whole tonnage;—*Held*, that a replication that she carried as full a cargo as she safely and prudently could, and that the plaintiff did let the defendant have the use of the whole tonnage, was good. *Supreme Ct.*, 1834, Wheeler v. Curtis, 11 *Wend.*, 658.

399. Conclusion. A replication containing new matter should conclude with a verification, and not to the country. *Supreme Ct.*, 1814, Hallett v. Slidell, 11 *Johns.*, 56; 1839, Hanna v. Rust, 21 *Wend.*, 149.

400. A replication stating no new matter, must conclude to the country. *Supreme Ct.*, 1806, Bindon v. Robinson, 1 *Johns.*, 516.

401. Where the defendant cannot take any new or other issue, in his rejoinder, than the matter he had pleaded before, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, the replication may conclude to the country. *Supreme Ct.*, 1807, Patcher v. Sprague, 2 *Johns.*, 462.

402. A replication, at once denying the particular fact intended to be put in issue, and concluding to the country, without any preamble, and without a formal traverse, frequently occurs in practice; and on account of its conciseness, should, when practicable, be adopted. [1 *Chitt. Pl.*, 592; 2 *T. R.*, 442.] If a plea answers the matter which is the gist of the action, it is sufficient. [1 *Saund.*, 28, n. 3; 2 *T. R.*, 297; 3 *Wils.*, 20.] *Supreme Ct.*, 1822, Andrus v. Waring, 20 *Johns.*, 158. To somewhat similar effect, 1807 [citing 2 *T. R.*, 439; *Doug.*, 94], Snyder v. Croy, 2 *Id.*, 428.

403. In an action of debt against devisees, a replication of assets by descent may conclude with a verification. *Supreme Ct.*, 1816, Labagh v. Cantine, 18 *Johns.*, 272.

404. A replication which is merely a denial, is not special. *Supreme Ct.*, 1804, Manhattan Co. v. Miller, 2 *Cai.*, 60; *S. C.*, *Col. & C. Cas.*, 345.

VII. REJOINDERS. SURREJOINDERS.

405. A rejoinder must maintain the plea, and cannot set forth matter at variance with

Double Replications and Rejoinders.

Of the Issues.

it. *Supreme Ct.*, 1808, Barlow v. Todd, 8 *Johns.*, 367; 1819, Allen v. Watson, 16 *Id.*, 205.

406. To an assignment of a breach of a bond for the fidelity of a clerk, charging deceit and fraud in making false entries, a rejoinder alleging that the false entries and defalcation, if any, took place by reason of over-payments made by him by mistake, is bad, for not taking issue on the fraud. *Supreme Ct.*, 1814, Union Bank v. Olossey, 11 *Johns.*, 182.

407. In an action on the bond of a deputy sheriff, to a replication that, after the making of the bond, and while the deputy continued in office, he had made default in returning a *fi. fa.*, whereby the plaintiff was damnified, the defendants rejoined, that the deputy was removed by the plaintiff on a day previous to the test of the writ and to the time when it came to his hands. *Held*, that a surrejoinder, that the writ was committed to the care and direction of the deputy while he continued to exercise the duties of the office of deputy sheriff, and was deputy sheriff under the plaintiff, was good. *Supreme Ct.*, 1822, Andrus v. Waring, 20 *Johns.*, 158.

408. But, to a rejoinder that the *fi. fa.* was committed to the deputy before the making of the bond, and while he was deputy under a previous appointment, a surrejoinder that it was committed to him while he was acting as deputy sheriff, and was deputy sheriff under the plaintiff, and that the moneys were collected upon it by him after the bond was given, is evasive and bad; for the bond does not extend to writs committed to him previous to its execution, or to any acts of his in relation to such writs, subsequent to the execution of the bond. *Id.*

409. In an action on a bond of a deputy, a rejoinder averring that the deputy was removed from his office by the sheriff, but not alleging that the discharge was under seal, is bad. *Id.*

410. After pleading that the plaintiff was not damnified, the defendant cannot rejoin confessing and avoiding the action [Co. Litt., 304, a.; 2 Wils., 96; 4 T. R., 504; 2 Cai., 320; 8 *Johns.*, 367; 16 *Id.*, 205],—*e. g.*, by setting up a personal discharge. *Id.*

411. One defendant having joined with the others in a plea in bar in an action on contract, cannot afterwards interpose a rejoinder

going to his personal discharge. [2 Str., 994; 2 Cai., 108.] *Id.*

VIII. DOUBLE REPLICATIONS AND REJOINDERS.

412. Under 2 Rev. Stat., 356, § 27,—allowing double replications and rejoinders,—they can be interposed only on leave. *Supreme Ct.*, 1830, Ames v. West, 4 *Wend.*, 211; 1834, Frisbie v. Riley, 12 *Id.*, 249.

413. The statute does not apply in replevin. *Supreme Ct.*, 1830, Calvin v. La Farge, 6 *Wend.*, 505. Followed, 1839, McPherson v. Melhinck, 20 *Id.*, 671.

414. It does not extend beyond rejoinders. *Supreme Ct.*, 1831, Oakley v. Romeyn, 6 *Wend.*, 521.

415. It does not take away the right of double pleading in cases in the nature of criminal cases—*e. g.*, *quo warranto*. *Supreme Ct.*, 1832, People v. Manhattan Co., 9 *Wend.*, 351.

416. An application for leave to reply double should set out particularly what matters are sought to be replied. *Supreme Ct.*, 1846, Bangs v. Avery, 2 *How. Pr.*, 128.

417. The truth of the matter proposed must be sworn to. *Supreme Ct.*, 1831, McNair v. Bronson, 6 *Wend.*, 534.

—positively. 1846, Frazer v. Taylor, 2 *How. Pr.*, 77.

418. Residence of counsel need not be stated in an affidavit for a motion for leave to reply double. *Supreme Ct.*, 1845, Flint v. Morehouse, 2 *How. Pr.*, 5.

419. If the affidavit is sufficient, the application will be granted, although the replications might be questioned on demurrer. *Supreme Ct.*, 1846, Hill v. Russell, 2 *How. Pr.*, 129.

IX. OF THE ISSUE.

420. Admission. What is traversable in pleading, and is not denied, is admitted. *Supreme Ct.*, 1807, Patcher v. Sprague, 2 *Johns.*, 462; 1821, Briggs v. Dorr, 19 *Id.*, 95. *Ct. of Errors*, 1827, Raymond v. Wheeler, 9 *Cow.*, 295. *Supreme Ct.*, 1834, Jack v. Martin,* 12 *Wend.*, 311; 1848, Tracy v. Rathbun, 3 *Barb.*, 543.

421. The defendant's default admits only the traversable allegations in the declaration. Thus, in an action for an assault, plaintiff must, before the sheriff's jury, prove a partic-

* Affirmed on the merits, 14 *Wend.*, 507.

Departure.

ular assault, and by the defendant, to warrant a recovery of any thing more than nominal damages. *Supreme Ct.*, 1830, *Bates v. Loomis*, 5 *Wend.*, 184. Compare *Foster v. Smith*, 10 *Id.*, 377; *q. v.*, DAMAGES, 280.

422. The object of special pleading is to reduce the matters in dispute to specific points; and when a number of facts are averred in pleading, all being necessary to make a defence, the denial of one only admits the others. Protest only prevents the party protesting from being concluded from contesting those facts in some other suit. Thus, in replevin, the plea of non-tenure admits all the specific allegations of the avowry, except tenure from the avowant, and *riens in arriere* admits the tenancy as stated in the avowry. *Supreme Ct.*, 1832, *Bloomer v. Juhel*, 8 *Wend.*, 448.

423. The plea of non-assumpsit to an action brought by administrator, admits the letters of administration as averred. *Supreme Ct.*, *N. P.*, *Smith v. Ludlow*, *Anth. N. P.*, 174.

424. Whenever a material fact is alleged in any pleading, which, if denied, will, upon issue joined, decide the cause one way or the other, the adverse party, if he pleads a matter inconsistent with and contrary to such allegation, must traverse it. Whenever such a traverse is taken, the other party is bound to it, and cannot waive it and tender another traverse; for the parties are not to go on *ad infinitum*. [1 *Saund.*, 22, n. 2.] *Supreme Ct.*, 1839, *Prosser v. Woodward*, 21 *Wend.*, 205.

425. That where the plaintiff may demur for the insufficiency of a rejoinder in substance, he may elect to waive that, and take issue on the most material point alleged by the defendants, without giving cause for a special demurrer. *Supreme Ct.*, 1822, *Andrus v. Waring*, 30 *Johns.*, 153.

426. The inducement to a special traverse is not in general traversable; yet when the special traverse is not to the point or substance of the action, or, in other words, is immaterial, the other party may pass it by, and traverse the inducement. [Arch. on Pl., 208.] *N. Y. Superior Ct.*, 1829, *Wheelwright v. Beers*, 2 *Hall*, 391.

427. Where the words "by virtue whereof," are used, not in predicating a legal conclusion, but in alleging a mixed matter of law and fact,—*e. g.*, after stating a warrant alleging that an arrest was made by virtue thereof,—it is traversable. *Supreme Ct.*, 1841, *Stickle*

v. Richmond, 1 *Hill*, 77. Compare *Dresser v. Brooks*, 8 *Barb.*, 429.

428. The words, "against the peace," &c., in a declaration in trespass, are matter of form, and not traversable. *Supreme Ct.*, 1817, *Gardner v. Thomas*, 14 *Johns.*, 184.

429. A mere emotion or intention of mind is not an issuable fact, for it is not susceptible of trial. *Supreme Ct.*, 1822, *Van Ness v. Hamilton*, 19 *Johns.*, 849; 1832, *People v. Manhattan Co.*, 9 *Wend.*, 351.

430. A rejoinder which attempts to put in issue a fact not triable,—*e. g.*, the intent of the plaintiff to impound a horse without application to the fence-viewers, to ascertain and appraise the damage it had done,—is bad. If that intent had actually existed at the time of taking the horse, it was revocable. *Supreme Ct.*, 1823, *Gates v. Lounsbury*, 20 *Johns.*, 427.

431. The practice of the court is not, in general, the subject of pleading. *Supreme Ct.*, 1832, *Nichols v. Nichols*, 9 *Wend.*, 263; 1837, *Thomas v. Cameron*, 17 *Id.*, 59.

432. One sufficient answer to a single pleading is enough, though others be bad. *Ct. of Appeals*, 1854, *Cole v. Jessup*, 10 *N. Y. (6 Seld.)*, 96; *S. C.*, 10 *How. Pr.*, 515.

433. Conclusion. Where there is an affirmative on one side and a negative on the other, the conclusion must be to the country. [1 *Saund.*, 103, n. 1.] *Supreme Ct.*, 1819, *Gazely v. Price*, 16 *Johns.*, 267.

X. DEPARTURE.

434. In general, a replication must not depart from any material allegation in the declaration; yet, when there is an evasive plea, the plaintiff may avoid the effect of it by restating his cause of action with more particularity and certainty, and so as to meet and thwart the particular defence set up. [1 *Ohitt. Pl.*, 608.] *Supreme Ct.*, 1822, *Troup v. Smith*, 20 *Johns.*, 33.

435. The replication may introduce new matter to explain and fortify the declaration, without a departure. [2 *Wils.*, 8.] *Supreme Ct.*, 1814, *Hallett v. Slidell*, 11 *Johns.*, 56.

436. What is a departure. After a plea of no award, a rejoinder, confessing and avoiding the award, is a departure. *Supreme Ct.*, 1805, *Munro v. Alaire*, 2 *Cai.*, 320.

437. After a plea of *non-damniatus*, rejoinders admitting that the plaintiff has been damaged, yet has no legal claim to be indem-

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nified, are bad, as a departure. *Supreme Ct.*, 1822, *Andrus v. Waring*, 20 *Johns.*, 158.

438. In an action on an arbitration bond, where to a plea of no award plaintiff replies, setting forth an award, a rejoinder impeaching the award as incomplete, is a departure. *Supreme Ct.*, 1808, *Barlow v. Todd*, 8 *Johns.*, 367.

439. But a rejoinder, that the defendant, prior to the making of the award, had, by writing under his hand and seal, revoked the submission, is good. A void award is no award. [11 East, 187.] *Supreme Ct.*, 1819, *Allen v. Watson*, 16 *Johns.*, 205.

440. A rejoinder of the violation of the non-intercourse law is a departure from a plea that the trading was unlawful, because during war. *Supreme Ct.*, 1817, *Kennedy v. Strong*, 14 *Johns.*, 128.

441. The declaration on a policy of insurance averring a total physical loss, a replication of a survey and condemnation after arrival at the port of destination is a departure. *Supreme Ct.*, 1824, *Griswold v. National Ins. Co.*, 8 *Cow.*, 98.

442. A rejoinder of infancy,—*Held*, a departure from a plea of an insolvent discharge. *N. Y. Superior Ct.*, 1829, *Roberts v. Kelly*, 2 *Hall*, 307.

443. Where to a plea of title the replication sets up a lease from the plaintiff, a rejoinder that the lease reserved the right to enter, is departure. [11 East, 188.] *Supreme Ct.*, 1880, *Dutton v. Holden*, 4 *Wend.*, 648.

444. A replication of a new promise by the executor, to his plea of limitations to a count on a promise of the testator, is bad for departure. *Supreme Ct.*, 1845, *Benjamin v. De Groot*, 1 *Den.*, 151.

445. To a declaration for breach of an agreement to bid at auction up to a certain limit, the defendant pleaded that the property was sold for more. *Held*, that a reply of fraud in the defendant, in procuring the bids for the greater amount, was no departure. *Supreme Ct.*, 1847, *Barne v. Drew*, 4 *Den.*, 287.

446. A rejoinder affirming the defence of the plea, by denying the substance of the replication, without reaffirming an immaterial averment of value in the plea, is not a departure. *Supreme Ct.*, 1829, *Barr v. Baldwin*, 2 *Wend.*, 580.

447. A departure is matter of substance, and bad on general demurrer. [2 Wils., 96; 1 *Id.*, 122; 4 T. R., 504; Wille, 688, 25, 27;

2 Saund., 84.] *Supreme Ct.*, 1817, *Sterns v. Patterson*, 14 *Johns.*, 182.

448. The People are bound by the allegations in their pleadings, like individuals, and notwithstanding their reply is a clear departure from the complaint, and as such obnoxious to a demurrer, it is still binding upon them. *Ct. of Appeals*, 1858, *People v. Van Rensselaer*, 9 *N. Y. (5 Seld.)*, 291.

XI. DEMURRER.

1. When it lies. Form.

449. In general, a party cannot demur, unless the objection appears on the face of the pleading. *Supreme Ct.*, 1815, *Amory v. McGregor*, 12 *Johns.*, 287.

450. The clause "comes and defends the force," &c., is essential to a demurrer. *Mayor's Ct.*, 1802, *Miller v. Doyle*, *Liv. Jud. Op.*, 9.

451. What defects are demurrable. Where the day of making a contract is immaterial, it is not ground of demurrer that the contract, if made on the day laid in the declaration, would be illegal. *Supreme Ct.*, 1815, *Amory v. McGregor*, 12 *Johns.*, 287.

452. Pledges of prosecution in the declaration are mere form, and may be entered at any time before judgment. [Barnes, 163.] The omission is not ground of demurrer. *Supreme Ct.*, 1809, *Baker v. Phillips*, 4 *Johns.*, 190.

453. That a variance between the judgment and execution relied on in an action for an escape, is not ground of demurrer. *Supreme Ct.*, 1826, *Dakin v. Hudson*, 6 *Cow.*, 221.

454. That the amount claimed by the declaration is too much, is no ground of demurrer. *Supreme Ct.*, 1828, *Pevey v. Sleight*, 1 *Wend.*, 518.

455. Where the declaration, in an action against one defendant, upon a contract or judgment, shows that he is a joint contractor or debtor with another not sued, but does not show whether such other is living, the non-joinder cannot be set up by general demurrer, but only by plea in abatement.* *Ct. of Errors*, 1848, *Burgess v. Abbott*, 6 *Hill*, 135; affirming *S. C.*, 1 *Id.*, 476.

* According to the opinion of the chancellor, it might be set up by special demurrer. 6 *Hill*, 141. But this opinion is disapproved in *Brainard v. Jones*, 11 *How. Pr.*, 569; citing *State of Indiana v. Woram*, 6 *Hill*, 38.

Demurrer;—How Determined.

456. If the declaration is on a contract made by the defendant and a private corporation, a demurrer for the non-joinder of the corporation does not lie, unless the declaration shows affirmatively that the corporation is in existence. *Supreme Ct.*, 1843, *State of Indiana v. Woram*, 6 *Hill*, 38.

457. In an action against a corporation not possessing banking powers, to recover on a promissory note made by them, the defendants demurred, assigning for cause, that the act of incorporation did not give them power to issue notes, under seal or otherwise, and that the declaration did not disclose any consideration. *Held*, that the demurrer was bad. Defendants ought to have made such defence by plea in confession and avoidance. [3 *Wend.*, 98; 15 *Id.*, 259.] *N. Y. Com. Pl.*, 1843, *Dubois v. N. Y. & Harlem R. R. Co.*, 1 *N. Y. Leg. Obs.*, 362.

458. A demurrer to the whole of an amended declaration sanctioned, although issue had been joined on some of the counts in the original declaration. *McIntyre v. Griswold*, 2 *How. Pr.*, 113.

459. A demurrer for a misjoinder of counts must be to the whole declaration. [1 *Ohitt. Pl.*, 180.] *Supreme Ct.*, 1841, *Ferris v. North American Fire Ins. Co.*, 1 *Hill*, 71.

460. Demurrer to plea. Where a plea contains distinct matters divisible in their nature, as separate and distinct demands,—*a. g.*, where an executor or administrator defendant pleads outstanding judgments,—some of which are well pleaded, and others badly pleaded, plaintiff should not demur to the whole plea, but only to such of the judgments as are ill pleaded, and should traverse the residue of the plea. *Supreme Ct.*, 1814, *Douglass v. Satterlee*, 11 *Johns.*, 16.

461. A plea of set-off so much resembles a declaration, that two or more parts of it are considered as so many counts, and if one part is good, a general demurrer to the whole will be bad. *Supreme Ct.*, 1842, *Mercein v. Smith*, 2 *Hill*, 210.

462. — to replication. The defendant may demur to a replication, without striking out the *similiter*. *Supreme Ct.*, 1820, *Bank of Auburn v. Aikin*, 18 *Johns.*, 137; 1796, *Branson v. Boardman*, *Col. & C. Cas.*, 51.

463. If a demurrer is filed within twenty days after service of a copy of the replication, a verdict taken, notwithstanding, will be set

aside. [Rule 9 of 1796.] *Supreme Ct.*, 1796, *Branson v. Boardman*, *Col. & C. Cas.*, 51.

464. Special demurrer. For the following defects the demurrer must be special. The want of profert of letters of administration. *Supreme Ct.*, 1828, *Allison v. Wilkin*, 1 *Wend.*, 153.

465. — That a plea amounts to the general issue. [1 *Ohitt.*, 493.] *Supreme Ct.*, 1834, *Wheeler v. Curtis*, 11 *Wend.*, 653.

466. Duplicity. [1 *Ohitt.*, 512.] 1823, *Bradner v. Demick*, 20 *Johns.*, 404. *N. Y. Superior Ct.*, 1828, *Wolfe v. Luyster*, 1 *Hall*, 146.

467. A demurrer for duplicity must point it out. *Supreme Ct.*, 1807, *Currie v. Henry*, 2 *Johns.*, 433.

468. Stating in a demurrer to a replication that it traverses several distinct and material averments in the plea, is a compliance with 2 *Rev. Stat.*, 352, § 4, which requires "the defect or other imperfection," to be *especially expressed* in the demurrer. *N. Y. Superior Ct.*, 1847, *McNulty v. Frame*, 1 *Sandf.*, 128.

469. Impertinent matter is not ground for a special demurrer. *N. Y. Superior Ct.*, 1829, *Tappan v. Powers*, 2 *Hall*, 277.

470. An informality not noticed in the special demurrer, will not be noticed by the court. [1 *Wils.*, 219.] *Supreme Ct.*, 1807, *Snyder v. Croy*, 2 *Johns.*, 428; *S. P.*, 1822, *Andrus v. Waring*, 20 *Id.*, 158.

2. How Determined.

471. On demurrer to the whole declaration, if one count is good, plaintiff must have judgment. *Supreme Ct.*, 1805, *Whitney v. Crosby*, 3 *Col.*, 89; *S. O.*, *Col. & C. Cas.*, 443; 1814, *Gidney v. Blake*, 11 *Johns.*, 54; 1816, *Martin v. Williams*, 18 *Id.*, 264; *Monell v. Colden*, *Id.*, 395; 1821, *Mumford v. Fitzhugh*, 18 *Id.*, 457; 1826, *People v. Bartow*, 6 *Cow.*, 290; 1845, *Freeland v. McCullough*, 1 *Den.*, 414. *N. Y. Superior Ct.*, 1823, *Wolfe v. Luyster*, 1 *Hall*, 146.

472. If there is a demurrer to the whole declaration, a count which is bad cannot be referred to in aid of another count. *Supreme Ct.*, 1816, *Nelson v. Swan*, 13 *Johns.*, 433.

473. Several breaches. Where the demurrer is to the whole count, and some of the breaches are good and some bad, the plaintiff has judgment. *Supreme Ct.*, 1840, *Glover v. Tuck*, 24 *Wend.*, 153.

474. In covenant, where some of the breach-

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es are well assigned, and some not, on a demurrer to the whole declaration, plaintiff has judgment for those which are well assigned. [2 Saund., 380; Cro. Jac., 575.] *Supreme Ct.*, 1810, *Adams v. Willoughby*, 6 *Johns.*, 65; 1816, *Martin v. Williams*, 18 *Id.*, 264.

475. If one assignment is good, demurrer to plea does not avail against another. *Supreme Ct.*, 1830, *People v. Russell*, 4 *Wend.*, 570.

475 a. Demurrer to replication for not stating which plea it answered,—*Held*, frivolous. *Carey v. Hanchet*, 1 *Cow.*, 154.

476. Demurrer to plea. If the declaration contains one good and one bad count, and defendant pleads a plea which goes to the whole cause of action, and to this plaintiff demurs, plaintiff is entitled to judgment on the count which is good. *Supreme Ct.*, 1805, *Ward v. Sackrider*, 8 *Cai.*, 268.

477. On demurrer to a bad plea, defendant will prevail, if all the counts to which the plea relates are bad in substance. *Supreme Ct.*, 1841, *United States v. White*, 2 *Hill*, 59.

478. On a demurrer to several pleas, if either is a good bar, defendant is entitled to judgment. *Supreme Ct.*, 1834, *Ouyler v. Trustees of Rochester*, 12 *Wend.*, 165. *N. Y. Com. Pl.* (1844?), *Jenkins v. Stephens*, 8 *N. Y. Leg. Obs.*, 37.

479. Judgment to be against the party who committed the first fault. Where the allegations of the parties terminate in a demurrer, the sufficiency of each one of the pleadings is drawn in question, and the first of them which is found to be insufficient must determine the cause against the party whose allegation it is. *Ct. of Errors*, 1814, *Spencer v. Southwick*, 11 *Johns.*, 578; reversing *S. C.*, 10 *Id.*, 259. *Supreme Ct.*, 1814, *Gelston v. Burr*, 11 *Id.*, 482. *N. Y. Superior Ct.*, 1828, *McKeon v. Lane*, 1 *Hall*, 319. To similar effect, *Rogers v. Rogers*, *Id.*, 391.

So held, on demurrer to surrejoinder where the plea was also bad. *Supreme Ct.*, 1842, *Mercein v. Smith*, 2 *Hill*, 210. Followed, 1846, *Mathewson v. Weller*, 3 *Den.*, 52.

480. This rule applies only where the previous pleading is bad in substance, and not defective merely in form. *Ct. of Errors*, 1831, *Tubbs v. Caswell*, 8 *Wend.*, 129. *Supreme Ct.*, 1818, *Comly v. Lockwood*, 15 *Johns.*, 188. *N. Y. Superior Ct.*, 1829, *Delavan v. Stanton*, 2 *Hall*, 190; *Roberts v. Kelly*, *Id.*, 307. *S. P.*, *Supreme Ct.*, 1827, *Allen v. Crofoot*, 7

Cow., 46; 1845, *Lipe v. Becker*, 1 *Den.*, 568. *Ct. of Errors*, 1826, *Utica Ins. Co. v. Scott*, 8 *Cow.*, 709. To somewhat similar effect [citing 16 *Wend.*, 9], *Supreme Ct.*, 1845, *Cooper v. Greeley*, 1 *Den.*, 347.

481. A demurrer to a plea in abatement of matter which is not pleadable in bar, is an exception to this rule. *Supreme Ct.*, 1838, *Shaw v. Dutcher*, 19 *Wend.*, 216.

482. Since, under 2 Rev. Stat., 352, § 9, defendant may interpose more than one plea to a count, whenever the pleadings resulting from either plea come to a demurrer, judgment is to be given against the party who committed the first fault in pleading, if the fault would make the pleading bad on general demurrer. *Supreme Ct.*, 1847, *Auburn & Owasco Canal Co. v. Leitch*, 4 *Den.*, 65; overruling dicta in *Wheeler v. Curtis*, 11 *Wend.*, 653; *Dearborn v. Kent*, 14 *Id.*, 183; and *Russell v. Rogers*, 15 *Id.*, 851. Followed, *Ct. of Appeals*, 1849, *Shaw v. Tobias*, 3 *N. Y. (8 Comst.)*, 188.

483. After the defendants have pleaded the general issue to the whole declaration, they cannot, on a demurrer to the replication, go back and object to the declaration. *Supreme Ct.*, 1834, *Wheeler v. Curtis*, 11 *Wend.*, 653.

XII. MATTERS OF PRACTICE.**1. Time to declare, plead, &c. Rule. Notice. Copy served.**

484. Time to declare. That plaintiff, unless ruled to declare, or *nonprossed*, is not limited to one year to do so. *Supreme Ct.*, 1805, *Cheetham v. Lewis*, 8 *Cai.*, 256; *S. C.*, *Col. & C. Cas.*, 498; 1814, *Dole v. Young*, 11 *Johns.*, 90.

485. Under 2 Rev. Stat., 350, § 23,—providing that where defendant is imprisoned for want of bail, plaintiff must declare before the next term after that at which the process is returnable, or defendant *shall* be discharged and entitled to judgment of discontinuance,—the court have no discretion as to the time within which plaintiff must declare. But under § 24,—providing that where defendant has given bail, plaintiff must declare, &c., or judgment of discontinuance *may* be entered,—the court have discretion to enlarge the time to declare. *Supreme Ct.*, *Sp. T.*, 1847, *People v. Superior Ct. of N. Y.*, 1 *Barb.*, 478. *N. Y. Superior Ct.*, 1847, *O'Hara v. Nieury*, 1 *Sandf.*, 655.

Matters of Practice;—Withdrawing Pleadings. Repleading.

486. — to plead. If the rule for pleading has expired when the venue is changed on motion of the defendant, he must plead forthwith to the amended declaration; if the twenty days allowed are not out, he has only the remaining days in which to plead. *Supreme Ct.*, 1802, *Russel v. Ball*, 8 *Johns. Cas.*, 91; but compare *Burrows v. Hillhouse*, 6 *Johns.*, 132.

487. Where a party obtains an order extending his time to plead, for his own convenience, the time continues to run; and on the expiration, or revocation of the order, he must plead immediately. *Supreme Ct.*, 1832, *Knap v. Smith*, 7 *Wend.*, 534; 1838, *Brown v. St. John*, 19 *Id.*, 617; 1840, *Jenkins v. Bloodgood*, 22 *Id.*, 645.

488. After obtaining a stay of proceedings until service of a bill of particulars, or oyer, defendant has the same time to plead, after plaintiff's compliance with it, that he had when the order was served. *Supreme Ct.*, 1828, *Mulholand v. Van Fine*, 8 *Cow.*, 182.

489. That a defendant has the same time to plead after oyer, as he had when he demanded it. *Supreme Ct.*, 1817, *Read v. Patterson*, 14 *Johns.*, 328.

490. Enlargement of time to plead should be for the shortest possible time; and, if necessary to prevent the loss of a trial, acceptance of short notice should be made a condition. *Supreme Ct.*, 1833, *Haywood v. Thayer*, 10 *Wend.*, 571.

491. An order extending the time to surrejoin, extends the time to demur. *Supreme Ct.*, 1846, *Flint v. Morehouse*, 2 *How. Pr.*, 173.

492. Rule to declare before the end of the next term, means before actual adjournment. *Supreme Ct.*, 1845, *Pike v. Power*, 1 *How. Pr.*, 103.

493. — to plead. The act of 1840, abolishing the rule to plead, does not apply to ejectment. *Supreme Ct.*, 1843, *Burr v. Kernan*, 6 *Hill*, 263.

494. — to reply. With a special plea of discharge in bankruptcy, a notice to reply must be served. *Supreme Ct.*, 1845, *Freeland v. Marvin*, 1 *How. Pr.*, 181.

495. "Take notice of a rule to plead," without specifying the time, is sufficient notice. *Supreme Ct.*, 1834, *Douw v. Rice*, 11 *Wend.*, 178.

496. Copy served controls. The party is to be governed by the pleadings delivered to

him, and is not to search the office to see whether the originals are filed; and if the defendant serves a plea, plaintiff cannot enter a default because there is none on file. *Supreme Ct.*, 1810, *Smith v. Wells*, 6 *Johns.*, 286; 1827, *Irwin v. Deyo*, 7 *Cow.*, 153; overruling *Giles v. Caines*, 3 *Cai.*, 107; *S. C.*, *Col. & C. Cas.*, 463.

497. Imperfect copy. The plaintiff may accept or refuse an imperfect copy of a plea served on him; and if he accepts it, the court will compel the defendant to file a perfect plea. *Supreme Ct.*, 1796, *Cohan v. Kip*, *Col. & C. Cas.*, 50.

2. Withdrawing Pleadings. Repleading.

498. Withdrawing demurrer. Where the demurrer is not frivolous, leave to withdraw it, on payment of costs, may be granted after it is overruled, if application be made at the same term, before judgment is entered. *Supreme Ct.*, 1800, *Andrews v. Beecker*, 1 *Johns. Cas.*, 411; 1801, *Seaman v. Haskins*, 2 *Id.*, 284; 1803, *Hildreth v. Harvey*, 8 *Id.*, 300; 1805, *Furman v. Haskin*, 2 *Cui.*, 369; 1806, *Service v. Heermance*, 1 *Johns.*, 91; 1808, *Currie v. Henry*, 8 *Id.*, 140.

499. Leave to withdraw a frivolous demurrer should not be granted. *Supreme Ct.*, 1799, *Griswold v. Haskins*, 1 *Johns. Cas.*, 185; *S. C.*, *Col. & C. Cas.*, 80.

To the contrary, 1827, *Miller v. Heath*, 7 *Cow.*, 101; and compare *Patten v. Harris*, 10 *Wend.*, 623.

500. Where defendant's demurrer in a justice's court is overruled, and he amends and pleads to the merits, this is a withdrawal of the demurrer, and the decision overruling it cannot afterwards be reviewed. If he intends to rely upon error in that decision, he should not amend, but should leave the issue upon the record, and take his appeal at once. *Supreme Ct.*, 1844, *Jones v. Thompson*, 6 *Hill*, 621; overruling *Wickware v. Bryan*, 11 *Wend.*, 545.

501. — special demurrer. The provision of 2 Rev. Stat., § 6,—that judgment for the plaintiff shall be absolute where the overruled demurrer was special for matter of form,—does not take away the discretion of the court to give leave to withdraw, where the objection could have been raised by general demurrer. *Supreme Ct.*, 1831, *Boltons v. Lawrence*, 7 *Wend.*, 461.

Matters of Practice;—Striking out. Disregarding. Motion for Judgment.

502. — general issue. The court will not allow the general issue to be withdrawn to let in a plea of coverture in abatement, although the first plea was put in without the defendant's knowledge, and by one he never meant to retain as attorney, and the latter plea was served in due time. *Supreme Ct.*, 1805, Anonymous, 3 *Cai.*, 102; *S. O., Col. & C. Cas.*, 456.

503. — notice. Where defendant, in an action for libel, pleads not guilty, and gives notice of certain facts to be proved on the trial, a subsequent motion for leave to strike out the notice should not be granted, unless he will make affidavit of the falsity of the matters stated in the notice. *Supreme Ct.*, 1808, Clinton v. Mitchell, 3 *Johns.*, 144.

504. — plea in abatement allowed to be withdrawn, though verified, where put in under mistake of fact. *Tally v. Hamilton*, 1 *Hall*, 222.

505. Substituted pleading. The permission of the court to substitute a new pleading, in place of one which has been struck out on motion, will not exempt such new pleading from the legal exceptions to which it may afterwards prove liable. *N. Y. Com. Pl.*, 1852, Ward v. Barber, 1 *E. D. Smith*, 428.

506. A repleader is awarded upon the form and manner of pleadings, and not on the merits. [2 *Tidd's Pr.*, 958; 1 *Ohitt. Pl.*, 695.] *Supreme Ct.*, 1841, Bellows v. Shannon, 2 *Hill*, 86.

507. After verdict against an administrator on a plea of payment, leave to plead *plene administravit* was denied. *Martin v. Sarles*, 4 *Cow.*, 24.

508. Where plaintiff amends his declaration, after plea, defendant may plead *de novo*. *Supreme Ct.*, 1800, Holmes v. Lansing, 1 *Johns. Cas.*, 248; *S. O., Col. & C. Cas.*, 92.

8. Striking out. Disregarding. Motion for Judgment.

509. False. Pleas admittedly false, and intended as mere instruments of delay, may be struck out on motion, though good in law. *Supreme Ct.*, 1826, Brewster v. Hall, 6 *Cow.*, 84; 1824, Steward v. Hotchkiss, 2 *Id.*, 634; 1834, Ames v. Webber, 10 *Wend.*, 624; Oakley v. Devoe, 12 *Id.*, 196; 1836, Broome County Bank v. Lewis, 18 *Id.*, 565. Compare *Tucker v. Ladd*, 4 *Cow.*, 47.

510. The question whether a plea is good in law, is not to be settled on a motion to

strike it out as false. *Supreme Ct.*, 1841, Fisher v. Pond, 1 *Hill*, 672.

511. Pleas verified under the rule of 1840, cannot be struck out on motion, as false. *Supreme Ct.*, 1841, Maury v. Van Arnum, 1 *Hill*, 370.

512. A frivolous plea may be struck out on motion at special term. *Supreme Ct.*, 1835, Heaton v. Bartlett, 18 *Wend.*, 672; but see *Melville v. Hazlett*, 18 *Id.*, 680.

The notice of motion must specify frivolousness as its ground. 1841, Maury v. Van Arnum, 1 *Hill*, 370.

513. The plaintiff may move to strike out a plea as frivolous, after he has demurred to it. *Supreme Ct.*, 1844, Anonymous, 7 *Hill*, 146.

514. Where plaintiff considers the plea frivolous, or a nullity, he may either demur or enter a default; but need not apply to the court for judgment by default. *Supreme Ct.*, 1808, Falls v. Stickney, 3 *Johns.*, 541. Followed, 1828, Sharp v. Sharp, 1 *Wend.*, 14.

515. A plea that has been adjudged bad, is not of course frivolous, nor can it be treated as a nullity. *Supreme Ct.*, 1825, Davis v. Adams, 4 *Cow.*, 142.

But judgment may be given on it out of its order, as frivolous. 1828, Hartford Bank v. Murrell, 1 *Wend.*, 87.

516. A replication cannot be stricken out as frivolous or inappropriate, unless it was evident that it was an insult to the court, or an improper paper to be on file. In other cases the remedy is by demurrer. *Ct. of Appeals*, 1847, Martin v. Wilson, 3 *How. Pr.*, 195.

517. A demurrer cannot be regarded as frivolous. *Supreme Ct.*, 1838, Ooster v. Waring, 19 *Wend.*, 97.

518. Impertinent. A notice which presents matter which can be plausibly urged as a defence, and is not entirely impertinent, cannot be struck out on motion. *Supreme Ct.*, 1841, Lowry v. Hall, 1 *Hill*, 668.

519. On a demurrer put in in bad faith, the plaintiff may take an inquest. *Supreme Ct.*, 1837, Lavery v. Murray, 18 *Wend.*, 656; and see *Hawley v. Hanchet*, 1 *Cow.*, 152.

520. Nullities. Pleas of non-assumpsit and set-off to an action of debt may be treated as nullities. [6 *East*, 549; 4 *Taunt.*, 164.] *Supreme Ct.*, 1841, Van Vechten v. Cowell, 1 *Hill*, 208.

521. A plea, though bad on special demurrer, if verified by a sufficient affidavit, cannot

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be treated as a nullity. *Supreme Ct.*, 1845, *Hyde v. Watson*, 1 *Den.*, 670.

522. Returning. A party receiving an informal pleading is bound to return it, or inform the other party that it will not be regarded as sufficient. *Supreme Ct.*, 1839, *City of Buffalo v. Scranton*, 20 *Wend.*, 676; *Sands v. Bullock*, *Id.*, 680; 1841, *Wirts v. Norton*, 25 *Id.*, 699.

523. Motion for judgment. If pleas are not palpably bad, the party must resort to his demurrer. The court will not grant judgment as for the want of a plea. *Supreme Ct.*, 1799, *Platt v. Robins*, *Col. & C. Cas.*, 85.

4. What cures Defects.

524. What is cured by verdict. If the issue joined be such as necessarily required, on the trial, the proof of facts either imperfectly stated or omitted, and without proof of which it is not to be presumed that the court would direct, or the jury give the verdict, such defect or omission is cured by the verdict. *Supreme Ct.*, 1818, *Bartlett v. Crozier*, 15 *Johns.*, 250; S. P., 1800, *Allaire v. Ouland*, 2 *Johns. Cas.*, 52; 1806, *Owens v. Morehouse*, 1 *Johns.*, 276; 1811, *Thomas v. Roosa*, 7 *Id.*, 461; and see *Duffie v. Hayes*, 15 *Id.*, 827; but compare *Bartlett v. Crozier*, 17 *Id.*, 439; reversing S. C., 15 *Id.*, 250.

525. In debt on bond as well as in covenant, the objection to an insufficient breach is removed by other breaches that are sufficient, in the same count; but damages under the defective breach cannot be assessed; and if a breach is in part properly assigned, it cannot be demurred to. *Supreme Ct.*, 1831, *People v. Brush*, 6 *Wend.*, 454.

526. A declaration alleging by way of recital, is cured by verdict. [2 *Ld. Raym.*, 1418; 2 *Wils.*, 808; 1 *Id.*, 99; 2 *Tyng's Mass.*, 358.] *Supreme Ct.*, 1810, *Collier v. Moulton*, 7 *Johns.*, 109.

527. After a verdict for plaintiff, defendant cannot take advantage of his own mispleading to defeat the suit. [1 *H. Bl.*, 644.] *Supreme Ct.*, 1815, *Coan v. Whitmore*, 12 *Johns.*, 358.

528. — by pleading over. A declaration, insufficient in substance, cannot be made good by the plea. [Cro. Eliz., 416.] *Supreme Ct.*, 1805, *Pelton v. Ward*, 3 *Cai.*, 73. To the contrary, see *Vaughan v. Havens*, 8 *Johns.*, 109.

529. In an action for libel, by pleading over, the defendant concedes the publication to have been of and concerning the plaintiff, &c., and

puts himself upon the justification [Cro. Gar., 288, 385; *Lutw.*, 627; Cro. Jac., 668, 688; Cro. Eliz., 825], so far as defect of form may exist. *Supreme Ct.*, 1838, *Fidler v. Delavan*, 20 *Wend.*, 57.

Otherwise of a defect in substance. 1839, *White v. Delavan*, 21 *Id.*, 26.

530. After plea, it is too late to take advantage of a variance between the declaration and the writ. *Supreme Ct.*, 1815, *Garland v. Chatfield*, 12 *Johns.*, 430.

531. Pleas bad in substance are not cured by the replication. [Com. Dig., Pl. (E. 37); *Id.* (M., 1, 2); 8 Co., 120, b; 2 *Salk.*, 519; 15 *Johns.*, 191.] *Supreme Ct.*, 1824, *Griswold v. National Ins. Co.*, 3 *Cow.*, 96.

532. Where the defendant pleads two distinct pleas, neither of which is, in itself, a defence, though both together would be; and the plaintiff replies separately, a verdict for defendant upon both will be upheld. *Supreme Ct.*, 1825, *Shook v. Fulton*, 4 *Cow.*, 424.

XIII. RULES PECULIARLY APPLICABLE TO PARTICULAR SUBJECTS, CAUSES OR FORMS OF ACTION, AND DEFENCES.

1. Account.

533. Requisites of declaration in a common law action of. *McMurray v. Rawson*, 3 *Hill*, 59.

534. Plea. Under 2 *Rev. Stat.*, 885, § 50, no plea can be put in before referees, in an action of account. *Supreme Ct.*, 1848, *Kelly v. Kelly*, 3 *Bard.*, 419. See, also, ACCOUNT.

2. Accord and Satisfaction. Payment.

534 a. A plea of an account stated, though it avers a balance and plaintiff's promise to pay, is bad on general demurrer. It is a mere accord. [Lawes, 479; 12 *Mod.*, 538.] *Supreme Ct.*, 1844, *Bump v. Phoenix*, 6 *Hill*, 808.

535. Delivery to third person. A plea that on statement of account, defendant delivered notes to C., for plaintiff, without averring that C. was plaintiff's agent, nor that the notes were received in satisfaction, is bad. *Supreme Ct.*, 1807, *Bird v. Caritat*, 2 *Johns.*, 342.

536. A plea that the defendant, being indebted to the plaintiff and others, agreed with them to assign his effects to them, they agreeing to receive the same in full satisfaction, and that he, in pursuance thereof, delivered and assigned, &c. (without naming the assignee), and the plaintiff and other creditors accepted

Rules peculiarly Applicable to—Actions against Heirs.

it in full satisfaction, is good. *Supreme Ct.*, 1810, *Watkinson v. Inglesby*, 5 *Johns.*, 386.

537. In an action of covenant, a plea of the acceptance of satisfaction from a stranger, is bad. [*Oro. Eliz.*, 541; *Com.*, tit. Accord, A. 2.] *Supreme Ct.*, 1810, *Clow v. Borst*, 6 *Johns.*, 37; 1888, *Daniels v. Hallenback*, 19 *Wend.*, 408; and see *Bleakley v. White*, 4 *Paige*, 654.

538. Specialty and record. Accord and satisfaction cannot be pleaded to a debt of specialty or record, although by 2 *Rev. Stat.*, 358, §§ 11–18, payment may be. *Supreme Ct.*, 1847, *Mitchell v. Hawley*, 4 *Den.*, 414; 1849, *Welch v. Lynch*, 7 *Barb.*, 380. See, also, ACCORD AND SATISFACTION.

539. Satisfaction of mortgage. To an action on a bond, against the mortgagor, a plea that plaintiff had become possessed of the equity of redemption by purchase, must aver that the value of the premises was equal to the amount due on the bond. *Supreme Ct.*, 1880, *Spencer v. Harford*, 4 *Wend.*, 381.

540. Levy of judgment. To debt, on a judgment, the defendant pleaded that it was confessed on a stipulation that it should be levied only on particular goods, and that the goods were levied upon and sold, and yielded an amount more than sufficient to pay the debt. *Held*, a plea not of accord and satisfaction, but that the debt had been levied; and this being so, the amount of the levy was immaterial and not issuable. *Supreme Ct.*, 1849, *Welch v. Lynch*, 7 *Barb.*, 380.

541. Lapse of time. To rely upon the presumption of payment from lapse of time, under 2 *Rev. Stat.*, 801, §§ 46, 48, defendant should plead, not the statute, but payment. And if he cannot swear to it, his affidavit may state the facts which raise the presumption. *Supreme Ct.*, 1846, *Henderson v. Henderson*, 3 *Den.*, 314; *S. P.*, *Sp. T.*, 1850, *Pattison v. Taylor*, 8 *Barb.*, 250.

542. The plea of payment in assumpsit, admits some damages, but not the amount claimed in the declaration. If there is no other issue, and no proof under it, plaintiff can recover only nominal damages, unless he proves a larger demand. *Supreme Ct.*, 1843, *N. Y. Dry Dock Co. v. McIntosh*, 5 *Hill*, 290; *Boyd v. Weeks*, *Id.*, 393.

543. A bond for the performance of a duty and for indemnity, is not within 2 *Rev. Stat.*, 853, § 12, which allows the plea of payment

after the day. *N. Y. Superior Ct.*, 1848, *Hart v. Meeker*, 1 *Sandf.*, 623.

544. A plea of payment of part of a bond and acceptance in full, is bad on demurrer. [5 *Johns.*, 391.] *Supreme Ct.*, 1812, *Dederick v. Leman*, 9 *Johns.*, 333.

545. Pending suit. A plea of payment of the principal, pending suit, without stating that the defendant paid the interest and costs, is sufficient. *Supreme Ct.*, 1808, *Tillotson v. Preston*, 3 *Johns.*, 229.

So held, of a plea *puis darrien*, which alleged that the payment slightly exceeded the principal, and was accepted in satisfaction. 1810, *Johnston v. Brannan*, 5 *Johns.*, 268.

546. A payment of the demand pending suit may be pleaded regularly after imparlance; not alone *puis darrein continuance*. *Supreme Ct.*, 1808, *Tillotson v. Preston*, 3 *Johns.*, 229. Compare *Boyd v. Weeks*, 2 *Den.*, 321.

547. To a declaration on a note alleging that defendant did not pay, &c., a plea *puis darrein* that defendant paid the plaintiff the several, &c., pursuing the terms of the declaration, is good on demurrer. It imports payment of interest as well as the principal, and it is therefore unnecessary to aver its receipt in full satisfaction. *Supreme Ct.*, 1811, *Chew v. Woolley*, 7 *Johns.*, 399.

8. Actions against Heirs.

548. Declaration. In an action to charge an heir with his ancestor's debt, whether by specialty or simple contract, the declaration must aver specially the facts on which his right to recover depends. [2 *Rev. Stat.*, 452, § 32.] *Supreme Ct.*, 1844, *Gere v. Clarke*, 6 *Hill*, 350.

549. In a declaration in debt, against heirs, on a note, averring that the testator was indebted to plaintiff, and that by reason of his death, &c., an action accrued against the heirs, the former allegation is immaterial, and a plea that testator was not indebted in his lifetime, is bad. *Supreme Ct.*, 1826, *Parsons v. Parsons*, 5 *Cow.*, 476.

550. Plea. Under 1 *Rev. L.*, 316, there is no inquiry of value, except on the issue of nothing by descent at the time of the commencement of the action. A clause added in the plea, "nor at any time before or since," is surplusage. *Supreme Ct.*, 1827, *Roosevelt v. Fulton*, 7 *Cow.*, 71.

551. Replication. If the heir pleads *riens per descent*, the replication may aver that he

Rules peculiarly Applicable to—Actions against Officers and their Sureties;—Actions on Judgments.

had lands, &c., without specifying what; for it rests peculiarly in the knowledge of defendant. *Supreme Ct.*, 1829, *Sharp v. Sharp*, 8 *Wend.*, 278.

4. Actions against Officers and their Sureties.

552. Scienter. A declaration against an officer for breach of a ministerial duty as distinguished from a judicial duty,—*e. g.*, against a justice of the peace for a false return on appeal,—need only aver the falsity of the return, and the materiality of the matter alleged to be falsely returned. Malice or a *scienter* is not necessary. *Supreme Ct.*, 1845, *Houghton v. Swarthout*, 1 *Den.*, 589.

553. False return. In an action on the case for a false return, the declaration must aver the falsity of the return, and the materiality of the matter alleged to have been falsely returned. *Supreme Ct.*, 1817, *Kidzie v. Sackrider*, 14 *Johns.*, 195.

554. The cause of action for a false return does not arise until the actual return of the writ; but it relates back to the return-day; and the false return is properly alleged in pleading to have been made on that day. *Supreme Ct.*, 1884, *Michaels v. Shaw*, 12 *Wend.*, 587.

555. In an action against a justice for a false return, an averment that "by pretext thereof (the falsity of the return) the plaintiff was not only prevented from obtaining any redress or reversal of the judgment and proceedings aforesaid, but he was also compelled to suffer imprisonment, and endure great pain both of body and mind, and to pay and expend divers large sums of money,"—if not an averment of the affirmance of the judgment, and the loss or damage consequent thereon, is cured by verdict. *Supreme Ct.*, 1814, *Pangburn v. Ramsay*, 11 *Johns.*, 141.

556. Omission to return execution. In an action against the sheriff for not returning an execution, the declaration need not aver that the defendant had property out of which the money might have been levied; for the gist of the action is the neglect to return the writ. *Supreme Ct.*, 1844, *Pardee v. Robertson*, 6 *Hill*, 550.

If the fact that defendant had such property is not averred, the plaintiff cannot prove it. 1846, *Stevens v. Rowe*, 8 *Den.*, 327. Compare *Ledyard v. Jones*, 7 *N. Y.* (3 *Seld.*), 550.

557. Omission to take security in re-

plevin. The proper mode of declaring in an action on the case against the sheriff for not taking sufficient security, pursuant to 1 Rev. L., 91, in executing a plaint in replevin. *Gibbs v. Bull*, 18 *Johns.*, 485.

558. It must now be averred in declaring against the sheriff for taking insufficient securities in replevin, that an exception was taken, that the sureties, or others in their place, did not justify, and judgment of discontinuance had therefor against the plaintiff in replevin. If the sheriff executes the writ without requiring the bond, he is liable, but the declaration must charge the fact distinctly. *Supreme Ct.*, 1838, *Westervelt v. Bell*, 19 *Wend.*, 581.

559. In an action on the bond of a deputy sheriff, the charge being that the deputy had taken insufficient bail on an arrest, whereby the sheriff was damnified, a rejoinder that A. became bail on the arrest, and had sufficient property at the time, within the county, to answer, and was good and responsible, is bad, for not averring his continued responsibility. [9 *Johns.*, 292.] *Supreme Ct.*, 1822, *Andrus v. Waring*, 20 *Johns.*, 153.

560. In an action upon the deputy's bond, for neglecting to pay over money collected on executions, a plea that he kept the money by the sheriff's leave, is bad, for the bond could not be discharged by parol; and a waiver, after breach of the condition, must have a consideration. *N. Y. Superior Ct.*, 1848, *Hart v. Brady*, 1 *Sandf.*, 626.

561. In an action against sureties in a constable's bond, an allegation that the constable did not levy the amount, nor take the body, without any averment that the defendant had property which might have been levied upon, or that his body could have been found, is bad. *Supreme Ct.*, 1882, *Lawton v. Erwin*, 9 *Wend.*, 238.

5. Actions on Judgments.

562. Jurisdiction of inferior court. A pleading relying on a proceeding of an inferior jurisdiction,—*e. g.*, a surrogate's decree; or a warrant against the property of an absconding husband,—must set forth the facts necessary to give jurisdiction, and it may then say, such proceedings were thereupon had, &c. *Supreme Ct.*, 1826, *Dakin v. Hudson*, 6 *Cow.*, 221; *Bowman v. Russ*, *Id.*, 234.

563. In an action upon the judgment of a justice of the peace of another State, the statute

Rules peculiarly Applicable to—Actions on Judgments.

giving him jurisdiction must be pleaded. [3 Wend., 267; 6 Id., 488.] *Supreme Ct.*, 1831, *Sheldon v. Hopkins*, 7 Wend., 485.

564. In pleading judgments of inferior courts of special and limited jurisdiction, whether in a declaration or a plea, a general averment of jurisdiction is not sufficient; the facts upon which it depends must be stated; and it is necessary to show that the court had jurisdiction of the person of the defendant, as well as of the subject-matter, after which it is sufficient, without setting out the proceedings, to say "such proceedings were had," &c. [6 Wend., 488; 5 Hill, 327; 6 Id., 311; 7 Id., 39; 1 Den., 592; 3 Lev., 408.] *Ct. of Appeals*, 1849, *Turner v. Roby*, 3 N. Y. (3 Comst.), 193; explaining *Smith v. Mumford*, 9 Cow., 26; and *Stiles v. Stewart*, 12 Wend., 473, which held otherwise after verdict.

565. That a judgment against the plaintiff for costs of a nonsuit only is an exception to the rule. *Id.*

566. So where an officer justifies under an execution issued by a justice, he must state the facts that gave the justice jurisdiction of the cause. *Supreme Ct.*, 1831, *Cleveland v. Rogers*, 6 Wend., 438.

567. So where proceedings before a justice of the peace are pleaded in an action on a constable's bond for neglecting to execute process, the facts giving the justice jurisdiction must be averred, though it would be otherwise in an action for not paying over money collected. [6 Wend., 438.] *Supreme Ct.*, 1832, *Lawton v. Erwin*, 9 Wend., 233; S. P., 1844, *Cornell v. Barnes*, 7 Hill, 85.

568. To show that jurisdiction over the person had been acquired, it is necessary to aver either that the party appeared, or that process was sued out and duly served on him. *Supreme Ct.*, 1844, *Cornell v. Barnes*, 7 Hill, 85.

569. Jurisdiction being properly shown, the omission of the general allegation that such proceedings were thereupon had, &c., is ground only of special demurrer. *Supreme Ct.*, 1848, *Barnes v. Harris*, 3 Barb., 603; but see affirmation, 4 N. Y. (4 Comst.), 374, 379, where the existence of this defect, in this case, seems not admitted.

570. — of Marine Court. In an action on a judgment of the Marine Court, which is a court of record, a count that the plaintiff levied his certain plaint in said court, against the de-

fendant, for a cause of action arising within the jurisdiction of said court, and such proceedings were thereupon had, that judgment was obtained, &c., is sufficient. *N. Y. Superior Ct.*, 1829, *Bennet v. Moody*, 2 Hall, 471.

571. In an action on a Marine Court judgment, it is not necessary for the declaration to aver facts showing its jurisdiction of the parties. *N. Y. Com. Pl.*, 1846, *Fisher v. Buylandth*, 4 N. Y. Leg. Obs., 384.

572. — of justice. In declaring upon a judgment rendered by a justice in a suit commenced by long summons, it is not necessary to allege that the defendant was a resident of the county; and if it is alleged that the summons was duly issued and personally served by a constable, it is not necessary to add that it was returned to the justice; nor that the constable made a return thereon; nor that any time of day was specified in the process; nor that a court was held at the time and place specified; nor that the sum claimed was within the limit of the justice's jurisdiction. *Ct. of Appeals*, 1850, *Barnes v. Harris*, 4 N. Y. (4 Comst.), 374; affirming S. O., 3 Barb., 603.

573. — of assistant-justice's court. A declaration upon a judgment recovered before an assistant-justice for certain wards in the city of New York, is bad on special demurrer if it avers that the proceedings were had in the ward court, naming the wards. *N. Y. Com. Pl.*, 1847, *McCarthy v. Noble*, 5 N. Y. Leg. Obs., 380.

574. — of court of another State. In pleading the judgment of a court of general jurisdiction of another State, if the defendant therein was served or appeared, the facts upon which jurisdiction is founded need not be averred; and, if there was a want of jurisdiction, that fact should come from the other side. *Supreme Ct.*, 1828, *Wheeler v. Raymond*, 8 Cow., 311.

575. — of United States Circuit Court. In a plea justifying under an order of a circuit court of the United States, if it were necessary to state enough to give jurisdiction, that is done by the averment that the complainant was a citizen of one State, and the defendant a citizen of another. *Supreme Ct.*, 1828, *Griswold v. Sedgwick*, 1 Wend., 126.

576. — of Supreme Court. A declaration on a judgment of the Supreme Court, stating the place where the court was held at which it was recovered, does not necessarily import

Rules peculiarly Applicable to—Another Action pending. Former Recovery.

that the record was filed there; and even if debt on a judgment is local, a general plea to the jurisdiction because the action was brought in another county, cannot be sustained. *N. Y. Superior Ct.*, 1829, *Kelly v. Mullany*, 2 *Hill*, 205.

577. Plea to action on judgment. In an action on a judgment of another State, a plea that the defendant's domicile has always been in this State, is bad, for he may temporarily have gone into the other State. [9 *Mass.*, 470.] *Supreme Ct.*, 1825, *Shumway v. Stillman*, 4 *Cow.*, 292.

578. So, a plea that he never was within the other State is bad, for he may have appeared by attorney; and an allegation that he was never subject to its jurisdiction, &c., is bad, as a mere conclusion of law. *Supreme Ct.*, 1830, *Starbuck v. Murray*, 5 *Wend.*, 148.

579. A plea that no process was ever served on defendant, and he had no notice of the action, is a sufficient denial of appearance. *Supreme Ct.*, 1830, *Holbrook v. Murray*, 5 *Wend.*, 161.

580. In an action on a judgment of another State, defendant may show by plea that the court had no jurisdiction of the subject-matter, or of the person. *Supreme Ct.*, 1825, *Shumway v. Stillman*, 4 *Cow.*, 292; 1830, *Starbuck v. Murray*,* 5 *Wend.*, 148; 1841, *Long v. Long*, 1 *Hill*, 597; S. P., JUDGMENT AND DECRET, 224.

581. In an action on a judgment of another State, a plea that no process was served on defendant, and that he had no notice of the pendency or prosecution of the action, is equivalent to a plea that he did not appear in person, or by attorney. *Supreme Ct.*, 1830, *Holbrook v. Murray*, 5 *Wend.*, 161.

582. Levy. A plea to an action on a judgment, that an execution was issued and a sufficient levy made, must at least aver that the goods are still detained by the sheriff. [1 *Den.*, 578; 4 *Moore*, 163.] *Supreme Ct.*, 1848, *Waddell v. Elmendorf*, 5 *Den.*, 447.

583. Replication. Five defendants were sued on a judgment obtained in another State, and two of them pleaded that the judgment was obtained without service of process, or appearance. *Held*, that a replication that such two retained an attorney to appear for themselves and the others, and that he did appear

accordingly, was good. *Supreme Ct.*, 1841, *Reed v. Pratt*, 2 *Hill*, 64.

584. In an action on a foreign judgment, a replication to a plea that defendant was never served, and did not appear in the foreign action, should distinctly state that he was served with process to appear and answer, or that he appeared, either in person or by attorney. Alleging that he was personally duly notified, but not saying of what, or that he had personal notice of the commencement of the suit, without saying from whom, is bad. *Supreme Ct.*, 1841, *Long v. Long*, 1 *Hill*, 597.

6. Another Action pending. Former Recovery.

585. That pendency of another suit for the same matter is, at most, only pleadable in abatement. *Supreme Ct.*, 1820, *Percival v. Hickey*, 18 *Johns.*, 257.

586. The pendency of another suit for the same cause, in another State, or a foreign court, is no stay or bar to a new suit here. *Supreme Ct.*, 1812, *Bowne v. Joy*, 9 *Johns.*, 221. Approved, 1815, *Walsh v. Durkin*, 12 *Id.*, 99.

587. Though a plea of another suit, subsequently commenced, is bad, a plea of a judgment recovered in such suit is a bar. *Supreme Ct.*, 1839, *Nicholl v. Mason*, 21 *Wend.*, 339.

588. Writ of error. To a suit on a judgment, the pendency of a writ of error may be pleaded in abatement, but not in bar. The plea must state that the writ was brought prior to the present suit, and the requisite steps taken to render it a *supersedeas* to the execution. *Supreme Ct.*, 1801, *Jenkins v. Pepon*, 2 *Johns. Cas.*, 312.

589. Splitting demand. If one has an account due, or several causes of action arising out of the same contract, and brings a suit for a part, and then another suit for the residue of the account or causes of action, the pendency of the former may be pleaded in abatement or bar of the second action. *Supreme Ct.*, 1838, *Bendernagle v. Cocks*, 19 *Wend.*, 207.

590. Former recovery. To an action on a promissory note, not negotiable, a plea of a former recovery for the same cause of action, on a foreign attachment, &c., in a court of another State, showing jurisdiction, and that the parties were before the court, is good. And a replication, that the note was assigned, and the defendant had notice of the assign-

* Approved in *Sears v. Terry*, 26 *Conn.*, 278.

Rules peculiarly Applicable to—Arbitration. Award.

ment, before the commencement of such proceedings, is bad, unless it set forth that the assignment was for a good and adequate consideration, stating its nature and amount. *Supreme Ct.*, 1820, Prescott v. Hull, 17 *Johns.*, 284. Followed, 1848, Warner v. Dunham, *Hill & D. Supp.*, 206.

591. Discontinuance. Where defendant pleads another action pending, *nil capiat per breve* may be entered in the first suit, before replication to such plea in abatement, and without leave or costs. *Supreme Ct.*, 1800, Marston v. Lawrence, 1 *Johns. Cas.*, 397; *S. O., Col. & C. Cas.*, 97.

592. A former suit, if discontinued before notice of retainer, though without payment of costs, can be pleaded in abatement of a new suit for the same cause. *Ct. of Errors*, 1844, Smith v. White, 7 *Hill*, 520; reversing *S. O.*, 4 *Id.*, 166; and overruling Robinson v. Taylor, 12 *Wend.*, 191. Followed, *Ct. of Appeals*, 1858, Averill v. Patterson, 10 *N. Y. (6 Seld.)*, 500; *S. O.*, 10 *How. Pr.*, 85.

593. Reply of assignment. Where an obligation for the payment of money having been assigned, and notice thereof given to the obligor, an action is brought thereon by the assignee, in the assignor's name, to which the defendant pleads a former recovery and satisfaction, the plaintiff may reply the assignment, and notice thereof to the defendant, and that the former action was not prosecuted by the authority, nor for the benefit of the assignee. *Supreme Ct.*, 1819, Dawson v. Coles, 16 *Johns.*, 51.

7. Arbitration. Award.

594. In an action on an arbitration bond for refusal to perform an award, it need not be averred that the arbitrators took upon themselves the consideration of the subject, prior to the appointment of an umpire. Where the umpire was appointed of and concerning the premises, and it was stated that he took upon himself the burden of the umpirage, it is to be intended, at least on general demurrer, that he awarded concerning the subject-matters submitted. *Supreme Ct.*, 1806, McKinstry v. Solomons, 2 *Johns.*, 57; affirmed, *Ct. of Errors*, 1815, 13 *Id.*, 27.

595. Revocation. In an action on a bond to submit to arbitration, where defendant revoked the arbitrator's powers, before the submission was actually made a rule of court, the

plaintiff should assign the revocation as a breach—not the non-performance of the award. *Supreme Ct.*, 1823, Frets v. Frets, 1 *Cow.*, 335.

596. In an action on a bond for performance of award, assigning a revocation as a breach is good, and though the plaintiff specifies items of damages under it which he is not entitled to recover, defendant cannot demur to the items. *Supreme Ct.*, 1832, Williams v. Maden, 9 *Wend.*, 240.

597. In replying the revocation of a submission, the replication should aver a breach of the bond, and that award was not made by reason of revocation; or that award was made, and defendant refused to abide by it. *Supreme Ct.*, 1811, Van Antwerp v. Stewart, 8 *Johns.*, 125.

598. The revocation must be shown to be under seal. *Id.*; *S. P.*, 1822, Andrus v. Waring, 20 *Id.*, 153.

599. A plea that the defendant revoked the submission is sufficient, for notice is necessarily implied. *Supreme Ct.*, 1819, Allen v. Watson, 16 *Johns.*, 205. Followed, 1823, Frets v. Frets, 1 *Cow.*, 335.

600. Legal effect. Where a party desires to question the legal effect of a submission or award, he must set it out and demur. *Supreme Ct.*, 1838, Fidler v. Cooper, 19 *Wend.*, 285.

601. In an action of debt upon an award, the plaintiff need only show so much of the award as is sufficient to state his demand. He need not show any more of the award than makes for him. If there be any thing by way of condition precedent to the payment of the money, the defendant must set it forth in pleading. [1 *Burr.*, 280; 2 *Saund.*, 61, 62, b., n. 5.] *Supreme Ct.*, 1806, McKinstry v. Solomons, 2 *Johns.*, 57; affirmed, *Ct. of Errors*, 1815, 13 *Id.*, 27. *Supreme Ct.*, 1814, Diblee v. Best, 11 *Id.*, 103.

602. But in an action on the arbitration bond, a replication to the plea of no award must set out the whole award, though not necessarily in *hæc verba*. [1 *Salk.*, 72; 1 *Ld. Raym.*, 715; 12 *Mod.*, 534.] *Supreme Ct.*, 1814, Diblee v. Best, 11 *Johns.*, 103.

603. Oath. In an action on an award, it is not necessary to allege that the arbitrators were sworn. *Supreme Ct.*, 1840, Browning v. Wheeler, 24 *Wend.*, 258.

604. Enlargement of time. A declaration in debt, setting forth the original submission,

Rules peculiarly Applicable to—Assignments of the Thing in Action. Survivorship.

an enlargement of the time, an award within the enlarged time, and a breach of it, is, in effect, founded on the agreement for extension as a new submission, and is good. *N. Y. Superior Ct.*, 1829, *Myers v. Dixon*, 2 *Hall*, 456.

605. To an action of debt on an award, a plea of no award is bad on special demurrer. *Nil debet* is the general issue. *Supreme Ct.*, 1848, *Ott v. Schroepel*, 3 *Barb.*, 56.

606. Under a plea of no award, the defendant may show that the arbitrators awarded on a matter not submitted to them. *So held*, in support of verdict. *Supreme Ct.*, 1819, *Macomb v. Wilber*, 16 *Johns.*, 227.

607. That on demurrer the intendments are in favor of the award being in pursuance of the submission. *Bacon v. Wilber*, 1 *Cow.*, 117.

608. In pleading an award in bar, it is not, in general, necessary to aver performance of the thing awarded. *Supreme Ct.*, 1814, *Armstrong v. Masten*, 11 *Johns.*, 189.

8. Assignments of the Thing in Action. Survivorship.

609. **Transfer.** A plea showing that the legal title to a note sued on has been transferred by the plaintiff, and is in another, is good. If the suit was brought by such other in the name of plaintiff, that fact should be replied, and it will be a good answer to the plea. [15 *Johns.*, 247; 20 *Id.*, 367; 7 *Cow.*, 176.] *Supreme Ct.*, 1838, *Waggoner v. Colvin*, 11 *Wend.*, 27. Compare *Gage v. Kendall*, 15 *Id.*, 640.

610. In setting up an assignment of a thing in action to avoid a release subsequently made by the assignor, it is necessary to aver a consideration for the assignment, although it was under seal, and to aver that the suit was brought for the benefit of the assignees; but it is not necessary to aver that defendants had notice of the assignment. [17 *Johns.*, 285.] *Supreme Ct.*, 1848, *Warner v. Dunham*, *Hill & D. Supp.*, 206.

611. **Replication.** When an assignee of a thing in action sues in the name of the assignor, and a defence as against the nominal plaintiff is pleaded, the replication must be special, setting up the assignment and notice. *Supreme Ct.*, 1841, *Say v. Dascomb*, 1 *Hill*, 552.

612. To a plea that the promises sued upon had been transferred in bankruptcy to an assignee, a replication that they had been repurchased from the assignee, is sufficient on

general demurrer, without averring that the sale and transfer had been made by order of the court. *Supreme Ct.*, 1849, *Barnes v. Matteson*, 5 *Barb.*, 375.

613. In **assumpsit for goods sold**, the defendant pleaded, that one A. carried on business in the name of the plaintiffs, and so doing, he sold the goods by the plaintiffs; and that he, by plaintiffs as his agents, subsequently assigned the demand to one of his own creditors; and defendant claimed a set-off against A., and that before the commencement of the suit, A. was indebted to the defendant in a larger sum, &c.

Held (by the *Supreme Ct.*), that the plea was bad, in not averring that the debt from A. to the defendant, was contracted prior to the assignment to A.'s creditor. 1818, *Brisban v. Caines*, 10 *Johns.*, 45; *Alsop v. Caines*, *Id.*, 396.

Held (by the *Ct. of Errors*), that whether the plea was good or not, a replication, that A. did not, by the plaintiff, sell the goods, tendered a material issue, and was good. 1815, *Caines v. Brisban*, 13 *Johns.*, 9.

614. A plea in such case, that after the sale A. became solely interested in the whole demand, and while so interested became insolvent, and assigned the debt by the plaintiffs to his own creditor, in order to secure to such creditor a preference,—*Held*, bad in substance. *Ct. of Errors*, 1815, *Caines v. Brisban*, 13 *Johns.*, 9; affirming *S. C.*, *sub nom.* *Alsop v. Caines*, 10 *Id.*, 396.

615. A. sued B. to recover back money recovered from him on his arbitration note, by C., to whom B. had transferred it, upon the ground that the award was void. *Held*, that it was essential to aver that the note was transferred before it fell due, so as to show that the defence could not have been set up in the suit by C. *Supreme Ct.*, 1816, *Batley v. Button*, 13 *Johns.*, 187.

616. **Survivorship.** One of two joint obligees cannot sue unless he avers that the other is dead; and the objection, when it appears on oyer, may be raised by demurrer or in arrest of judgment. Wherever, by reason of a several interest, one may sue, he must set forth the bond truly, and then, by proper averments, show a cause of action in himself alone, clearly embraced within the condition of the bond. *Supreme Ct.*, 1831, *Ehlo v. Purdy*, 6 *Wend.*, 629.

Rules peculiarly Applicable to—Bills and Notes.

9. Bills and Notes.

617. Time of payment. As it is sufficient to state a promissory note in the declaration, according to its terms, a count stating no time of payment is good, for such a note is payable immediately. *Supreme Ct.*, 1811, *Herrick v. Bennett*, 8 *Johns.*, 374.

618. Firm signature. An indorsement or signature of a note, in the name of a firm, by a partner, may be alleged as made by the firm. It is sufficient to set forth a writing according to its legal effect. *Supreme Ct.*, 1808, *Manhattan Co. v. Ledyard*, 1 *Cai.*, 192; *S. C.*, *Col. & C. Cas.*, 226; 1881, *Vallett v. Parker*, 6 *Wend.*, 615.

So, also, of joint makers not alleged to be partners. [2 *Camp.*, 305.] 1880, *Mack v. Spencer*, 4 *Wend.*, 411.

Otherwise, if the allegation be "their own proper hands and names being thereunto subscribed." 1811, *Pease v. Morgan*, 7 *Johns.*, 468.

619. Under a declaration that of three defendants, two were partners, and that the defendants made a note, their own proper hands being thereunto subscribed, plaintiff may recover on proof that one of the partners signed the firm-name, and the other defendant his own. *Supreme Ct.*, 1831, *Porter v. Cummings*, 7 *Wend.*, 172.

620. It is not necessary to state the names of the partners at large, in counting on a note made or indorsed by a copartnership, when the suit is brought against other parties. *N. Y. Superior Ct.*, 1847, *Bacon v. Cook*, 1 *Sandf.*, 77.

621. An agreement to accept, since it amounts to an acceptance, should be counted upon as an acceptance, and no consideration need be shown. *Supreme Ct.*, 1834, *Ontario Bank v. Worthington*, 12 *Wend.*, 593.

622. Demand. If the maker, when a note falls due, cannot be found, nor payment demanded of him personally, the declaration need not state this fact specially, but may aver generally that the note was presented and payment refused. Under such a count, plaintiff may give evidence of any diligence which is deemed equivalent to an actual presentation of it to the maker. [2 *H. Bl.*, 510.] *Supreme Ct.*, 1804, *Stewart v. Eden*, 2 *Cai.*, 121; 1824, *Williams v. Matthews*, 3 *Cow.*, 252. Followed, but questioned, *N. P.*, 1808, *Cummings v. Fisher*, *Anth. N. P.*, 1.

623. If the indorser of a note dies before it becomes due, the notice and promise to pay alleged in an action against his personal representatives, must be alleged to have been made to and by them, and not by the deceased. *Supreme Ct.*, 1804, *Stewart v. Eden*, 2 *Cai.*, 121.

624. The holder of a bill, upon protest for non-acceptance, has an immediate cause of action against the drawer; and if demand of payment, and protest, be deemed void, averments of them may be rejected on demurrer, if the declaration counts properly for non-acceptance. *Supreme Ct.*, 1808, *Mason v. Franklin*, 3 *Johns.*, 202.

625. In an action against the maker of a note payable at a particular time and place, the plaintiff need not aver a demand at the time and place. *Supreme Ct.*, 1828, *Caldwell v. Cassidy*, 8 *Cow.*, 271; *S. P.*, 1819, *Wolcott v. Van Santvoord*, 17 *Johns.*, 248.

626. Notice. In a declaration on a bill of exchange, after averments of non-acceptance, &c., a general averment of notice of all the premises, is sufficient. *Supreme Ct.*, 1808, *Boot v. Franklin*, 3 *Johns.*, 207.

627. Consideration. In declaring on a note not within the statute, and expressed to be for value received, it is sufficient to state that it was given for value received. [3 *Johns.*, 484; overruling 3 *Cai.*, 286.] But if plaintiff undertakes to set forth the consideration specially, he is bound to prove it as laid. *Supreme Ct.*, 1811, *Jerome v. Whitney*, 7 *Johns.*, 321.

628. Non-payment. In declaring upon a note for a sum of money payable in specific articles, it is enough to allege non-payment of the money, without alleging non-delivery of the articles. [5 *Wend.*, 393.] *Supreme Ct.*, 1843, *Rockwell v. Rockwell*, 4 *Hill*, 164.

629. Under the statute authorizing the holder of a bill or note to include all or any of the parties in one action, and to declare upon the money counts alone (*Laws of 1832*, 489), a plea must be to the count, not to the note, and a plea in bar of the note is no answer to the declaration, although it averred that the only cause of action which plaintiff had was the note.* *Supreme Ct.*, 1838, *Anonymous*, 19 *Wend.*, 226. Followed, *N. Y. Com.*

* As to variance in a peculiar case, see *Commercial Bank of Erie v. Norton*, 1 *Hill*, 501.

Rules peculiarly Applicable to—By-laws;—Carriers.

Pl., 1848, *White v. Sherman*, 2 *N. Y. Leg. Obs.*, 90; *S. P.*, *Supreme Ct.*, 1841, *Dibble v. Kempshall*, 2 *Hill*, 124.

630. The statute relating to the form of declaring upon bills and notes (*Laws of 1837*, 72, § 1), only applies to cases where different parties, as maker and indorser, drawer and acceptor, are joined in the same action, not to the case of a surety. *Supreme Ct.*, 1845, *Butler v. Rawson*, 1 *Den.*, 105. To the same effect, 1845, *Tomlinson v. Willey*, 1 *How. Pr.*, 247.

631. The plaintiff may count specially upon the note or bill, in one count, against all the defendants; and he may discontinue as to one set of the defendants and proceed against another. *Supreme Ct.*, 1836, *Fuller v. Van Schaick*, 18 *Wend.*, 547.

632. The plaintiff, as indorsee of a bill of exchange, sued the acceptor, declaring, under the statute of 1832, on the money counts, and appending a copy of the bill, with notice that it was his cause of action; but in the copy the indorsement was omitted. *Held*, that delivery was sufficiently averred by implication; that indorsement was not necessary to pass title; and that the bill was therefore admissible upon the trial of the cause. *Ct. of Appeals*, 1858, *Purdy v. Vermilya*, 8 *N. Y. (4 Seld.)*, 846.

633. The charter of the Bank of Chenango, declared all the parties, whether makers, obligors, indorsers, or guarantors, of any note, bond, or bill, discounted at said bank, or pledged for money due to the same, to be joint makers, obligors, or drawers, and as such might be sued, declared against, &c., jointly. *Held*, that the bank might recover against makers and indorsers on a declaration averring that they were all makers; but could not recover on the money counts against indorsers. *Supreme Ct.*, 1822, *Bank of Chenango v. Curtiss*, 19 *Johns.*, 326.

634. On a note not negotiable, the payee may declare against the maker, as a note within the statute. *Supreme Ct.*, 1805, *Downing v. Backenstoos*, 3 *Cai.*, 187.

635. In a suit by payee against maker, no copy-note is necessary to be given, but the suit may be brought without reference to the statute. [4 *Johns.*, 280; 28 *Wend.*, 88.] *N. Y. Com. Pl.*, 1842, *Van Saun v. Doremus*, 1 *N. Y. Leg. Obs.*, 27.

636. A plea that the note sued on was given for a conveyance covenanting against in-

cumbrances, and that there is one outstanding, is bad in substance, for such a breach only involves nominal damages. *Supreme Ct.*, 1837, *Lattin v. Vail*, 17 *Wend.*, 188.

10. By-Laws.

637. The by-laws of all corporate bodies, including municipal corporations, must be set forth in pleading, when they are sought to be enforced by an action, or set up as a protection. [*Wile. Treat. on Mun. Corp.*, pt. 1, § 480.] *Supreme Ct.*, 1837, *Harker v. Mayor, &c.*, of *N. Y.*, 17 *Wend.*, 199.

638. Authority to enact. Where a corporation are authorized to pass a by-law if they find it necessary, and they pass it, a declaration on the by-law need not aver the necessity. *Supreme Ct.*, 1827, *Stuyvesant v. Mayor, &c.*, of *N. Y.*, 7 *Cow.*, 588.

11. Carriers.

639. Form of action. An action against carriers, solely upon the custom, is an action of tort. If the plaintiff states the custom, and also relies on an undertaking general or special, then the action may be said to be *ex delicto quasi ex contractu*, but in reality is founded on the contract, and to be treated as such. But if all the counts are substantially upon the custom and in case, and though some of them contain expressions similar to those used in actions of assumpsit, no one relies upon any undertaking of the defendants, the action belongs to the class of actions arising upon a tort or misfeasance *ex delicto*. *Supreme Ct.*, 1829, *Bank of Orange v. Brown*, 8 *Wend.*, 158.

640. In assumpsit on a bill of lading, for the non-delivery of the goods, the jury found, among other things, that the goods were lost without any fault or negligence of the defendants, or their agents,—*Held*, that the plaintiff could not recover in this form of action, the jury having negatived the *gravamen* of the action, to wit, the negligence of the defendants; and that the court would not look to the other facts found by the jury, in order to support the action, as that would be allowing plaintiff to declare for one cause of action, and recover for another. *Ct. of Errors*, 1819, *Palmer v. Lorillard*, 16 *Johns.*, 348.

641. Defendant covenanted to carry goods within a certain time, and, if he made default, to deduct from the freight for every day's default. *Held*, not alternative covenants, and

Rules peculiarly Applicable to—Conspiracy;—Contracts.

that a declaration by the owner of the goods, in an action to recover back the freight paid under protest, need only set forth the first part and aver a breach. *Ct. of Appeals*, 1854, *Harmony v. Bingham*, 12 *N. Y.* (2 *Kern.*), 99; affirming *S. C.*, 1 *Duer*, 209.

642. Exception. A carrier contracting to carry upon the canals, except dangers of, &c., in setting up such exception must specify what the dangers were. *Supreme Ct.*, 1829, *Woodworth v. McBride*, 8 *Wend.*, 227.

643. Special pleas rarely to be used, in case, against carriers. *Supreme Ct.*, 1842, *Hoyt v. Allen*, 2 *Hill*, 322.

12. Conspiracy.

644. In an action on the case, in the nature of a conspiracy, whatever is done in pursuance of the conspiracy by any of the parties concerned in it, may be averred to be the act of all; or, after averring the fraudulent combination to cheat the plaintiff, the acts of each defendant in furtherance of the conspiracy, may be stated to have been done individually. [2 *Day*, 205; 3 *Pick.*, 38.] *N. Y. Superior Ct.*, 1829, *Tappan v. Powers*, 2 *Hall*, 277. Compare *Jones v. Baker*, 7 *Cow.*, 445.

13. Contracts.

645. A count on a promise by parol, may be supported by a promise in writing, if it comports with that stated. *Supreme Ct.*, 1816, *Nelson v. Dubois*, 12 *Johns.*, 175.

646. Statute of Frauds. In pleading a contract which is within the Statute of Frauds, it need not be stated to be in writing. *Supreme Ct.*, 1808, *Miller v. Drake*, 1 *Cai.*, 45; 1809, *Elting v. Vanderlyn*, 4 *Johns.*, 237.

So held, also, under the Revised Statutes. 1843, *State of Indiana v. Woram*, 6 *Hill*, 38; 1848, *Gibbs v. Nash*, 4 *Barb.*, 449. *S. P.*, *Chancery*, 1844, *Coles v. Bowne*, 10 *Paige*, 526.

But if the contract is denied, the party must, on the trial, prove a contract valid under the statute. *Supreme Ct.*, 1848, *Gibbs v. Nash*, 4 *Barb.*, 449. *S. P.*, *Chancery*, 1844, *Coles v. Bowne*, 10 *Paige*, 526.

647. Statute authority. In pleading a contract, it is not necessary to state or refer to a public statute upon the authority of which the contract was made. *Ct. of Appeals*, 1849, *Shaw v. Tobias*, 3 *N. Y.* (3 *Comst.*), 188.

648. Though where the charter of a corpo-

ration requires every subscriber for stock to pay to one of the commissioners, at the time of subscribing, five dollars upon each share, the company, in suing a subscriber for an unpaid subscription, must aver that he so paid [1 *Cai. Cas.*, 86; 9 *Johns.*, 218]; yet an averment that defendant was a commissioner, and subscribed while the subscription-book was open and in his hands, is equivalent to an averment of the payment. *Supreme Ct.*, 1814, *Highland Turnpike Co. v. McKean*, 11 *Johns.*, 98.

649. In an action on a contract of a banking association, it is not necessary to aver that it was signed by the officers which the statute requires should sign its contracts. It is enough to allege in general terms that it made the contract. *Supreme Ct.*, 1840, *Delafield v. Kinney*, 24 *Wend.*, 345.

650. Contracts with agents of corporation. A contract not under seal, signed by agents of a corporation, and showing upon its face that the agents intended to contract for the corporation, and not for themselves, may be declared upon as its contract. Reformation in equity is not necessary. [Stor. on Ag., 143, § 154; 22 *Wend.*, 825.] *Chancery*, 1841, *Many v. Beekman Iron Co.*, 9 *Paige*, 188.

651. Though an obligation given to a corporation, which is in terms payable to its agents or directors, should properly be described, in declaring on it, as given to the corporation, by the name and description of the directors, &c., the omission of such averment is cured by verdict, or judgment by default. *Supreme Ct.*, 1844, *Bayley v. Onondaga County Mutual Ins. Co.*, 6 *Hill*, 476.

652. Contract misnaming corporation. Where a deed is made to a corporation, by a name varying from the true name, they may sue in their true name, and aver in the declaration, that the defendant made the deed to them, by the name mentioned in the deed; and an allegation that defendants acknowledged themselves to be bound unto the plaintiffs, by the description of, &c., is equivalent to such an averment. [10 *Co.*, 125, b; 1 *Kyd. on Corp.*, 287.] *Supreme Ct.*, 1816, *N. Y. African Society v. Varick*, 13 *Johns.*, 38.

653. On a promise made to a third person for the benefit of the plaintiff, on a consideration moving from the third person, the plaintiff may declare as if made to the third person. *Supreme Ct.*, 1847, *Delaware & Hud-*

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son Canal Co. v. Westchester County Bank, 4 Den., 97.

654. Order for goods. The acceptance in writing of a written order for the delivery of goods is not a sale; it is only a promise to deliver them upon request, and should be declared on as such. *Supreme Ct.*, 1847, Burrell v. Jacot, 1 Barb., 165.

655. The whole contract need not be set out. A party declaring on an agreement, need only state so much of it as constitutes the engagement, the breach of which is relied on. [14 Johns., 400; 1 Chitt. Pl., 802; 6 East, 564; 2 Den., 258.] *Supreme Ct.*, 1846, Williams v. Healey, 8 Den., 868; N. P., 1818, Denton v. Bours, *Anth. N. P.*, 241; 1829, Scott v. Leiber, 2 Wend., 479.

656. If, however, unnecessary matter be stated, which is foreign to the cause of action, it may be rejected as surplusage; and does not vitiate. [1 Chitt. Pl., 282–284.] *Supreme Ct.*, 1827, Grannis v. Clark, 8 Cow., 86.

657. In a declaration in covenant upon an agreement, it is not necessary to set out the whole of it, but only such parts thereof as relate to the breaches assigned. And where the part of the agreement which is not set out, is not necessary to be set out for the purpose of assigning the breaches relied on, and does not qualify or vary it, it is no variance; and the plaintiff cannot be nonsuited on that ground. [1 Carr. & P., 80.] *Ct. of Errors*, 1845, Sandford v. Halsey, 2 Den., 235. *Supreme Ct.*, 1817, Henry v. Cleland, 14 Johns., 400; 1846, Williams v. Healey, 8 Den., 868.

658. Supplying defects. In declaring upon an agreement not specifying when or where a delivery or payment of consideration was to be made, the pleader must supply these deficiencies by proper averments of the legal effect of the agreement. The time of performance is always material, and must be averred according to the truth, and proved as stated. If no time was stated, it must be averred that the performance was to be in a reasonable time, or upon request. *Supreme Ct.*, 1832, Osborne v. Lawrence, 9 Wend., 135; and see Coonley v. Anderson, 1 Hill, 519. Compare Pearsoll v. Frazer, 14 Barb., 564; and *supra*, 617.

659. A contract which is in the alternative, must be so set out in the declaration. *Supreme Ct.*, 1827, Hatch v. Adams, 8 Cow., 85; 1829, Stone v. Knowlton, 3 Wend., 374.

660. On a contract in the alternative, a

count averring demand of one alternative only, is bad on general demurrer. *Supreme Ct.*, 1850, Lutweller v. Linnell, 12 Barb., 512.

661. Paying difference. In an action for not delivering goods, pursuant to an agreement by which plaintiff was to deliver to the defendant a note of a third person to a larger amount in payment, and the defendant to pay the plaintiff the difference;—the agreement to pay the difference is a material part of the contract, and omitting to set it forth is a variance. *Supreme Ct.*, 1804, Roget v. Merritt, 2 Cai., 117.

662. After a contract is modified, the declaration must not be upon the original contract. *Supreme Ct.*, 1812, Freeman v. Adams,* 9 Johns., 115; 1829, Baldwin v. Munn, 2 Wend., 399; Langworthy v. Smith, *Id.*, 587; S. P., 1811, Philips v. Rose, 8 Johns., 892.

663. A mere parol extension of the time of performing a sealed agreement, does not prevent plaintiff from declaring on the original contract, if it is no part of his complaint that the work was not done in time. *Supreme Ct.*, 1834, Crane v. Maynard, 12 Wend., 408.

664. Plaintiff counted upon a special agreement which was void by the Statute of Frauds. *Held*, that he could not recover upon a valid substituted agreement not counted upon. *Supreme Ct.*, 1845, Spencer v. Halstead, 1 Den., 606.

665. Promises. In assumpsit, except on a contract which imports legal liability, a promise by defendant must be averred. [Laves on Pl., 88; 1 Lev., 164, 246; 7 Ld. Raym., 124; 8 Mass., 160; Gould's Treat. on Pl., 73.] *Supreme Ct.*, 1833, Candler v. Rossiter, 10 Wend., 487.

666. Mutual promises must be pleaded as made at the same time. *Supreme Ct.*, 1804, Livingston v. Rogers, 1 Cai., 588; S. C., *Col. & C. Cas.*, 330; 1815, Keep v. Goodrich, 13 Johns., 397.

667. In suing the successor in office of a town or county officer, upon the contract of such officer, it is not necessary to aver a promise by the defendant. [2 Rev. Stat., 474, § 98.] *Supreme Ct.*, 1835, Morse v. Earl, 18 Wend., 271.

668. A consideration must be stated in every action on a promise. *Supreme Ct.*, 1809, Bailey v. Freeman, 4 Johns., 280.

* See this case in table of CASES CITED, Vol. I.

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669. The consideration of a special agreement must be truly stated and proved as pleaded. An averment of sale and delivery of goods, as the consideration, is not supported by the words "value received" in the instrument produced. *N. Y. Superior Ct.*, 1828, *Wheelwright v. Moore*, 1 *Hall*, 201; *Id.*, 648.

670. Where the promise was founded upon several good considerations, all must be averred and proved. *Supreme Ct.*, 1805, *Lansing v. McKillip*, 8 *Cai.*, 286.

671. A declaration on a contract which is in restraint of trade is bad, unless it appears by the contract or proper averments in the declaration that there was a sufficient consideration to support such a contract. *Supreme Ct.*, 1839, *Ross v. Sadgbeer*, 21 *Wend.*, 166.

672. The declaration in an action by an heir to recover a sum promised him in consideration that he would withdraw his caveat against the proof of the will, must show that he had an interest in setting aside the will. *Supreme Ct.*, 1834, *Seaman v. Seaman*, 12 *Wend.*, 881.

673. A count by a corporation, setting forth that defendant, being indebted to it in the sum of, &c., for six shares of the stock of that company, which were held by him, in consideration thereof promised to pay the same, is good. It is not necessary to set forth the manner in which he became owner of the stock. *N. Y. Superior Ct.*, 1829, *Harlem Canal Co. v. Spear*, 2 *Hall*, 510.

674. If the consideration for a promise is past, it must be laid as done at defendant's request. [1 *Saund.*, 264, n. 1; 1 *Fonb.*, 386.] *Supreme Ct.*, 1810, *Comstock v. Smith*, 7 *Johns.*, 87; 1831, *Parker v. Crane*, 6 *Wend.*, 647.

675. But where it is shown that defendant derives a benefit from the consideration, an averment of a request is unnecessary. *Supreme Ct.*, 1817, *Doty v. Wilson*, 14 *Johns.*, 378.

676. In a count upon mutual promises, the averment that one promise was in consideration of the other, is a sufficient averment of a consideration. *N. Y. Superior Ct.*, 1829, *White v. Demilt*, 2 *Hall*, 405.

677. In a declaration setting out an agreement which admits receipt of the consideration, a separate averment of the payment of the consideration is unnecessary. *Supreme Ct.*, 1805, *Ward v. Sackrider*, 3 *Cai.*, 263.

678. Failure of consideration. In an action on a bond given for purchase-money of

land, where the conveyance was with covenant of seizin, a plea that the plaintiff was not seized in his own right of an absolute estate in fee, without showing an eviction, nor averring that the plaintiff had no estate or interest in the land, does not constitute a bar. The plea must show an absolute failure of the title, as the bond is presumptive evidence of a good consideration for the whole amount of the purchase-money for which it was given. *Ct. of Errors*, 1840, *Tallmadge v. Wallis*, 25 *Wend.*, 107.

679. In an action for the purchase-money of land, which was sold with a covenant for quiet enjoyment, a plea that plaintiff was not seized of the fee, but that another person was, neither shows a failure nor an original want of consideration. *Supreme Ct.*, 1839, *Whitney v. Lewis*, 21 *Wend.*, 181. Approved, *Ct. of Errors*, 1840, *Tallmadge v. Wallis*, 25 *Id.*, 107.

680. Conditions. On a promise to pay money when collected, collection is condition precedent, and must be averred. *Supreme Ct.*, 1808, *Dodge v. Coddington*, 8 *Johns.*, 146.

681. Where the agreement was to deliver to the plaintiff, or his agent, at B., and the plaintiff was to pay the price on the defendant's presenting the receipts for the goods,—*Held*, that a payment on delivery was not dispensed with, if the plaintiff himself was at B., for the provision for the production of receipts applied only in case of a delivery to an agent. *Supreme Ct.*, 1815, *Porter v. Rose*, 12 *Johns.*, 209.

682. A declaration averring that plaintiff agreed to subscribe for a number of lots of land, "agreeably to the conditions, as set forth in said articles of subscription," and to be allowed a commission thereon,—*Held*, on general demurrer, sufficient without setting forth the conditions. *N. Y. Superior Ct.*, 1829, *Smith v. Wiswall*, 2 *Hall*, 469.

683. Under a contract for the hire of a thing, the compensation for which was to depend upon its earnings, the declaration must not merely set forth the contract and aver performance by the plaintiff; but the facts on which the amount of compensation claimed by plaintiff depends, must be set forth. *Supreme Ct.*, 1845, *Relyea v. Drew*, 1 *Den.*, 561.

684. Performance, when to be averred. In a case of mutual promises, where the one is a consideration for the other, and a performance of the plaintiff's promise is not a condi-

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tion to the performance of the other, performance by the plaintiff need not be averred and shown, to entitle him to recover. [1 Wils., 88; Hob., 88.] *Supreme Ct.*, 1818, *Close v. Miller*, 10 *Johns.*, 90.

685. Where the consideration of the defendant's contract is executory, or his performance is to depend on some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfilment of such condition precedent—whether it is in the affirmative or negative, or to be performed or observed by him or by the defendant, or by any other person, or must show some excuse for the non-performance. [1 Chitt. Pl., 809; 11 Wend., 68; Com. Dig., Pl. C., 59; 4 Wend., 553; 4 Day, 313.] Thus where, in a contract to sell lands, the price to be secured by a purchase-money mortgage, including also other lands of the purchaser, defendant agreed to procure a survey of the land to be sold to him, to fix the price, and the plaintiff agreed to produce a certificate of his title to the other lands to be mortgaged.—*Held*, that plaintiff must aver that he had procured and exhibited to the defendant the certificate referred to, and that he was ready and willing, and had offered to execute the bond and mortgage, upon the defendant's executing a deed. *Supreme Ct.*, 1846, *Williams v. Healey*, 8 *Den.*, 368.

686. That where the declaration by the purchaser is only on a special contract for the delivery of goods, he cannot recover without showing due performance. *Supreme Ct.*, 1827, *Davenport v. Wheeler*, 7 *Cow.*, 281.

687. If covenants between A. and B. are dependent, A. must aver a performance of his covenant in suing for a breach of B.'s. [1 H. Bl., 270; 1 Selw. N. P., 385, n.; 1 Saund., 320.] *Supreme Ct.*, 1838, *Dakin v. Williams*, 11 *Wend.*, 67.

688. Where covenants are mutual and independent, and defendant has received a part of the consideration, and refuses to perform, at the time fixed, the plaintiff may recover without averring performance, or readiness to perform. [6 T. R., 570.] *Supreme Ct.*, 1831, *Woodworth v. Curtiss*, 7 *Wend.*, 113; S. P., 1810, *Bennet v. Pixley*, 7 *Johns.*, 249; 1829, *Dox v. Dey*, 3 *Wend.*, 356; 1832, *Dey v. Dox*, 9 *Id.*, 129.

689. Under an agreement for the purchase of a thing at a future day named, and at a

specified price, the transfer and the payment of the price are dependent acts, and the vendor cannot recover without averring and proving a tender or offer to sell and transfer at the time fixed. A count averring that he was ready and willing to sell and transfer at the time named, is bad on demurrer. [Reviewing many cases.] *Ct. of Appeals*, 1854, *Lester v. Jewett*, 11 *N. Y.* (1 *Kern.*), 453; reversing S. C., 12 *Barb.*, 502. Followed, *Smith v. Wright*, 1 *Abbotts' Pr.*, 243; affirming S. C., 5 *Sandf.*, 118.

690. Where a specific act is to be done by the plaintiff, or any number of acts, by way of condition precedent, he must show, in pleading, precisely what he has done by way of performing them. [1 Chitt. Pl., 278, 282; Mans. on Dem., 26, 43, 51, 66; 4 Wend., 449; 2 *Johns.*, 413.] *Supreme Ct.*, 1840, *Glover v. Tuck*, 24 *Wend.*, 153.

691. In an action on a surety's absolute promise to pay, if the principal does not, in a certain time after delivery to the latter, tender and refusal on the part of the principal, being equivalent to a delivery, may be averred specially in lieu of a delivery; and this notwithstanding he subsequently accepted a delivery. *Supreme Ct.*, 1838, *Kemble v. Wallis*, 10 *Wend.*, 374.

692. Performance to satisfaction of plaintiff. Although in an action on a contract to pay for work, if done to the satisfaction of defendant, it is not necessary to aver that it was done to his satisfaction, if it is shown to be according to the contract; yet if the contract requires it to be done to the satisfaction of third parties, the plaintiff must aver that it was done to their satisfaction. *Supreme Ct.*, 1840, *Butler v. Tucker*, 24 *Wend.*, 447.

693. — to the satisfaction of third party. Under a building contract which provides for payment when the architect should furnish a certificate "that the work was fully and completely finished according to the specifications," the giving of the certificate must be averred and proven in an action for payment. The condition is not satisfied by a written statement of the architect that the building was finished in such a manner that he would accept it if he were the owner. *Supreme Ct.*, 1846, *Smith v. Briggs*, 8 *Den.*, 78.

694. Waiver. Where the payment of money is a condition precedent to the performance of a covenant to convey land, a waiver

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of the condition cannot be given in evidence in support of a declaration for breach of the covenant averring performance. [8 Johns., 392; 9 Id., 115; 3 Id., 528; 15 Id., 204; 4 Cow., 566; 1 Johns. Cas., 22; 3 T. R., 590.] *Supreme Ct.*, 1829, Baldwin v. Munn, 2 *Wend.*, 399. Compare, however, Holmes v. Holmes, 9 *N. Y.* (5 *Seld.*), 525; affirming S. C., 12 *Barb.*, 187.

695. In an action by a vendor, to recover upon the contract of sale, if it is averred that before the day fixed for conveyance and payment, the defendant, by writing, gave notice to the plaintiff that he had determined not to take his farm, had abandoned the agreement and refused to perform, this dispenses with an offer or readiness to perform on the part of the plaintiff, as it shows that such step would have been but an idle ceremony. [1 Chitt., 318; Dougl., 684; 1 T. R., 688; 5 Cow., 506.] *Supreme Ct.*, 1839, North v. Pepper, 21 *Wend.*, 636; but compare Traver v. Halsted, 28 *Id.*, 66.

696. In an action for breach of contract, an averment that the plaintiff was prevented from performing, or being ready to perform on his part, by the act of the defendant, is a sufficient excuse, and dispenses with the necessity of an allegation of performance, or readiness to perform. [8 *Barb.*, 614; 7 *Id.*, 170; 3 Johns., 528; 19 *Id.*, 69; 7 *Barb.*, 387; 5 Cow., 506; 21 *Wend.*, 636; 28 *Id.*, 66; 9 *Id.*, 68; 16 *Mass.*, 161; *Yelv.*, 76.] *Supreme Ct.*, 1858, Clarke v. Crandall, 27 *Barb.*, 78.

697. Offer to perform. That A. attended at the place and time appointed, "ready and prepared, and offering to execute" a conveyance "according to the said agreement," and that the defendant did not attend, and that he has refused to accept the same, and perform the agreement on his part,—*Held*, a substantially sufficient averment of an offer to perform. *Supreme Ct.*, 1808, Miller v. Drake, 1 *Cal.*, 45.

698. Readiness. Where two acts are to be done at the same time, as where one agrees to sell and deliver, and the other to receive and pay, in suing for a non-delivery, it is necessary for the plaintiff to aver a readiness to pay on his part, whether the other party was at the place ready to deliver or not. [7 T. R., 125; 1 East, 208; 2 Bos. & P., 447; 1 Saund., 320, n. 4; 5 Johns., 179; 2 *Id.*, 207.] *Supreme Ct.*, 1815, Porter v. Rose, 12 *Johns.*, 209.

And the averment must be proved. 1826, Topping v. Root, 5 *Cow.*, 404.

But he need not prove tender and demand. 1841, Coonley v. Anderson, 1 *Hill*, 519.

699. In an action for the non-delivery of goods, pursuant to an agreement, it is sufficient for plaintiff to aver that he had at all times been ready to receive them, and to pay, without saying that he was ready at the particular time stipulated. *Supreme Ct.*, 1815, Porter v. Rose, 12 *Johns.*, 209.

700. Where the power to perform the covenant, on the part of the plaintiff, depends on acts previously to be done on the part of the defendant,—*e. g.*, plaintiff's executing a purchase-money mortgage,—it is unnecessary for the plaintiff to aver a tender and refusal, but an averment of a readiness to perform is sufficient. [1 East, 208; 2 Bos. & P., 457.] *Supreme Ct.*, 1809, West v. Emmons, 5 *Johns.*, 179.

701. So, where plaintiff's obligation depends on an act of the defendant to be done at the same time,—*e. g.*, where plaintiff was to give his own notes on a delivery of goods by defendant,—an averment of plaintiff's readiness and defendant's refusal is sufficient, without a tender. *N. Y. Superior Ct.*, 1829, White v. Demilt, 2 *Hall*, 405.

702. Tender. An averment of the execution of a deed ready to be delivered at the stipulated time, that notice was given thereof to the purchaser, and the money demanded and a refusal, is substantially an averment of a tender and refusal. *Supreme Ct.*, 1839, North v. Pepper, 21 *Wend.*, 636.

703. — excuse. An averment of a tender is simply an affirmation that the party had done all that was in his power to do, towards the fulfilment of his obligation; and under this averment, proof that the other party had prevented or dispensed with some of the legal requisites of a formal tender, is admissible. [2 Greenl. Ev., § 608; 10 East, 101; 2 Carr & P., 77; 3 T. R., 688.] *Ct. of Appeals*, 1854, Holmes v. Holmes, 9 *N. Y.* (5 *Seld.*), 525; affirming S. C., 12 *Barb.*, 187.

704. Request. When a party agrees to pay on a request, as a surety of a third person, the request is parcel of the contract, and must be specially alleged and proved. [Oro. Eliz., 85; Oro. Jac., 523, 639; 1 Saund., 32; 6 Mod., 200; Com. Dig., Pl. (c., 69); 6 M. & S., 9; 3 Camp., 459; 7 Pet., 118; 2 Saund.,

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108, n. 8; *Lawes Pl.*, 282, 251; 1 *Ohitt. Pl.*, 863.] *Supreme Ct.*, 1843, *Nelson v. Bostwick*, 5 *Hill*, 37; *Douglass v. Rathbone*, *Id.*, 143.

705. Under a covenant to pay a salary at a certain rate, to be paid quarterly or half-yearly, according to the request of the plaintiff, the request is not a condition precedent, and it is not necessary for the plaintiff to state a special request or demand in the declaration; but the bringing the action is itself a legal demand. *Supreme Ct.*, 1800, *Ernst v. Bartle*, 1 *Johns. Cas.*, 319.

706. In an action for breach of a promise to indorse a note, the declaration should allege that the note was prepared, and an indorsement demanded. *Supreme Ct.*, 1826, *Gallagher v. Brunel*, 6 *Cow.*, 346.

707. In an action upon an absolute guaranty of a negotiated note, it is not necessary to aver a demand of the principal and notice to the guarantor in the declaration. *N. Y. Com. Pl.*, 1846, *Deane ads. Higgins*, 4 *N. Y. Leg. Obs.*, 423.

708. Second request. The rule that a vendor is not in default, until the purchaser has demanded a conveyance, and, after waiting a reasonable time for the vendor to prepare it, has again demanded it, is a rule of evidence merely, and the facts need not be set forth specially. *Supreme Ct.*, 1853, *Pearroll v. Frazer*, 14 *Barb.*, 564.

709. Breach. On a contract to sell goods for not less than a certain sum, and to account, a count averring that defendant sold them for a less sum, and did not account, is bad for duplicity, but good in substance. A count not averring a sale, but only a refusal to account, is bad; for until sale there is no breach. *N. Y. Superior Ct.*, 1828, *Wolfe v. Luyster*, 1 *Hall*, 146.

710. The parties were engaged in running a line of stages, and by the agreement between them, one was to run at his own expense a certain portion of the route, and the other in like manner, the residue; and they were to settle monthly, and divide the fare received. *Held*, that a declaration setting forth the agreement, and alleging that the defendant had received fare from passengers to a specified amount, and had not, although requested so to do by the plaintiffs, paid to them the balance remaining in his hands belonging to them, is bad in substance, for want of an aver-

ment of a definite balance in the defendant's hands; or that he had refused to settle with the plaintiffs to ascertain the balance. *Ct. of Appeals*, 1851, *Pattison v. Blanchard*, 5 *N. Y. (1 Seld.)*, 186.

711. Refusal. An averment that the plaintiff, before the day, refused to perform, without showing that the refusal was addressed to the defendant, is bad. *Supreme Ct.*, 1840, *Traver v. Halsted*, 23 *Wend.*, 66.

712. Defence that defendant contracted as agent. Where a person who has sealed a deed or covenant in behalf of others, is sued personally thereon, he is bound to aver and prove the authority under which he acted. It is not enough to crave oyer of and set forth the instrument executed by him, in his plea. He must show that the plaintiffs have a right of action against some other person. *Supreme Ct.*, 1816, *White v. Skinner*, 13 *Johns.*, 307.

713. A bond of indemnity to an officer recited a levy made, and that the goods were claimed by A., and indemnified the officer against all damage that "may" be incurred. *Held*, that a count alleging that subsequently B. recovered judgment on account of said levy, was sufficient. *N. Y. Com. Pl.*, 1843, *Jenkins v. Stevens*, 2 *N. Y. Leg. Obs.*, 297.

14. Covenants.

714. In an action of covenant a plaintiff is bound to aver enough to show, with all reasonable certainty, that he has been damaged. Thus, on an agreement to buy a farm of a specified number of acres at a specified sum per acre, but excepting a road running through it, and to bid upon it up to that amount on a judicial sale, a declaration for not bidding must state the quantity of land in the road, so as to show that plaintiff was damaged. *Supreme Ct.*, 1828, *Gould v. Allen*, 1 *Wend.*, 182.

715. In a declaration for a breach of a covenant, it is sufficient to state that the defendant conveyed to the plaintiff certain land or premises in the said deed particularly mentioned and specified, making profert, without any further description. [1 *Saund.*, 233, n. 2; 2 *Ohitt. Pl.*, 192, n. i.] *Supreme Ct.*, 1817, *Dunham v. Pratt*, 14 *Johns.*, 373.

716. A declaration for a breach of a covenant of quiet enjoyment and general warranty must allege that plaintiff was evicted by one having a lawful title, and by process of

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law. *Supreme Ct.*, 1806, *Greenby v. Wilcocks*, 2 *Johns.*, 1.

717. In actions for breach of covenants of warranty and power to convey, in a lease, the declaration must state the particulars of the plaintiff's being prevented from taking possession of the premises; that is, as to the person or persons who thus prevented him; and by what right; and show a title at or before the date of the lease declared on. *Supreme Ct.*, 1827, *Grannis v. Clark*, 8 *Cow.*, 36.

718. On a covenant to save harmless and indemnify against claims, costs, damages, &c., it is not enough to allege that plaintiff was forced to pay, but the declaration must show how and in what manner. That he was compelled to pay by a court of competent jurisdiction, is not enough. [2 *Salk.*, 517.] *Supreme Ct.*, 1828, *Patton v. Foote*, 1 *Wend.*, 207.

719. Otherwise on general demurrer. *Supreme Ct.*, 1827, *Packard v. Hill*, 7 *Cow.*, 484; affirmed, *Ct. of Errors*, 1830, 5 *Wend.*, 375.

720. Where, after dissolution, one partner sues the other for breaking his covenant to indemnify him against the firm-debts, and to pay them, notice of a debt, on account of which suit is brought, need not be averred, especially if it is averred that the books and papers of the firm were transferred to the defendant. It is a general rule in pleading, that where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred. [1 *Ohitt. Pl.*, 320; 1 *Saund.*, 116, n. 2; 2 *Id.*, 62, n. 4; *Com. Dig.*, Pl. C, 78-75; 3 *T. R.*, 874.] *So held*, on general demurrer. *Supreme Ct.*, 1830, *Clough v. Hoffman*, 5 *Wend.*, 499.

721. In an action on a covenant to pay the sum mentioned in the condition of A.'s bond, if he makes default, it is enough, if the whole sum is due at the time of the breach, to aver how much was due and in arrear, without specifying what was principal and what interest. *Supreme Ct.*, 1840, *Bush v. Stevens*, 24 *Wend.*, 256.

722. Under a covenant to deliver one half a crop, a declaration assigning as a breach that defendant had raised 600 bushels of wheat, and had not delivered the same to the plaintiff, but had converted the whole to his own use, and without averring a demand, is substantially good; and a plea taking an issue on the quantity only, or not denying the conversion, but setting up that the plaintiff did not

designate a place for the delivery, is bad. *Supreme Ct.*, 1850, *Beach v. Barons*, 18 *Barb.*, 305.

723. In an action by the sheriff to recover from a receptor for a breach of his covenant to deliver the property, a plea to invalidate the levy must show that the defendant in the execution had no property whatever in the goods. Alleging that it was partnership property, the defendant being one of the firm, is no answer. *Ct. of Errors*, 1840, *Burrall v. Acker*, 28 *Wend.*, 606; aff'g *S. C.*, 21 *Id.*, 605.

724. Performance. It is not always sufficient to aver performance in the words of the covenant. It must be set forth with such certainty as to enable the court to judge whether the intent of the covenant has been fulfilled. Thus, under a covenant to sell a lot of land, the plaintiff, in pleading performance, should aver, not that he sold, but that he conveyed, setting forth the nature of the conveyance. *Supreme Ct.*, 1830, *Thomas v. Van Ness*, 4 *Wend.*, 549.

725. Defences. That where a grantee has been damnified by a breach of the covenant of seizin, without an eviction, he may, when sued on his bond for the purchase-money, plead *non est factum*, and give notice of the partial failure of title to reduce the amount of the recovery. *Ct. of Errors*, 1840, *Tallmadge v. Wallis*, 25 *Wend.*, 107.

726. In an action of covenant for purchase-money, a plea that one A. claimed title to the land, without averring that it was a lawful claim, and that A.'s title existed before or at the time of the plaintiff's conveyance to the defendant, is bad. *Supreme Ct.*, 1807, *Folliard v. Wallace*, 2 *Johns.*, 395.

727. In an action on a covenant of seizin, if defendant pleads that defendant was seized, but had defeated his estate by a subsequent deed, the plea must disclose the nature of the deed, and the parties to it. *Supreme Ct.*, 1814, *Gelston v. Burr*, 11 *Johns.*, 482.

728. A replication denying that the plaintiff did defeat and bar his estate, without confessing or traversing that the plaintiff was previously seized, is bad. *Id.*

729. A. sold land to B., who gave a purchase-money mortgage to A., and A. afterwards conveyed with covenant of seizin to the plaintiff. The plaintiff assigned the seizin of B. as a breach of the covenant. *Held*, that defendant's plea that the mortgage had become forfeited, and that he re-entered and was

Rules peculiarly Applicable to—Deceit. False Warranty. Fraud.

seized of the land before the conveyance to the plaintiff, was bad, for not averring that the equity of redemption had been barred. *Supreme Ct.*, 1814, *Gelston v. Burr*, 11 *Johns.*, 482.

730. Plea of performance. Where in an action of covenant, a particular breach is assigned, a general plea of performance, pursuing the words of the covenant, is bad, on demurrer. *Supreme Ct.*, 1816, *Bradley v. Ostarhoudt*, 18 *Johns.*, 404; 1850, *Beach v. Barona*, 18 *Barb.*, 805.

731. Not damaged. In an action of covenant to recover damages for non-performance of an agreement for the transportation of property, the defendant pleaded, that if the plaintiff had been damaged, it was by his own wrong, and through his own act, means, and default;—*Held*, on demurrer, that the plea was bad. Such a plea is applicable only to a bond of indemnity; and is not a proper defence to an action upon a covenant for the performance of a particular act. [1 *Saund.*, 116, a. 1; 1 *Bos. & P.*, 688.] *Ct. of Appeals*, 1854, *Harmony v. Bingham*, 12 *N. Y.* (2 *Kern.*), 99; affirming *S. C.*, 1 *Duer*, 209.

732. Replication. In an action for the breach of the covenant of seisin, where the declaration negatives the words of the covenant, and the plea is that defendants were seized, pursuing the words of the covenant, a replication merely negating the covenant, and reiterating the breach assigned in the declaration, is good; though it is otherwise in those cases where the subject of the breach is within plaintiff's own knowledge, and is multifarious. *Supreme Ct.*, 1817, *Abbott v. Allen*, 14 *Johns.*, 248.

733. To a declaration on the covenants in a lease, which set up a grant of the land, and an assignment of the lease to the plaintiff, on a day named, and charged subsequent breaches, the plea set up that on the same day the plaintiff assigned and conveyed to a third party. *Held*, that a replication that all the breaches counted upon took place intermediate conveyance to the plaintiff and his conveyance, was good. *Supreme Ct.*, 1850, *Beach v. Barona*, 18 *Barb.*, 805.

15. Deceit. False Warranty. Fraud.

734. In an action on the case to recover damages sustained by defendant's false representations of his title to premises leased by

him to plaintiff, a count averring no fraud, falsehood, or deceit, in the defendant, but grounded on the mere fact of the defendant's title having failed, is insufficient, and will not support a verdict. *N. Y. Com. Pl.*, 1842, *Dearborn v. Fry*, 1 *N. Y. Leg. Obs.*, 829.

735. Where in an action for deceit, the epithets false and fraudulent usually prefixed to the verb in the allegation of the representations, were omitted there, but after stating the representations and their falsity, it was alleged that the plaintiff by reason of the affirmation was falsely and fraudulently deceived,—*Held*, sufficient after verdict. *Ct. of Errors*, 1807, *Bayard v. Malcolm*, 2 *Johns.*, 550; reversing *S. C.*, 1 *Id.*, 458.

736. That laying affirmations to have been fraudulently made, imports a *scienter*. *Ib.* Compare *Everton v. Miles*, 6 *Johns.*, 188; *Panton v. Holland*, 17 *Id.*, 92.

737. Intent. The declaration in an action for deceit must aver that the false representation was made, or the truth suppressed, with an intention to deceive and defraud, or judgment will be arrested. *Ct. of Errors*, 1823, *Addington v. Allen*, 11 *Wend.*, 874; reversing *S. C.*, 7 *Id.*, 9.

738. Scienter. A declaration by a buyer against the seller for using weights, &c., not conformable with the legal standard, need not allege that the defendant knowingly used them. *Supreme Ct.*, 1827, *Bayard v. Smith*, 17 *Wend.*, 88.

739. False warranty. In assumpsit, on a breach of warranty, deceit or fraud in the sale; in order to be admissible in evidence, must be substantively alleged in the declaration. *Supreme Ct.*, 1810, *Everton v. Miles*, 6 *Johns.*, 188; and see *Snell v. Moses*, 1 *Id.*, 96; *Perry v. Aaron*, *Id.*, 129.

740. On an absolute warranty, it is not necessary to aver a *scienter* as in the case of a bare representation. *Supreme Ct.*, 1823, *Case v. Boughton*, 11 *Wend.*, 106.

741. In an action on the case on a false warranty, it is not necessary to aver or prove a *scienter* of the defendant. *Supreme Ct.*, 1851, *Holman v. Dord*, 19 *Barb.*, 886.

742. Fraud. In an action for fraud in a sale, it is unnecessary to set forth the contract between the parties, or a consideration; for that only relates to the damages. *Supreme Ct.*, 1816, *Barney v. Dewey*, 13 *Johns.*, 224. Followed, 1828, *Corwin v. Davison*, 9 *Cow.*, 22.

Rules peculiarly Applicable to—Discharges.

743. But an allegation that the true owner had recovered against the plaintiff on the ground that defendant was not the owner, is proper; and an allegation that defendant was a witness at the trial of the owner's action, is equivalent to an averment of notice. *Id.*

744. Substance of a count for fraud and deceit with damage, which was held sufficient. *Dearborn v. Fry*, 1 *N. Y. Leg. Obs.*, 829.

16. Discharges.

745. Insolvent's discharge. In general. If a plea of a discharge in insolvency states enough to give the magistrate who granted it jurisdiction, and sets forth the discharge itself, it will be sufficient, without stating all the proceedings. It is a salutary principle, that where the matter tends to great prolixity, a concise manner of pleading is to be admitted. [8 T. R., 461.] In setting forth the proceedings of an inferior court, it is sufficient to say that a plaint was levied, and such proceedings were thereupon had, that such an act was done by the court. Moreover, by the statute the discharge is conclusive, and regularity is to be presumed. *Supreme Ct.*, 1806, *Service v. Heermance*, 1 *Johns.*, 91. Followed, 1807, *Peebles v. Kittle*, 2 *Id.*, 363; 1814, *Hines v. Ballard*, 11 *Id.*, 491; 1822, *Roosevelt v. Kellogg*, 20 *Id.*, 208.

746. It is not necessary, or even proper to state more than to aver the presentation of the petition and inventory to the officer, and aver, generally, compliance with the requirements of the act, and then proceed with "such proceedings," &c. *Supreme Ct.*, 1840, *Hayden v. Palmer*, 24 *Wend.*, 864.

747. It is not necessary to aver that a schedule accompanied the petition, but only such proceedings as give the officer jurisdiction. *N. Y. Com. Pl.*, 1843, *Schultz v. Woodroffe*, 2 *N. Y. Leg. Obs.*, 295.

748. The discharge must be set forth. Referring to it is not enough. *Supreme Ct.*, 1808, *Oruger v. Oropsey*, 3 *Johns.*, 242.

749 The want of an averment of a fact necessary to give the officer jurisdiction, cannot be supplied by a recital of it in the discharge. The presumption that the judge did his duty, and required those things to be done which were necessary, does not arise until after jurisdiction is sufficiently alleged. [1 *Johns.*, 91; 7 *Id.*, 75; 20 *Id.*, 210.] *Supreme Ct.*, 1828, *Wyman v. Mitchell*, 1 *Cow.*, 816; 1829,

Wheeler v. Townsend, 3 *Wend.*, 247. *N. Y. Superior Ct.*, 1829, *Delavan v. Stanton*, 2 *Hall*, 190; *Hildreth v. Shillabee*, *Id.*, 281.

750. If the pleader prefers to state all the proceedings in relation to his discharge, he must state a conformity in every respect to the act, or the plea is bad. *Supreme Ct.*, 1810, *Frery v. Dakin*, 7 *Johns.*, 75.

751. If a discharge states that the officer was satisfied that the insolvent had conformed, in all things, to those matters required of him, according to the true intent and meaning of the act, before he directed an assignment, and if it directs the manner in which it was to be made, and states that a certificate of the assignees was produced, that the insolvent had made such assignment,—a plea setting out such discharge verbatim sufficiently shows a compliance with the act, and a delivery of the property, &c., of the insolvent. *Supreme Ct.*, 1822, *Roosevelt v. Kellogg*, 20 *Johns.*, 208.

752. A pleading of an insolvent's discharge, under the act of 1817, must set forth the action in which the debtor was imprisoned, and the court out of which the execution issued, and the name of the creditor upon whose application the proceeding was instituted; and the omission is a defect of substance. *N. Y. Superior Ct.*, 1829, *Delavan v. Stanton*, 2 *Hall*, 190.

753. — residence of debtor. A plea of a discharge under the act of 1811, must show that the defendant had been for three months preceding the petition, an inhabitant of, or imprisoned in, the county where he applied. The plea should state sufficient to show that the judge was authorized to proceed, and if that is done, then the discharge is evidence of the subsequent proceedings. [1 *Johns.*, 91; 7 *Id.*, 75.] *Supreme Ct.*, 1818, *Morgan v. Dyer*, 10 *Johns.*, 161; 1831, *Otis v. Hitchcock*, 6 *Wend.*, 438.

754. An averment that defendant, "at R., in the county of, &c., was an insolvent debtor," is insufficient (under the act of 1818). *Supreme Ct.*, 1828, *Wyman v. Mitchell*, 1 *Cow.*, 816.

755. An averment that he was "of the county," imports that he was a resident of it, and is sufficient. *Supreme Ct.*, 1829, *Porter v. Miller*, 3 *Wend.*, 829.

756. Under an act referring to an inhabitant of the county, a plea that A. was a resident, is sufficient. *Supreme Ct.*, 1822, *Roosevelt v. Kellogg*, 20 *Johns.*, 208.

Rules peculiarly Applicable to—Discharges.

757. In pleading a discharge in insolvency, in bar of a judgment *for a tort*, an omission to allege that the plaintiff was a resident within this State at the time of the first publication of notice of application for the discharge, or that being resident abroad, he united in the petition, or accepted a dividend, is fatal. *Supreme Ct.*, 1887, *Smith v. Bennett*, 17 *Wend.*, 479.

758. A plea omitting to aver that the plaintiff and defendant were inhabitants of the State at the time of the insolvent's discharge; —*Held*, not cured, even by verdict. *N. Y. Com. Pl.*, 1848, *Swedenstern v. Rowe*; 1 *N. Y. Leg. Obs.*, 327.

759. — signing. A plea of an insolvent's discharge need not set forth that the insolvent and his creditors signed the petition. Assent is implied; especially after verdict. *Supreme Ct.*, 1887, *Smith v. Bennett*, 17 *Wend.*, 479. *N. Y. Com. Pl.*, 1848, *Schultz v. Woodroffe*, 2 *N. Y. Leg. Obs.*, 295.

760. — imprisonment. A plea of a discharge under section 9 of the act of 1818, must aver that the debtor had been imprisoned for sixty days, upon execution in a civil action. *N. Y. Superior Ct.*, 1829, *Hildreth v. Shillabee*, 2 *Hall*, 281.

761. — amount of debt. Since a discharge under section 9 of the act of 1818, can only be had on proceedings by a creditor whose debt exceeds \$25, a plea setting up such discharge must show that the creditor's demand exceeded that amount. *Supreme Ct.*, 1829, *Wheeler v. Townsend*, 8 *Wend.*, 247.

762. Bankrupt's discharge. In pleading a bankrupt discharge, a general averment that the court by which it was granted had jurisdiction will not answer; the facts necessary to confer jurisdiction must be set forth. Alleging that such affidavits, schedules, and other necessary and proper papers as are required by the bankrupt act, were presented, is not enough, but the plea should state what papers in particular were presented. Alleging that a discharge was granted by the judge, when it could only be granted by the court, is bad. The debt must be averred to have been provable under the act. *Supreme Ct.*, 1848, *Sackett v. Andross*, 5 *Hill*, 327; *S. C.*, 3 *N. Y. Leg. Obs.*, 11. To similar effect, in case of pleading under the act to abolish imprisonment for debt, 1844, *Van Etten v. Hurst*, 6 *Hill*, 811. See, also, *Ruckman v. Cowell*, 1 *N. Y. (1 Comst.)*, 505.

763. A plea of a bankrupt's discharge must aver that the plaintiff's debt did not arise by reason of a defalcation as a public officer, &c., which debts are excepted by the act. *Supreme Ct.*, 1848, *Sackett v. Andross*, 5 *Hill*, 327; *S. C.*, 3 *N. Y. Leg. Obs.*, 11; 1845, *Mables v. Burnside*, 1 *Den.*, 332. Followed, 1848, *Dresser v. Brooks*, 3 *Barb.*, 429.

764. In pleading a bankrupt discharge, the plea should aver that the defendant was indebted for debts which he was unable to pay. Also, that the petition of the bankrupt was presented to the court, not that it was presented to the judge. *N. Y. Com. Pl.*, 1847, *Gillon v. Bruen*, 5 *N. Y. Leg. Obs.*, 227.

765. A plea that defendant did owe debts which are not within the excepted classes, and that he presented a petition, &c., imports that he was a bankrupt within the act. *N. Y. Superior Ct.*, 1847, *McNulty v. Frame*, 1 *Sandf.*, 128.

766. — under the compulsory provisions. A plea of a discharge under the compulsory provisions of the bankrupt act, need not aver the existence of the facts upon which his creditors proceeded against the bankrupt; for they were determined against him, and he should not be required to prove them. It should aver generally, that the defendant was a bankrupt within the true intent and meaning of the act, setting forth enough of the proceedings to show jurisdiction, and then that "such proceedings were thereupon had" that he was discharged by the court. *Supreme Ct.*, 1844, *Stephens v. Ely*, 6 *Hill*, 607.

767. — under the voluntary provisions. A plea of a discharge under the voluntary provisions of the bankrupt act, must aver positively that the defendant, at the time of presenting the petition, owed debts. An averment that the petition so alleged, is not sufficient. *Supreme Ct.*, 1845, *Varnum v. Wheeler*, 1 *Den.*, 331; and see *Dresser v. Brooks*, 3 *Barb.*, 429.

768. A plea of a discharge under the voluntary provisions of the bankrupt act, must state, for the purpose of showing the jurisdiction of the district court to grant the discharge, 1. The residence of the defendant, which must be stated for two purposes, to wit, first, to show that he is within the class of persons entitled to the benefit of the act; and next, to show that his application is made to the proper district or territorial court; 2.

Rules peculiarly Applicable to Ejectment.

That he owed debts, not created in consequence of a defalcation as a public officer, &c., as above specified in the act; 8. That he presented his petition to the district court of the district in which the defendant resided or had his place of business, and that his petition contained what the act required it should contain. These facts being distinctly and directly stated, the legal presumption is thenceforth in favor of the regularity of the proceedings, and the plea may at once proceed to aver that, upon the presentation of the petition to the court, such proceedings were thereupon had that he was duly decreed to be a bankrupt; without averring that notice was published to the creditors, or that objections were or were not made against the decree, or that twenty days had elapsed before the decree. *Ct. of Appeals*, 1850, *McCormick v. Pickering*, 4 *N. Y. (4 Comst.)*, 276.

769. An averment that the petition for a discharge was filed, and that proceedings were had thereupon, imports that it was presented to the court. *Id.*

770. A special averment that the demand in suit was included in the list of creditors contained in the petition, is unnecessary; and an averment that the debt, if any there was, was provable under the act, is good; though not admitting the validity or existence of the debt. *Id.*

771. **Replication.** The replication to a plea of a discharge under the bankrupt act of 1841, may impeach it for fraud in making preferences, and payments, &c., in contemplation of bankruptcy, or wilful concealment of property or rights of property, but must describe the property, as to kind and quantity, and specify how the concealment was effected, or in what stage of the proceedings it occurred, and must state to whom and how unlawful preferences were given. *Supreme Ct.*, 1845, *Brereton v. Hull*, 1 *Den.*, 75; 1848, *Dresser v. Brooks*, 8 *Barb.*, 429.

772. A plaintiff seeking to invalidate a discharge or exemption in bankruptcy, upon notice specifying acts of fraud of defendant, entitled to give evidence of the matters so specified, as if they had been specially pleaded. *Laws of 1846*, 306, ch. 243.

773. To a plea of a bankrupt's discharge, a replication charging merely that a creditor proved his debt and filed sufficient objections, but not averring their truth, and averring that the defendant induced the creditor, by paying

him a certain consideration, to withdraw his opposition, is bad. *Supreme Ct.*, 1846, *Chamberlin v. Griggs*, 3 *Den.*, 9.

774. **Discharge from imprisonment.** In a plea to an action for an escape, stating that defendant was discharged pursuant to the act for the relief of debtors, an averment of the fact of jurisdiction is enough; but alleging that the prisoner was discharged out of custody by due course of law, is bad, on special demurrer. *Supreme Ct.*, 1807, *Currie v. Henry*, 2 *Johns.*, 433.

775. In an action for an escape on execution the sheriff pleaded, that the defendant presented his petition to the Court of Common Pleas, &c., and was discharged out of custody on the said execution by order of the Court of Common Pleas, having full power and authority for that purpose, pursuant, &c. *Held*, on general demurrer, sufficient to show jurisdiction. *Supreme Ct.*, 1811, *Cantillon v. Graves*, 8 *Johns.*, 472.

776. Where the sheriff justifies under a discharge pursuant to the act for the relief of debtors with respect to imprisonment, it is sufficient to show that the Common Pleas had jurisdiction in the case. With the regularity of their proceedings he has no concern. *Id.*

17. Ejectment.

777. **The demise must be laid at or subsequent to the time when the plaintiff's right accrued.** *Supreme Ct.*, 1800, *Van Alen v. Rogers*, 1 *Johns. Cas.*, 281. To the same effect, 1826 [citing 6 *Johns.*, 273], *Dickenson v. Jackson*, 6 *Cow.*, 147.

778. **Separate demises.** Tenants in common may declare on a joint demise, or on separate demises. *Supreme Ct.*, 1804, *Jackson v. Bradt*, 2 *Coi.*, 169.

779. The plaintiff may declare on separate demises of several lessors, and make proof of their separate titles to separate parts of the premises, and recover accordingly. *Supreme Ct.*, 1815, *Jackson v. Sidney*, 12 *Johns.*, 185.

780. In ejectment, counts may be inserted in the name of both grantor and grantee; where the objection of adverse possession at the time of the conveyance to the grantee is anticipated. *Supreme Ct.*, 1881, *Ely v. Ballantine*, 7 *Wend.*, 470.

781. **A demise must be proved as laid.** If laid as joint, it must be shown that the lessors had such an interest as would enable

Rules peculiarly Applicable to—Escape;—Estoppel.

them to join in a demise. If one had no interest, it is ground of nonsuit. *Supreme Ct.*, 1829, *Doe v. Butler*, 3 *Wend.*, 149. Followed, 1841, *Gillet v. Stanley*, 1 *Hill*, 121.

782. Under the Revised Statutes, plaintiff must aver possession on some day subsequent to the accruing of his title, and a subsequent ouster; and it is not necessary to prove an actual entry, nor a receipt of profits, but a right of possession at the time of the suit commenced is sufficient. *Supreme Ct.*, 1833, *Siglar v. Van Riper*, 10 *Wend.*, 414.

783. Several persons may unite in bringing ejectment, and may count severally. [2 *Rev. Stat.*, 803, § 1.] A joint count is allowed, but not required. *Supreme Ct.*, 1886, *Smith v. Dewey*, 15 *Wend.*, 601.

784. If one of several joint assignees is dead, the others should declare jointly, instead of alleging a several title in each. *Supreme Ct.*, 1841, *Gillet v. Stanley*, 1 *Hill*, 121.

785. Leave to plead a release, from the lessor of the plaintiff, to defeat the action, denied. *Jackson v. Bell*,* 19 *Johns.*, 168.

18. Escape.

786. A declaration stating that the defendant arrested B., and had and detained him in his custody until, &c., is a sufficient averment of a committal to jail, within 2 *Rev. Stat.*, 437, § 63,—which gives debt for an escape. *Supreme Ct.*, 1832, *Ames v. Webbers*, 8 *Wend.*, 545.

787. In an action for an escape the indorsement on the writ need not be stated. It is surplusage. *Supreme Ct.*, 1828, *Jones v. Cook*, 1 *Cow.*, 809.

788. Plea. In an action for escape, a plea admitting the escape for even an hour, must aver that the return was before suit brought; for it may be intended that the suit was brought after the escape and before the return. *Supreme Ct.*, 1809, *Bissell v. Kip*, 5 *Johns.*, 89.

789. Under a single count for an escape, and plea of voluntary return, defendant cannot show a previous escape and return, and defend himself by setting this up as the escape in question. *Supreme Ct.*, 1828, *Howland v. Squier*, 9 *Cow.*, 91.

790. The defendant is bound only to answer to the escape or escapes in the declaration,

which is done by excusing as many as are there alleged. If the prisoner is in custody when the suit is commenced, it is an answer to every claim for prior negligent escape; and an allegation in the plea of a voluntary return, that the prisoner continued in custody to the time of suit brought, is immaterial, and need not be proven though issue be taken upon it. [Reviewing many cases.] *Supreme Ct.*, 1827, *Middle District Bank v. Deyo*, 6 *Cow.*, 782. Compare *Howland v. Squier*, 9 *Id.*, 91.

791. In an action by the old sheriff on the limit bond, a plea that the party remained a prisoner while the plaintiff continued in office, and until his successor was appointed, is bad; for he should so remain ten days longer. [2 *Rev. Stat.*, 436.] But a plea that before the alleged escape, the plaintiff had been served with a certificate, and within ten days thereafter, delivered the jail and all the prisoners, including the party, to his successor, is a good bar; and a replication that the party was not assigned, is bad. *Supreme Ct.*, 1839, *Hinds v. Doubleday*, 21 *Wend.*, 228.

19. Estoppel.

792. Estoppels not to be pleaded. *Welland Canal Co. v. Hathaway*, 8 *Wend.*, 480. Compare *Reed v. Pratt*, 2 *Hill*, 64.

793. That an estoppel *in pais*, though not customarily pleaded, may, if not specially demurred to as argumentative, nor avoided by replication, be received as a substantial bar. *Supreme Ct.*, 1840, *People v. Bristol & Rensselaerville Turnpike Co.*, 23 *Wend.*, 222.

794. An estoppel by former adjudication, pleadable. *Etheridge v. Osborn*, 12 *Wend.*, 899.

795. Seal. No instrument not under seal can be pleaded by way of estoppel. *Supreme Ct.*, 1821, *Davis v. Tyler*, 18 *Johns.*, 490; 1832 [citing, also, *Co. Litt.*, 352; *Vin. Abr.*, 422; 1 *Gilb. Ev.*, 87], *Welland Canal Co. v. Hathaway*, 8 *Wend.*, 480. To the contrary effect is *Gaylord v. Van Loan*, 15 *Wend.*, 808.

796. The form of pleading an estoppel, stated. *Davis v. Tyler*, 18 *Johns.*, 490.

20. Executors and Administrators. Trustees. Actions by and against them.

797. A declaration by a plaintiff, as administrator, containing common counts, without stating any indebtedness to the intestate, or referring to the plaintiff, in his representative

* See this case in table of CASES CRITICIZED, Vol. I., *Ante*.

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character in any subsequent part of the declaration, except in a profert of letters of administration, is bad on demurrer. *Supreme Ct.*, 1830, *Christopher v. Stockholm*, 5 *Wend.*, 36.

798. The declaration described the plaintiffs as administrators, and made profert of the letters, but did not state that the promises were made in the intestate's lifetime, nor to him, nor for an indebtedness to him, nor to them as administrators, though it added to the damage of said plaintiff as administrators aforesaid. *Held*, that the action must be deemed to be by the plaintiffs in their individual and not in their representative character. *Supreme Ct.*, 1848, *Worden v. Worthington*, 2 *Barb.*, 368.

799. In a suit by the public administrator, the declaration must aver distinctly the decedent's intestacy. *N. Y. Com. Pl.* (1843?), *Ketchum v. Morrell*, 2 *N. Y. Leg. Obs.*, 58.

800. Promise, how laid. In an action against executors, plaintiff may, to save the Statute of Limitations, lay the promise as made by the representative, who will have the same defences and the same judgment against him as though it had been laid as the promise of the testator. *Supreme Ct.*, 1810, *Whitaker v. Whitaker*, 6 *Johns.*, 112; and see *Carter v. Phelps*, 8 *Id.*, 440.

801. Assets. In an action against executors for a legacy, plaintiff must aver and prove that the executors, at the time of bringing the action, had sufficient assets to pay the debts and legacies. *Supreme Ct.*, 1807, *Dewitt v. Schoonmaker*, 2 *Johns.*, 243.

802. Denial of assets. A plea by an executor, stating that he had not, on the day the suit was commenced, nor at any time since, any goods or chattels which were of the testator at the time of his death, in his hands to be administered, is sufficient, without alleging that he had fully administered. *Supreme Ct.*, 1818, *Fowler v. Sharp*, 15 *Johns.*, 323.

803. The plea of plene administravit is inappropriate and useless since the Revised Statutes. *Supreme Ct.*, 1841, *Allen v. Bishop*, 25 *Wend.*, 414.

804. Plea of outstanding judgments. In an action against administrators, a plea of outstanding judgments recovered against the decedent, jointly with others, must aver that he was the survivor, without which he is not chargeable at law. [2 *Saund.*, 48.] *Supreme Ct.*, 1814, *Douglass v. Satterlee*, 11 *Johns.*, 18.

805. If the executor plead an outstanding judgment in extinguishment of assets, the simple contract-creditor may reply fraud and covin in the judgment generally. *Supreme Ct.*, 1828, *Sherwood v. Johnson*, 1 *Wend.*, 443.

806. Executor of his own wrong. When one who is sought to be charged as executor of his own wrong, pleads that the decedent died intestate, and that defendant took out letters of administration, a replication that, prior thereto, he had become executor *de son tort*, is bad, for the letters justify the prior acts. [Str., 328, 1106; And., 328; 8 T. R., 587.] *Supreme Ct.*, 1811, *Rattoon v. Overaker*, 8 *Johns.*, 126.

807. Replication of foreign executor. To a plea denying that the defendant, sued as executrix, was ever executrix, a replication, that she was and now is executrix, to wit, in the State of Florida, is bad. *Supreme Ct.*, 1849, *Vermilya v. Beatty*, 6 *Barb.*, 429.

808. Appointment. The defendant's plea that he is an administrator, must directly allege that letters were granted to him, and by what officer. He must show how he was appointed. It is not enough to aver that he was duly appointed, for this is a question of law. [9 Co., 24.] *Supreme Ct.*, 1837, *Beach v. King*, 17 *Wend.*, 197.

So of a declaration by a receiver. 1847, *Gillet v. Fairchild*, 4 *Den.*, 80.

809. That a *narr.* alleging that administration was granted in due form, is not bad on the ground of putting in issue matters of law. *N. Y. Com. Pl.* (1843?), *Ketchum v. Morrell*, 2 *N. Y. Leg. Obs.*, 58.

810. Where the plaintiff declares in a special character, beginning his declaration by showing his character, he may, in all the subsequent parts of his declaration, refer to himself as the said plaintiff, without adding his special character. *Supreme Ct.*, 1828, *Stanley v. Chappell*, 8 *Cow.*, 235. *N. Y. Com. Pl.* (1843?), *Ketchum v. Morrell*, 2 *N. Y. Leg. Obs.*, 58; but compare *Christopher v. Stockholm*, 5 *Wend.*, 36.

811. Where a declaration named plaintiff as "M., executor of the will, &c., of S., deceased," but contained no farther reference to his representative capacity, and no mention of letters, but counted upon promises to him individually;—*Held*, that plaintiff must be deemed to have sued in his individual capacity. *Ct. of Appeals*, 1852, *Merritt v. Seaman*,

Rules peculiarly Applicable to—Incorporation;—Infancy;—Insurance.

6 *N. Y.* (2 *Seld.*), 168; reversing *S. C.*, 6 *Barb.*, 880.

812. Trustee. If the plaintiff declares as guardian and security for A., he must show how he is guardian and security—that he was specially appointed by the court, and that A. is an infant. [1 *Lev.*, 224; 2 *Saund.*, 117, f. n. 1.] *Supreme Ct.*, 1828, *Stanley v. Chappell*, 8 *Cow.*, 285.

21. Incorporation.

813. A corporation plaintiff may declare by its name of incorporation, and without setting forth the act of incorporation, even if it be a private law. *Supreme Ct.*, 1799, *U. S. Bank v. Haskins*, 1 *Johns. Cas.*, 182; 1817 [citing, also, 2 *Ld. Raym.*, 1585], *Dutchess Cotton Manufactory v. Davis*, 14 *Johns.*, 288.

814. Incorporation. A plea setting forth that A. and others, his associates, were created and declared a body corporate, &c., by the name of, &c., without alleging organization,—*Held*, sufficient. *Supreme Ct.*, 1838, *Beekman v. Traver*, 20 *Wend.*, 67.

815. In actions by or against a corporation created under a law of this State, it is not necessary to recite the act or proceedings of incorporation, or to set forth the substance thereof; but the same may be pleaded by reciting the title of such act, and the date of its passage. 2 *Rev. Stat.*, 459, § 13.

816. The short mode of pleading permitted in actions by 2 *Rev. Stat.*, 459, § 13, is not intended to relieve corporations from proving their existence. *Supreme Ct.*, 1837, *Onondaga County Bank v. Carr*,* 17 *Wend.*, 443.

817. Replication. A corporation of this State, replying, under 2 *Rev. Stat.*, 459, § 13, to the plea of *nul tiel corporation*, must recite the title of its act of incorporation, and the date of its passage, with entire accuracy; and if the act is a public one, a misrecital may be objected to by demurrer. *N. Y. Superior Ct.*, 1848, *Union Bank v. Dewey*, 1 *Sandf.*, 509.

818. A banking association may be sued, or sue, in the name of its president; but in such suit the debt or contract must be laid as that of the corporation, not as that of "the defendant." *Supreme Ct.*, 1840, *Delafield v. Kinney*, 24 *Wend.*, 845; 1843, *Ogdensburgh Bank v. Van Rensselaer*, 6 *Hill*, 240. Compare *Hunt v. Van Alstyne*, 25 *Wend.*, 605.

* See this case explained in *Bank of Waterville v. Belter*, 18 *Hov. Pr.*, 270.

819. In an action on negotiable paper, a verdict in the president's name, in such a case, may be sustained by disregarding the words of description. *Supreme Ct.*, 1843, *Pentz v. Sackett*, *Hill & D. Supp.*, 113.

22. Infancy.

820. The plaintiff in error assigned for error his appearance by attorney, averring that he was an infant at the time of the trial, and the defendant pleaded that he was of full age when judgment was rendered. *Held*, that the plea tendered an immaterial issue. [14 *Johns.*, 417.] *Supreme Ct.*, 1841, *Gosling v. Acker*, 25 *Wend.*, 689.

821. Parol. Pleas of infancy praying that the parol may demur, are bad, since 1 *Rev. L.*, 318. *Supreme Ct.*, 1828, *Sharp ads. Sharp*, 1 *Wend.*, 14.

822. That in trespass for wilfully abusing a hired horse, a plea of infancy, setting up the contract and averring that the injury occurred in driving the horse, through the defendant's unskilfulness and want of knowledge, discretion, and judgment, would be a complete answer. *Ct. of Errors*, 1828, *Campbell v. Stakes*, 2 *Wend.*, 137.

23. Insurance.

823. Interest. On a policy of insurance on a cargo, it is a sufficient averment of the plaintiff's interest to allege that the insurance was for the proper account and benefit of the plaintiff as a common carrier; and plaintiff's liability to the owners being shown, it is not necessary to aver actual payment by him. *N. Y. Superior Ct.*, 1849, *Van Natta v. Mutual Security Ins. Co.*, 2 *Sandf.*, 490.

824. Where the charter of an insurance company gives an action to an assignee in his own name, provided he becomes the purchaser of the subject insured, after the insurance and before the loss, it is not sufficient to aver that he has an interest in the premises, and a transfer of the policy, but he must aver that he has the whole interest insured. *Supreme Ct.*, 1830, *Granger v. Howard Ins. Co.*, 5 *Wend.*, 200.

825. A condition in an insurance policy that fraud or false swearing shall cause a forfeiture of any claim on the insurer, and bar all remedies on the policy, relates only to the preliminary proofs; and a plea founded upon such condition must allege that the fraud, &c.,

Rules peculiarly Applicable to—Jurisdiction;—Justification;—Libel.

was committed in those proofs, and that it was committed by the plaintiff, or some party in interest. *Supreme Ct.*, 1841, *Ferriss v. North American Fire Ins. Co.*, 1 *Hill*, 71.

826. In pleading a survey of an insured vessel, as unseaworthy, it is not necessary to set forth the manner and particulars of the survey; but it is sufficient to state "that a regular survey was had, upon which survey the said ship was thereby declared unseaworthy by reason of her being rotten." But a plea that on the survey "she was found to be in a very bad and rotten condition," is bad. *Supreme Ct.*, 1824, *Griswold v. National Ins. Co.*, 8 *Cow.*, 96.

24. Jurisdiction.

827. A plea to exclude the jurisdiction of the Court of Sessions, of an offence, on the ground that it was committed in a place within the State ceded to the United States, must show that the place was purchased by the United States; being subject to their jurisdiction is not sufficient. It must appear, by some act on the part of the government, that they intend to exercise exclusive jurisdiction. *Gen. Sess.*, 1819, *People v. Lent*, 2 *Wheel. Cr.*, 548.

828. A plea to the jurisdiction of the Supreme Court of this State, should show that some other court in the same State has jurisdiction. [5 *Mass.*, 362; 3 *Id.*, 24.] *Supreme Ct.*, 1841, *Otis v. Wakeman*, 1 *Hill*, 404.

25. Justification.

829. Limited jurisdiction. In justifying under the proceedings of tribunals of special, limited, and inferior jurisdiction, the material facts necessary to give such tribunal jurisdiction, must be alleged and proved. Thus, a party in justifying under a summary proceeding in his own favor, which is only authorized to be had under the complaint of a particular officer, must show that he was such officer. *Supreme Ct.*, 1847, *Walker v. Moseley*, 5 *Den.*, 102.

830. A party who invokes the exercise of the jurisdiction of an inferior tribunal must, in justifying, aver the actual existence of the material facts upon which the jurisdiction depends. Thus, in justifying under a justice's warrant, the defendant must aver in his plea the facts giving the justice jurisdiction of the

subject-matter. *Supreme Ct.*, 1845, *Whitney v. Shufelt*, 1 *Den.*, 592.

831. Search-warrant. A plea of justification under a search-warrant, not stating that it was in fact executed in the daytime,—*Held*, sufficient. *Supreme Ct.*, 1818, *Bell v. Clapp*, 10 *Johns.*, 268.

832. Court-martial. In an action by a militiaman, employed in the service of the United States, against the president of a court-martial, it is not necessary for the defendant in justifying, to allege that a case had occurred authorizing the President to call out the militia under the act of 1795; nor to aver that the officers composing the court were in the service of the United States; nor that the general ordering it, commanded the army; nor that he approved the sentence. *Supreme Ct.*, 1814, *Vanderheyden v. Young*, 11 *Johns.*, 150. Compare *Mills v. Martin*, 19 *Id.*, 7; which was followed in *Rathbun v. Martin*, 20 *Id.*, 348.

833. Lands taken by railroad. Form and requisites of a plea by a railroad company setting up the proceedings by which they acquired title to lands. *Polly v. Saratoga & Washington R. R. Co.*, 9 *Barb.*, 449.

834. Replevin. A plea of a sheriff, justifying the taking upon a writ of replevin under the Revised Statutes, must show the execution and delivery to him of the replevin bond and affidavit, with the writ. *Supreme Ct.*, 1838, *Morris v. Van Voast*, 19 *Wend.*, 263.

835. If a sheriff sued in trespass, justifies under a writ of replevin, a replication setting up a dispossession is bad on special demurrer, if it does not show that it was after a claim of property and notice to the sheriff. [1 *Rev. L.*, 98.] *Supreme Ct.*, 1829, *Lisher v. Pierson*, 2 *Wend.*, 845.

See, also, *supra*, 341-347.

26. Libel.

836. Publication. Alleging that defendant sent a letter to the plaintiff, and the same was, by means of such sending thereof, received and read by plaintiff, and thereby published by the plaintiff, is bad; for the letter is to be presumed sealed, and sending a letter is not publication. *Supreme Ct.*, 1804, *Lyle v. Clason*, 1 *Cai.*, 581.

837. Intent. In an action for libel, the declaration, after stating the plaintiff's good name, &c., stated, that the defendant, well

Rules peculiarly Applicable to—Malicious Prosecution.

knowing the premises, &c., maliciously intending to injure the plaintiff, &c., and to bring him into great scandal and disgrace, and to cause it to be believed that the plaintiff had been guilty of the crime of treason, and of the promulgation of treasonable sentiments, &c., published the libel. *Held*, that these were not averments necessary to be proved, but mere suggestions, by way of inducement to the libel. *Supreme Ct.*, 1812, *Coleman v. Southwick*, 9 *Johns.*, 45.

838. Innuendo. That the proper object of an innuendo is to give certainty to something uncertain in the libel; but an innuendo cannot be used to vary the meaning of the libel, or to give it a construction, where the meaning is clear upon the libel itself. *Ct. of Errors*, 1814, *Spencer v. Southwick*, 11 *Johns.*, 578; reversing *S. C.*, 10 *Id.*, 259.

839. That an innuendo cannot extend the sense of the words, unless it explains them by reference to some preceding averment or *colloquium*. The office of these several parts of the pleading, explained. *Supreme Ct.*, 1809, *Van Vechten v. Hopkins*,* 5 *Johns.*, 211; 1831, *Milligan v. Thorn*, 6 *Wend.*, 412; 1845, *Cooper v. Greeley*, 1 *Den.*, 847; 1886, *Andrews v. Woodmansee*, 15 *Wend.*, 232; 1842, *Tyler v. Tillotson*, 2 *Hill*, 507. To the same effect, 1886, *Miller v. Maxwell*, 16 *Wend.*, 9; and see *Cheetham v. Tillotson*, 5 *Johns.*, 430.

840. Reference to plaintiff. In an action for a libel maligning the editor of a paper and the paper itself, the plaintiff set forth that he was, at the time, the editor of the paper, and that the name of the paper was used and intended, in the libel, and understood by the public, to designate him. *Held*, sufficient. *Supreme Ct.*, 1841, *Crosswell v. Weed*, 25 *Wend.*, 621. Compare *Titus v. Follett*, 2 *Hill*, 318.

841. In a declaration for a libel on one "who edits the Times;" an averment that the plaintiff was editor of the Ogdensburgh Times, with an innuendo that such paper was meant by the libel,—*Held*, insufficient. *Supreme Ct.*, 1842, *Tyler v. Tillotson*, 2 *Hill*, 507.

842. Several counts. In declaring on a libel, so much of the libellous matter as the plaintiff chooses to select, may be counted on. If the declaration states the whole libel, then

there is necessarily but one count; but if, after selecting a part, and setting it forth as libellous, he then proceeds to select another part, as distinctly libellous, it appears, from his own showing, that he alleges himself to be twice libelled, and claims damages in proportion to the enormity of the charges, and the different parts are to be deemed separate counts; so that if one part is bad, a general verdict cannot be sustained. *Ct. of Errors*, 1809, *Cheetham v. Tillotson*, 5 *Johns.*, 430; but compare *Rathbun v. Emigh*, 6 *Wend.*, 407.

843. Impertinent matter. Where defendant in an action for libel, set forth two declarations by the plaintiff in other actions,—*Held*, that they should be struck out, as an oppressive incumbrance of the record. *Supreme Ct.*, 1812, *Spencer v. Tabele*, 9 *Johns.*, 180.

844. Pleas. Where a libel charges the plaintiff, not with wrongful conduct, but with having a bad reputation, the defendant, in his plea, is not bound to set forth and prove the grounds of such public estimate of reputation; and still less is he bound to show that such public estimation was correctly made. *Supreme Ct.*, 1845, *Cooper v. Greeley*, 1 *Den.*, 847. Compare *Stone v. Cooper*, 2 *Id.*, 298.

845. Requisites of a plea of justification to an action for a libel. *Riggs v. Denniston*, 3 *Johns. Cas.*, 198.

846. Voluminous pleas in an action for libel in a charge of legislative corruption,—*Held*, bad on peculiar grounds. *Supreme Ct.*, 1822, *Van Ness v. Hamilton*, 19 *Johns.*, 349.

27. Malicious Prosecution.

847. A declaration in an action for malicious prosecution, stated that the defendant, maliciously, falsely, and without probable cause, procured a justice to issue his warrant to arrest the plaintiff, if a cow of defendant, which had been stolen, was in the plaintiff's possession, &c., and, on being brought before the justice, he, after every thing that could be alleged against plaintiff had been heard and considered, wholly acquitted and discharged the plaintiff from the supposed crime, &c.,—*Held*, sufficient. *Supreme Ct.*, 1807, *Secor v. Babcock*, 2 *Johns.*, 208.

848. Justification. It was the duty of defendant as a city attorney to sue, by warrant, for the recovery of penalties for the violations of the city ordinances. *Held*, that in justify-

* This case is strongly approved in *Fry v. Bennett*, 5 *Sandf.*, 59; *S. C.*, 9 *N. Y. Leg. Obs.*, 330; less fully, 1 *Code R.*, *N. S.*, 238.

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ing against an action for false imprisonment, he need not aver that the plaintiff had in fact violated the ordinance. *Supreme Ct.*, 1842, *Walker v. Cruikshank*, 2 *Hill*, 296.

849. — admits want of probable cause.

In an action for a malicious prosecution for felony, defendant pleaded simply that the charge of felony was true. *Held*, that the want of probable cause was admitted, if the justification failed. Every traversable fact in the declaration, not answered by the plea, is admitted. *Supreme Ct.*, 1827, *Morris v. Corson*, 7 *Cow.*, 281.

28. Negligence.

850. Overseer of highways. If a private action can be sustained against an overseer of highways for neglect to keep the bridges repaired, the declaration must show that he had funds and the other circumstances necessary to charge him with the duty of making the repairs. If these are not stated, it is a substantial defect which is not cured by verdict. *Ct. of Errors*, 1820, *Bartlett v. Crozier*, 17 *Johns.*, 489; reversing S. C., 15 *Id.*, 250. Followed, *Ct. of Appeals*, 1851, *Huff v. Knapp*, 5 *N. Y.* (1 *Seld.*), 65.

851. Canal officer. Where the law makes it the duty of a public officer to act, and provides the means for him to do so,—*e. g.*, a canal officer in respect to the removal of obstructions in the canals,—a declaration in an action against him for damages sustained by the plaintiff by an obstruction which he omitted to remove, need not allege that he had funds. Nor need his neglect be alleged to be wilful and malicious, the obstruction being a nuisance. *Supreme Ct.*, 1848, *Adsit v. Brady*, 4 *Hill*, 680. Compare *Bartlett v. Crozier*, 17 *Johns.*, 489.

852. Attorney. In an action against an attorney for negligence in examining a title, the declaration that there were incumbrances upon the property, is insufficient if the retainer alleged was merely to examine the title and procure a conveyance in fee simple. *Supreme Ct.*, 1848, *Elder v. Bogardus*, *Hill & D. Supp.*, 116.

853. The declaration in such case must, moreover, show how the property was incumbered. *Id.*

854. Collision. To a declaration in trespass for defendant's driving his wagon against plaintiff's on a highway, defendant pleaded

that he was on the right and the plaintiff on the wrong side of the road. *Held*, that a replication admitting the plea, and alleging generally that there was no carelessness on plaintiff's part in being on that side, but without setting forth some fact to show that the plaintiff was not careless in being on the wrong side, nor averring that the defendant intentionally and unnecessarily inflicted the injury, was bad. *Supreme Ct.*, 1848, *Burdick v. Worrall*, 4 *Barb.*, 596.

29. New Promise.

855. How set up. Where a debt which has been barred by an insolvent discharge is revived by a new promise, it is sufficient in such case to declare upon the original cause of action, and set up the new promise by replication. [1 *Ohitt. Pl.*, 40; 8 *Bos. & P.*, 250, n. 7.] *Supreme Ct.*, 1817, *Shippey v. Henderson*, 14 *Johns.*, 178; 1829, *Depuy v. Swart*, 8 *Wend.*, 185; 1838, *Fitzgerald v. Alexander*, 19 *Id.*, 402; and see *McNair v. Gilbert*, 8 *Id.*, 844.

856. But if he counts on the original cause of action, he must reply specially the new promise. He cannot recover upon general pleadings. [8 *Wend.*, 185; 4 *Id.*, 420; 6 *Id.*, 394; 4 *Campb.*, 205.] *Supreme Ct.*, 1841, *Stafford v. Bacon*, 1 *Hill*, 532.

Otherwise of a new promise on a debt barred by the Statute of Limitations. 1820, *Martin v. Williams*, 17 *Johns.*, 380.

857. If the new promise be conditional, it must be so stated in the replication, or there is a variance. 1831, *Wait v. Morris*, 6 *Wend.*, 394.

858. Mode of alleging. To a plea of an insolvent discharge, a replication that after discharge and before suit, defendant "renewed the promises," is appropriate and sufficient. *Supreme Ct.*, 1817, *Shippey v. Henderson*, 14 *Johns.*, 178.

So, in an action on a judgment, is a replication that defendant "assented to, ratified, renewed, and confirmed, the said judgment and demand of the plaintiff." [Citing, also, 8 *Mass.*, 127.] *N. Y. Superior Ct.*, 1829, *Hildreth v. Shillabee*, 2 *Hall*, 231.

859. To a plea of a discharge in bankruptcy, a reply of a new promise must allege the promise to have been made subsequent to the discharge. When a debt is in full force, a naked promise to pay it cannot be the legitimate sub-

Rules peculiarly Applicable to—Nuisance;—Particular Facts and Allegations.

ject of a replication designed to show it revived. *N. Y. Superior Ct.*, 1848, *Stebbins v. Sherman*, 1 *Sandf.*, 510.

30. Nuisance.

860. Writ. The plaintiff commenced his action by writ of nuisance, pursuant to 2 Rev. Stat., 832, and the declaration referred to the writ, but contained no averment that the plaintiff had a freehold estate in the premises affected by the nuisance, but showed a good cause of action on the case. *Held*, upon a motion in arrest, that the action was on the case, and that a verdict was good. *Ct. of Appeals*, 1848, *Cornes v. Harris*, 1 *N. Y. (1 Comst.)*, 228.

861. The declaration on a writ of nuisance (3 *Rev. Stat.*, 427), showed title to a lot, with a right of way to the rear, and that defendant erected a house on the lot whereby the way was obstructed. *Held*, bad, for not averring that the building was on the way, and that it obstructed the way. *Supreme Ct.*, 1848, *Clark v. Storrs*, 4 *Barb.*, 562.

31. Particular Facts and Allegations.

862. Offer. An allegation that plaintiff "offered,"—*Held*, to import a voluntary offer. *Supreme Ct.*, 1802, *Riggs v. Denniston*, 3 *Johns. Cas.*, 198; *S. P.*, *Holmes v. Lansing*, *Id.*, 78.

863. Writing implied. An award set forth "as in the form following," and with a date, may be presumed to have been in writing. *Supreme Ct.*, 1805, *Munro v. Alaire*, 2 *Cat.*, 320.

864. Seal. In declaring on a specialty, it must be averred that it was sealed by the defendant. Setting it forth with its conclusion, that it was signed and sealed with the name of the defendant, and with an L. S., is not sufficient. [1 *Saund.*, 291, n. 1.] *Supreme Ct.*, 1815, *Van Santwood v. Sandford*, 12 *Johns.*, 197; 1817, *Macomb v. Thompson*, 14 *Id.*, 207. To much the same effect, 1848, *Stanton v. Camp*, 4 *Barb.*, 274. Compare *Jenkins v. Pell*, 17 *Wend.*, 417; affirmed, 20 *Id.*, 450.

865. Where the law requires an instrument to be under seal to authorize a particular remedy thereon, it is necessary in pleading to state the fact that it was under seal, either in terms or in other language from which the fact that it was under seal can be legally inferred. But where it is wholly immaterial whether the instrument was or was not under seal, an

avermment that it was in writing will be supported by the production of a written instrument either with or without a seal attached to the same. *Ct. of Errors*, 1838, *Jenkins v. Pell*, 20 *Wend.*, 450; affirming *S. C.*, 17 *Id.*, 417.

866. Averring the issue of a warrant imports a seal if the case is one in which a seal was necessary. *Supreme Ct.*, 1838, *Beekman v. Traver*, 20 *Wend.*, 67.

867. In an action on a sealed undertaking to answer for the debt of another, the seal imports a consideration, and none need be alleged in pleading. *Supreme Ct.*, 1840, *Bush v. Stevens*, 24 *Wend.*, 256.

868. Delivery. An allegation that an award was made, imports that it was ready to be delivered. *Supreme Ct.*, 1805, *Munro v. Alaire*, 2 *Cat.*, 320.

869. Where the award was required to be delivered to the parties, a replication that it was ready to be, and was delivered to the plaintiff, is bad. *Supreme Ct.*, 1810, *Pratt v. Hackett*, 6 *Johns.*, 14.

870. That an averment that one executed an instrument, imports that he delivered as well as signed it. [2 *J. & W.*, 571.] *A. V. Chan. Ct.*, 1845, *Brinkerhoff v. Lawrence*, 2 *Sandf. Ch.*, 400.

871. Plaintiff's averment that he gave a deed according to the agreement, implies that it was accepted. *Supreme Ct.*, 1819, *Gazley v. Price*, 16 *Johns.*, 267.

872. A delivery of a deed need not be stated in pleading; and it may be stated to have been made on a day other than its date. Where the merits of the case are affected by the time when it became operative, the time of delivery should be averred; but, in general, a party cannot be permitted to set up that his deed became operative at a time other than the date. Hence, proof that the date appearing in the deed and alleged in the pleading was not the original date, but that it had been substituted by an erasure by the consent of parties, is not a variance. *Supreme Ct.*, 1828, *Tompkins v. Corwin*, 9 *Cow.*, 255.

873. A plea averred a disagreement between a railroad company and the owner of lands to be taken, and that the judge, &c., "on the petition of the defendants in writing, duly issued, &c., process for the assessment of damages." *Held*, a direct and issuable averment of the presentation of a petition. *Supreme*

Rules peculiarly Applicable to—Particular Facts and Allegations.

Ct., 1850, *Polly v. Saratoga & Washington R. R. Co.*, 9 *Barb.*, 449.

874. Conversion. A declaration which alleged that cattle "were converted and disposed of to the use of the United States,"—*Held*, after verdict, not to import that the cattle were forfeited. *Supreme Ct.*, 1818, *Hastings v. Wood*, 18 *Johns.*, 482.

875. In replevin, alleging that the defendant took the plaintiff's property, sufficiently imports a wrongful taking. *Supreme Ct.*, 1849, *Childs v. Hart*, 7 *Barb.*, 870; disapproving *Reynolds v. Lounsbury*, 6 *Hill*, 534, where it was said that this was a defect, but cured by a verdict.

876. Time of "exhibiting bill,"—*Held*, tantamount to "commencement of the suit," except on special demurrer. *Supreme Ct.*, 1818, *Fowler v. Sharp*, 15 *Johns.*, 828.

877. Association. An averment in a plea that a corporation became members of an association, without saying with whom, is good. If a pleading can be made good by any state of facts consistent with its averments, it is sufficient. *Ct. of Errors*, 1826, *Utica Ins. Co. v. Scott*, 8 *Cow.*, 709.

878. Date. In an averment that by the terms of a bond, dated on the 10th of January, the award was to be made on or before the 18th day of January next ensuing the date of the bond, the words "next" or "then next" may be considered as referring to the day of the month, and not the month itself. *Supreme Ct.*, 1828, *Tompkins v. Corwin*, 9 *Cow.*, 255.

879. Embezzled. Where the breach is that the treasurer wrongfully and fraudulently embezzled and converted money of the county to his own use, a plea that he had never been requested by the supervisors to pay over the money, is bad; though perhaps "embezzle" might be insufficient on special demurrer. *Supreme Ct.*, 1829, *Supervisors of Allegany v. Van Campen*, 8 *Wend.*, 48.

880. Request. Allegation that plaintiff refused, &c., though then and there particularly requested so to do, is a sufficiently explicit allegation of a request to amount to a positive averment, and the plea should conclude to the country. *Id.*

881. Where the agreement is to pay, on request, the debt of another, if he does not pay at the day, a special request must be averred. The general allegation of "though often re-

quested," is not enough. *Supreme Ct.*, 1840, *Bush v. Stevens*, 24 *Wend.*, 256.

882. In an action against the indorser of a bill or note, an allegation of a demand of payment in the general terms "although often requested," &c., is good; at least, after verdict. *Supreme Ct.*, 1799, *Leffingwell v. White*, 1 *Johns. Cas.*, 99.

883. Necessary expenses. An averment that plaintiff necessarily incurred expenses, is equivalent to an averment that he incurred necessary expenses. *Supreme Ct.*, 1841, *Glover v. Tuck*, 1 *Hill*, 66.

884. Value. To allege that the plaintiff might have sold a thing and thus have paid his debt, is tantamount to saying that the thing was of sufficient value to satisfy the demand. *Supreme Ct.*, 1838, *Case v. Boughton*, 11 *Wend.*, 106.

885. Bailee. A plea averring that defendant was an innkeeper, and as such received horses from a third person, to be kept, sufficiently imports that the latter was a guest; if, indeed, his being a guest is necessary to raise a lien. *Supreme Ct.*, 1841, *Peet v. McGraw*, 25 *Wend.*, 658.

886. Erection. If a dam at a certain height is lawful, and the proprietor raise it, a person injured thereby may recover under a declaration for the wrongful erection and continuance of the dam. *Supreme Ct.*, 1842, *Colvin v. Burnet*, 2 *Hill*, 620.

887. Assuming incumbrances. An averment in an action by a vendor that incumbrances were deducted out of the purchase-money, and were to be paid by the purchaser,—*Held*, to import an express agreement between plaintiff and defendant, at the time of the sale, that the latter would pay them off. *Supreme Ct.*, 1843, *Smith v. Johnson*, *Hill & D. Supp.*, 240.

888. Causing an act. In declaring against directors of a corporation, under 1 Rev. Stat., § 589, §§ 1-10, charging that they caused, procured, or permitted an act which, if done at all, they must themselves have done, is bad on special demurrer. *Supreme Ct.*, 1844, *Gaffney v. Colvill*, 6 *Hill*, 587.

889. Mode of declaring under this statute. *Id.*

890. Issue of letters. An averment that letters-testamentary, on, &c., and not before, were issued to, &c.,—*Held*, sufficiently to import that no other or prior letters had been

Rules peculiarly Applicable to—Partition;—Partnership;—Rent.

issued. *Supreme Ct.*, 1845, *Benjamin v. De Groot*, 1 *Den.*, 151.

891. Deputy's default. That in an action on a sheriff's bond, to recover for default of his deputy, the act of the deputy should be alleged as that of the sheriff. *Supreme Ct.*, 1835, *People v. Ten Eyck*, 18 *Wend.*, 448.

82. Partition.

892. In proceedings for a partition under the Revised Statutes, the pleadings are intended to be like those in an action in which the petition should stand for the complaint; and any thing may be pleaded which will abate the action or bar the petitioner's right to a judgment. The defendants are not restricted to the two defences which by § 16 of the statute (2 *Rev. Stat.*, 820) they are permitted to interpose. *Supreme Ct.*, *Sp. T.*, 1849, *Reed v. Child*, 4 *Hov. Pr.*, 125.

Consult, also, PARTITION.

83. Partnership.

893. The survivor of a partnership may be charged on a debt of the firm contracted before the death of the other, and without averring the partnership, death, &c. *Supreme Ct.*, 1800, *Goelet v. McKinstry*, 1 *Johns. Cas.*, 405. Compare *Holmes v. De Camp*, 1 *Johns.*, 84.

894. Where, after the death of one partner, an account is stated between defendant and the copartnership, admitting a balance due by him for goods sold in the lifetime of the deceased, the surviving partner may recover it on an *in simul computassent*, without averring the death of the other partner, and the survivorship; for stating the account is in the nature of a new promise to the survivor. *Supreme Ct.*, 1806, *Holmes v. De Camp*, 1 *Johns.*, 84.

895. In an action for money paid, &c., to the use of a partnership, if one of the partners died previously to the time that the right of action accrued, the promise must be stated to have been made by the survivors alone. [6 *T. R.*, 363; 1 *Johns.*, 86.] *Supreme Ct.*, 1807, *Tom v. Goodrich*, 2 *Johns.*, 218.

896. In deriving title through a firm who are not parties, it is not necessary to set out their names. *Supreme Ct.*, 1829, *Cochran v. Scott*, 8 *Wend.*, 229.

84. Rent.

897. To avoid unnecessary prolixity in an action of covenant for non-payment of rent,

it is sufficient to allege in the declaration, that the plaintiff (naming time and place), by a certain indenture made between him of the one part and the defendant of the other part, demised to the defendant certain premises particularly mentioned and described in the said indenture, instead of setting out the parcels. [Cowp., 665; 1 *Saund.*, 233, n. 2.] This rule applies where the action is against an assignee. Where the assignment was only of a part, a description of it as so many acres of the southerly side of the said demised premises of equal value by the acre with the rest, was *Held*, sufficient. *Supreme Ct.*, 1846, *Van Rensselaer v. Bradley*, 8 *Den.*, 135.

898. An allegation that a certain amount is due for the period specified for which rent is claimed, as the fair and just proportion of the rent due for that period, chargeable upon the portion of the premises assigned to the defendant, is sufficient; but a count claiming the whole rent as due from an assignee of part, is bad. *Ib.*

899. Though a party is not bound to show the precise title of his adversary, alleging in the alternative that the defendant is assignee of the whole, or of some part of the demised premises, is bad. *Ib.*

900. That a religious corporation suing for rent, need not aver its capacity to take real property. *Supreme Ct.*, 1830, *Reformed Dutch Church v. Veeder*, 4 *Wend.*, 494.

901. Suit by assignee. The assignee of rent, suing in his own name, must, in declaring, show distinctly, that there was a lease, that the defendant was lessee, that the rent was assigned to the plaintiff, and that he is now suing for it. *Supreme Ct.*, 1842, *Willard v. Tillman*, 2 *Hill*, 274.

902. Against assignee. In an action for rent, against the assignee of the lessee, an averment that the rent accrued subsequent to the assignment, and is due and in arrear, and owing from the defendant to the plaintiff, states a sufficient breach. That the lessee has not paid it, is implied in the averment that the defendant owes it. *Supreme Ct.*, 1810, *Dubois v. Van Orden*, 6 *Johns.*, 105; 1846, *Van Rensselaer v. Bradley*, 8 *Den.*, 135.

903. Debt lies on an expired lease; and the declaration against an assignee need not show the manner in which he became assignee. He may be described as assignee in general terms, and such description will be sufficient to charge

Rules peculiarly Applicable to—Replevin.

him for the estate which actually came into his possession; for the plaintiff is a stranger to the defendant's title. *N. Y. Superior Ct.*, 1828, *Norton v. Vultee*, 1 *Hall*, 384.

904. Readiness to pay. In an action for rent, payable in book accounts, a plea that defendant was at the premises for three hours before sunset, and at sunset, ready to pay in such accounts, but no one was there to receive them, and averring a readiness to pay, and bringing the accounts into court, is a good bar. *Supreme Ct.*, 1819, *Walter v. Dewey*, 16 *Johns.*, 222.

905. Eviction. In an action for rent, the defendant, under a plea that plaintiff entered and ejected him, may prove a constructive entry and expulsion. In pleading, the legal effect of the facts is stated, not the facts themselves. The form of the plea, therefore, does not determine the kind of evidence necessary to support it. *Ct. of Errors*, 1826, *Dyett v. Pendleton*, 8 *Cow.*, 727.

906. A wrongful entry and eviction, to constitute a bar, must be averred to have taken place before the rent claimed fell due. [1 *Saund.*, 204, n. 2; *Comyn. L. & T.*, 524; 4 *Cow.*, 585.] *Supreme Ct.*, 1840, *McCarty v. Hudsons*, 24 *Wend.*, 291.

907. Payment. To the declaration of the assignee of the rent, a plea of payment to the lessor and the assigns and owners of the covenant, is bad. *Supreme Ct.*, 1838, *Willard v. Tillman*, 19 *Wend.*, 358.

35. Replevin.

908. Place. In replevin, the declaration must state a place certain, within the village or town; but the omission may be cured by the defendant's pleading over. [*Hob.*, 16.] *Supreme Ct.*, 1813, *Gardner v. Humphrey*, 10 *Johns.*, 53.

909. The place of taking a distress for rent is material and traversable. *Supreme Ct.*, 1814, *Jackson v. Rogers*, 11 *Johns.*, 88.

910. Pleas which deny holding under the lease,—*Held*, not a general disclaimer of holding any thing under the lease. *Id.*

911. A description of the articles sufficient to identify them, as far as may be useful for the purposes of delivery by the sheriff, is sufficient. A declaration, describing certain articles of furniture by name and quantity, and adding that they were the same and all the goods which defendant received at a particu-

lar time, and which were then in, and constituted the furniture of a house designated, sufficiently describes such articles, and if there are others insufficiently described, a demurrer for an insufficient description of all of them cannot be sustained. *Supreme Ct.*, 1844, *Root v. Woodruff*, 6 *Hill*, 418.

912. Value. It is not necessary to state the value of each separate article of property; but it is enough if the value of the whole is given. *Id.*

913. Plaintiff's title. A declaration stating that "plaintiff was entitled to the possession" of the goods, is bad on special demurrer. It should allege that they were the goods of the plaintiff, in terms, or by words of equivalent import. *Supreme Ct.*, 1845, *Pattison v. Adams*, 7 *Hill*, 126; 1848, *Bond v. Mitchell*, 8 *Barb.*, 304; 1850, *Vandenburgh v. Van Valkenburgh*, 8 *Id.*, 217.

914. Averring that the "plaintiffs were the owners" of, &c., "and entitled to the possession thereof," is good. The last clause may be regarded as surplusage. *Supreme Ct.*, 1844, *Pattison v. Adams*, *Hill & D. Supp.*, 426.

915. An avowry showing a conclusive bar to the action, is a perfect pleading, requiring an answer; although it follows immediately after a plea of property in a stranger. *Supreme Ct.*, 1829, *People v. New York C. P.*, 2 *Wend.*, 644.

916. The avowant must set forth his title, and allege the estate of which he is seized. *Supreme Ct.*, 1806, *Harrison v. McIntosh*, 1 *Johns.*, 380; 1818, *Hopkins v. Hopkins*, 10 *Id.*, 369.

Pleading over, and a verdict, do not cure omitting it. [2 *Wils.*, 258.] 1813, *Bain v. Clark*, 10 *Johns.*, 424.

917. An avowry for distraining off the premises after the expiration of the lease, is bad on general demurrer if it does not aver that the avowant's title and the lessee's possession continued to the time of the distress. *Supreme Ct.*, 1824, *Burr v. Van Buskirk*, 8 *Cow.*, 263.

918. The avowant must allege what estate he is seized of, in order to show by what authority he distrains. A seizin in fee may be alleged generally, but under a particular estate, commencement of that estate must be shown. An executor, avowing, must show that the rent fell due in the testator's lifetime. *Supreme Ct.*, 1826, *Wright v. Williams*, 5 *Cow.*, 338.

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919. Rent. An avowry, or cognizance for part of a year's rent, without showing that the residue is paid, is bad. *Supreme Ct.*, 1807, *Shepherd v. Boyce*, 2 *Johns.*, 446.

920. The Laws of 1815, ch. 166, having declared that no landlord shall distrain in the city of New York, before filing an affidavit of the amount of rent due, the avowry for a distress in that city must aver that this step has been taken. *Supreme Ct.*, 1824, *Burr v. Van Buskirk*, 3 *Cow.*, 268.

Otherwise in declaring on a replevin bond. *Supreme Ct.*, 1829, *Gould v. Warner*, 3 *Wend.*, 54.

921. An avowry under 2 Rev. Stat., 2 ed., 436, must show that there was a tenancy, and that the rent accrued while it was subsisting, and that the defendant was the landlord. And a defect in this respect is not aided by that part of the avowry which sets forth the affidavit and distress-warrant; nor by a verdict specially stating the relation. *Supreme Ct.*, 1844, *Hill v. Stocking*, 6 *Hill*, 277; and see *Nichols v. Dusenbury*, 2 *N. Y. (2 Comst.)*, 288.

922. Though the tenant need not be named in the avowry, he must be truly named, if at all. *Supreme Ct.*, 1844, *Hill v. Stocking*, 6 *Hill*, 277.

923. A general avowry without setting forth the landlord's title, is good under 2 Rev. Stat., 529, § 41, where the tenant was in the enjoyment of the premises at the time of the distress, although the rent was payable in advance, and the tenant had not enjoyed possession for the period for which the rent was to be paid. *Ct. of Appeals*, 1849, *Nichols v. Dusenbury*, 2 *N. Y. (2 Comst.)*, 288.

924. An avowry justifying under an execution, must set forth the judgment. *N. Y. Superior Ct.*, 1842, *Leavitt v. Smith*, 1 *N. Y. Leg. Obs.*, 46.

925. To a declaration in replevin, averring a taking in Brooklyn, to wit, in New York, avowries are defective in attempting to justify a taking in New York. *Ib.*

926. In relation to number, value, or quantity, the justification may, in general, safely follow the declaration. *Supreme Ct.*, 1844, *Root v. Woodruff*, 6 *Hill*, 418.

927. A plea to an avowry is bad, if it does not answer all it professes to answer. *Ct. of Appeals*, 1849, *Nichols v. Dusenbury*, 2 *N. Y. (2 Comst.)*, 288.

928. Traverse of plaintiff's title. The de-

fendant, whether he lays property in himself or in a stranger, must traverse property in the plaintiff. *Supreme Ct.*, 1834, *Rogers v. Arnold*, 12 *Wend.*, 80; *S. P.*, 1839, *Prosser v. Woodward*, 21 *Id.*, 205. Followed, *Ct. of Appeals*, 1847, *Curtis v. Jones*, 1 *How. App. Cas.*, 187; affirming *S. C.*, 3 *Den.*, 590. *N. Y. Superior Ct.*, 1848, *Pringle v. Phillips*, 1 *Sandf.*, 292.

929. A plea of property in a stranger is good in bar or in abatement, and entitles the party to a return without avowry. [2 *Lev.*, 92; 1 *Salk.*, 94.] *Supreme Ct.*, 1806, *Harrison v. McIntosh*, 1 *Johns.*, 380; 1841, *Ingraham v. Mead*, 1 *Hill*, 858.

930. In replevin by many plaintiffs, a plea of property in two of them and in a stranger, is good; and a replication that the stranger had transferred his right to the plaintiffs, or some of them, without saying when or how, is bad. *Supreme Ct.*, 1844, *Pattison v. Adams*, *Hill & D. Supp.*, 426.

931. Plea of property in a stranger must name him. *Supreme Ct.*, 1846, *Anstice v. Holmes*, 3 *Den.*, 244.

932. The plea of non detinet, to replevin in the *detinet* only, puts in issue not only the detention but the property of the plaintiff. [2 *Rev. Stat.*, 529, § 40.] *Supreme Ct.*, 1847, *Yates v. Fassett*, 5 *Den.*, 21.

933. Non-joinder. In replevin in the *detinet*, the non-joinder of co-tenants of the plaintiff is not available in bar, by special plea, or under *non detinet*; though it is proper matter for a plea in abatement. *Supreme Ct.*, 1848, *Wright v. Bennett*, 3 *Barb.*, 451.

934. Non cepit puts in issue only the taking, and the place of taking when material. Matter of justification or excuse must be specially pleaded. [3 *Wend.*, 667; 15 *Id.*, 324; 8 *Id.*, 448; 4 *Id.*, 216; 1 *Chitt. Pl.*, 159, 408; 2 *Rev. Stat.*, 528, § 89; *Steph. Pl.*, 161; 1 *Chitt.*, 157, 490; 1 *Saund.*, 347, n. 1; 1 *Vent.*, 249.] *Ct. of Appeals*, 1850, *Ely v. Ehle*, 3 *N. Y. (3 Comst.)*, 506. To similar effect, *Supreme Ct.*, 1835, *Seymour v. Billings*, 12 *Wend.*, 285. *N. Y. Com. Pl.*, 1842, *Skidmore v. Devoy*, 1 *N. Y. Leg. Obs.*, 123.

935. Plea of lien. If the avowry in replevin justifies the detainer under a lien for the making of the article, the plaintiff may plead that it was made under an agreement which precludes defendant from setting up the lien, or which impliedly negates the right; but its

Rules peculiarly Applicable to—Slander.

particulars, and especially the price and time of payment, must be set forth. *Ct. of Appeals*, 1847, *Curtis v. Jones*, 1 *How. App. Cas.*, 187; affirming *S. C.*, 8 *Den.*, 590.

936. Denial of rent. To an avowry which set forth a lease which made rent payable in advance, a plea that the rent never became due, is bad. *Ct. of Appeals*, 1849, *Nichols v. Dusenbury*, 2 *N. Y. (2 Comst.)*, 288.

937. Cepit in alio loco does not admit the taking as laid, but traverses the place, which in replevin is material. *Supreme Ct.*, 1880, *Williams v. Welch*, 5 *Wend.*, 290.

938. Under riens in arriere, defendant may prove an eviction. *Supreme Ct.*, 1880, *Lewis v. Payn*, 4 *Wend.*, 428; 1882, *Bloomer v. Juhel*, 8 *Id.*, 448.

939. Replication. To a plea in replevin of property in a stranger, replication that plaintiff entered the house in the night-time; or that the goods were delivered to plaintiff by B. for safe-keeping, and that plaintiff has a special property in them, without stating that B. had any property in the goods, or authority to make the deposit, is bad. *Supreme Ct.*, 1806, *Harrison v. McIntosh*, 1 *Johns.*, 380.

86. Slander.

940. A Declaration for "falsely and maliciously charging and imposing on the defendant the crime of perjury," is bad, for uncertainty. *Supreme Ct.*, 1806, *Ward v. Clark*, 2 *Johns.*, 10.

941. Under a declaration for slander in charging perjury as committed upon a particular occasion, proof of a general charge of perjury is inadmissible. Parties must state the cause of action upon which they rely, with reasonable certainty and precision, and a substantial departure, on the trial, from the case made by the pleadings, is not to be allowed. [11 *Wend.*, 596.] *Supreme Ct.*, 1845, *Emery v. Miller*, 1 *Den.*, 208; 1848, *Coons v. Robinson*, 3 *Barb.*, 625.

It is admissible, if the words charged are actionable *per se*, and there is no *colloquium* concerning a particular occasion. 1842, *Jacobs v. Fyler*, 3 *Hill*, 572; 1848, *Coons v. Robinson*, 3 *Barb.*, 625.

942. A declaration in slander, charging the plaintiff with swearing to a lie, as a witness on a trial in a justice's court, but not showing jurisdiction or the materiality of the testimony, is good. The same certainty is not requisite as in an indictment for perjury. [8 *Johns.*, 74.]

So held, after verdict. *Supreme Ct.*, 1816, *Niven v. Munn*, 18 *Johns.*, 48. To similar effect, *Chapman v. Smith*, *Id.*, 78.

943. Where jurisdiction is otherwise sufficiently shown, a false title of the cause may be rejected as surplusage. *Supreme Ct.*, 1816, *Chapman v. Smith*, 18 *Johns.*, 78.

944. Colloquium. In an action for slander, to the injury of the plaintiff in two different characters, if there is a *colloquium* concerning him in one character only, and entire damages are given, judgment will be arrested. *Supreme Ct.*, 1805, *Gilbert v. Field*, 3 *Cai.*, 829.

945. The slander was, "your children are thieves," and the declaration averred that plaintiff was one of the children of whom the discourse was. *Held*, that the *colloquium* conclusively pointed the words. *Supreme Ct.*, 1814, *Gidney v. Blake*, 11 *Johns.*, 54. Compare *Milligan v. Thorn*, 6 *Wend.*, 412.

946. If the words are not actionable except in regard of the plaintiff's trade or profession, it is not sufficient to allege the speaking of him, without a *colloquium* of his trade, &c. [1 *Com. Dig.*, 277 (G. 3); 1 *Lev.*, 250.] Yet if his trade is alleged, and then it is stated that the defendant, in a discourse concerning the plaintiff, in his said business, published the words charged, this is in substance a sufficient *colloquium*. [*Com. Dig.*, 277.] *Supreme Ct.*, 1819, *Burtch v. Nickerson*, 17 *Johns.*, 217.

947. An innuendo cannot supply the place of the *colloquium*; but if there is a *colloquium* sufficient to point the application of the words to the plaintiff, if spoken maliciously, he must have judgment. *Supreme Ct.*, 1811, *Lindsey v. Smith*, 7 *Johns.*, 359.

948. Of and concerning. The omission of the averment that the slanderous words were spoken of and concerning the plaintiff, is fatal even after verdict. [*Cro. Jac.*, 126; 2 *Str.*, 984; 1 *Saund.*, 242, n. 8; 2 *Chitt. Pl.*, 263, n.; 7 *Johns.*, 359.] *Supreme Ct.*, 1834, *Sayre v. Jewett*, 12 *Wend.*, 135; and see *Havemeyer ads. Wannan*, 4 *N. Y. Leg. Obs.*, 343.

949. A declaration which stated a *colloquium* of and concerning the plaintiff, did not aver that the words were spoken concerning him, but showed, with reasonable certainty, that they were so. *Held*, sufficient, after verdict. *Supreme Ct.*, 1842, *Nestle v. Van Slyck*, 2 *Hill*, 382. Compare *Titus v. Follet*, *Id.*, 318.

950. In an action by husband and wife for slander, if all the counts contain words

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actionable *per se*, as well as others spoken of the wife, the defendant cannot demur, but may object on the trial. *Supreme Ct.*, 1842, *Beach v. Ranney*, 2 *Hill*, 309.

951. Defamation. Of the rules of pleading and evidence in actions for defamation before the Code. *Bisbey v. Shaw*, 12 *N. Y.* (2 *Kern.*), 67.

952. It is not enough in a declaration for defamation to state the tenor of the charge. The manner in which it was made must be stated. *Mayor's Ct.*, 1802, *Clark v. Mount*, *Liv. Jud. Op.*, 18; *Fulkerson v. Ashley*, *Id.*, 21.

37. Statute of Limitations.

953. Form of the plea. When the declaration is on a promise to perform a future act, the proper plea of limitations is *actio non accrevit*. *Supreme Ct.*, 1830, *Soulden v. Van Rensselaer*, 8 *Wend.*, 472.

954. Non-assumpsit *infra sex annos* is not a good plea to a count setting forth a note payable at a day subsequent to its date. [Ball on Lim., 216.] *Supreme Ct.*, 1841, *Stilwell v. Hasbrouck*, 1 *Hill*, 561; *United States v. White*, 2 *Id.*, 59.

955. Where the plea of the Statute of Limitations is "before the exhibition of the bill," if the plaintiff wishes to rely upon his process as having commenced the action in time, he must reply the process specially; though it is otherwise where the plea is "before the commencement of the suit." *Supreme Ct.*, 1835, *Bank of Orange County v. Haight*, 14 *Wend.*, 83; 1841, *Richmond v. Little*, 2 *Hill*, 134.

956. A plea that the defendant did not promise, &c., within six years next before the exhibition of the bill, is bad, for suits are no longer brought by bill. *Supreme Ct.*, 1844, *Swift v. Vaughn*, 6 *Hill*, 488. *N. Y. Com. Pl.* (1848†), *Lewis v. Aubernan*, 2 *N. Y. Leg. Obs.*, 76.

957. In an action on the case against an officer, for not returning an execution, a plea of the Statute of Limitations should pursue the terms of the statute, and aver that the cause of action did not accrue within three years. [8 *Barn. & Ald.*, 448.] *Supreme Ct.*, 1842, *Fisher v. Pond*, 2 *Hill*, 338.

958. In an action against joint-debtors, a plea by one that he did not promise within six years, is bad. *Supreme Ct.*, 1848, *Tracy v. Rathbun*, 3 *Barb.*, 543. To the contrary, 1841, is *Stilwell v. Hasbrouck*, 1 *Hill*, 561.

959. Exceptions. That the Statute of Limitations should be pleaded generally, leaving the plaintiff to set up the exceptions in the statute. [2 *Saund.*, 64, n. 63, b; 2 *Chitt.*, 607; 1 *Id.*, 555; 1 *Went.*, 257; 3 *Id.*, 208; *Id.*, index, 20.] *Supreme Ct.*, 1838, *Huntington v. Brinckerhoff*, 10 *Wend.*, 278.

960. The time of the defendant's absences from the State, after action accrued, which, under the Statute of Limitations, is not to be deemed or taken as any part of the time limited, need not be specially set up by replication. It is a matter of evidence which does not affect the pleading. [24 *Wend.*, 488; 1 *Den.*, 151.] *N. Y. Superior Ct.*, 1847, *Graham v. Schmidt*, 1 *Sandf.*, 74.

961. In a plea that six years had elapsed since the return of the defendant, it is not necessary to aver that his return was public, or that the plaintiff had notice thereof, or could have had process served on him with due diligence; for these facts are implied in the allegation of a return, pursuing the words of the statute, and in order to sustain the plea, must be proved on the trial. When a defendant seeks to avail himself of the statutory bar, by pleading his return, he is bound to prove all the facts necessary to render the bar effectual, even where none of those facts, except by implication of law, have been averred in his plea. The want of such an averment cannot therefore be a valid cause of demurrer. *N. Y. Superior Ct.*, 1849, *Ford v. Babcock*, 7 *N. Y. Leg. Obs.*, 270; *S. C.*, less fully, 2 *Sandf.*, 518. Approved and followed, *Ct. of Appeals*, 1854, *Cole v. Jessup*, 10 *N. Y.* (6 *Seld.*), 96; *S. C.*, 10 *How. Pr.*, 515; overruling *S. C.*, 2 *Barb.*, 309.

962. In pleading the Statute of Limitations, the defendant is not bound to negative the exceptions from the general rule that the statute establishes. It lies upon the plaintiff to aver and prove the facts that create the exception. *N. Y. Superior Ct.*, 1849, *Ford v. Babcock*, 7 *N. Y. Leg. Obs.*, 270; *S. C.*, less fully, 2 *Sandf.*, 518.

963. In a plea of the Statute of Limitations, an averment that the defendant was out of the State when the cause of action accrued, without alleging that he was a non-resident, is enough; nor need the plea aver that the defendant ever resided in this State. *Id.*

964. A plea of the Statute of Limitations need not aver that defendant resided within

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the State after his return. The fact of a return is sufficient. *Id.*

965. In actions by or against executors. In a plea of limitations to an action by or against executors, or administrators, it is not necessary to plead specially the additional time allowed by 2 Rev. Stat., 2 ed., 865, §§ 8, 9, for it is matter of evidence under the usual plea of the Statute of Limitations. *Supreme Ct.*, 1840, *Howell v. Babcock*, 24 *Wend.*, 488; 1845, *Benjamin v. De Groot*, 1 *Den.*, 151; 1848, *Nelson v. Lounsbury*, 8 *Barb.*, 125; S. P., in an action against heirs, 1832, *Livingston v. Ostrander*, 9 *Wend.*, 806. S. P., in the case of the exception of time of defendant's absence from the State, *N. Y. Superior Ct.*, 1848, *Graham v. Schmidt*, 1 *Sandf.*, 74.

966. Writ of error. The Statute of Limitations can be interposed against a writ of error only by plea. *Ct. of Errors*, 1838, *Fleet v. Youngs*, 11 *Wend.*, 522. *Supreme Ct.*, 1846, *Keefer v. Keefer*, 2 *How. Pr.*, 67.

967. Replication. To a plea of limitations interposed to a declaration of an administrator counting upon a promise to himself, as such, a replication that the intestate died within six years, is bad. *Supreme Ct.*, 1848, *Worden v. Worthington*, 2 *Barb.*, 868.

88. Statute Securities.

968. A declaration upon a statutory security.—*e. g.*, a replevin bond,—need not aver that it was taken in pursuance of the statute. It is enough that the instrument set forth is in accordance with the statute. *Ct. of Appeals*, 1849, *Shaw v. Tobias*, 3 *N. Y. (8 Comst.)*, 188.

969. The declaration on a replevin bond must set out the proceedings in the replevin, and the facts forfeiting the bond; but need not the title to the premises, the avowry or cognizance. *Supreme Ct.*, 1829, *Gould v. Warner*, 8 *Wend.*, 54.

970. Nor the return of the writ, though this must be shown on the trial. *Supreme Ct.*, 1838, *Cowden v. Pease*, 10 *Wend.*, 338; *Donahue ad. Collins*, 5 *N. Y. Leg. Obs.*, 227.

971. It need not aver that the bond was executed on behalf of the plaintiffs in the replevin suit; nor, where the bond is executed to the coroner, need it state that the writ was directed to the coroner,—for that may be presumed from the proceedings. *Ct. of Appeals*, 1849, *Shaw v. Tobias*, 3 *N. Y. (8 Comst.)*, 188.

972. In an assignee's action on a replevin

bond, the fact that the goods replevied were taken as a distress for rent, must be averred in the declaration, but in an action on the bond it is not necessary to aver the issuing of a writ *de retorno habendo*, and a return of *elongata*. *Supreme Ct.*, 1880, *Knapp v. Colburn*, 4 *Wend.*, 616; *McFarland v. McNitt*, 10 *Id.*, 329.

973. Appeal-bond. Where in a bond on appeal from a justice's court, the clause that the appellant would surrender in execution is omitted, the declaration need not contain an averment that an execution had been issued on the judgment. The plaintiff should not be responsible for any defect in the appeal-bond, if there was one. *Supreme Ct.*, 1828, *Pevy v. Sleight*, 1 *Wend.*, 518.

974. Administration bond. In an action against the surety on an administration bond, it is not necessary for the plaintiff to describe the property which came into the hands of the administrator, and which he had converted, the creditor not being presumed to know precisely what it was. *Supreme Ct.*, 1816, *People v. Dunlap*, 13 *Johns.*, 437.

975. The non-payment of a judgment obtained against the administratrix, may be assigned as a breach of the condition of such bond. *Id.*

976. A declaration on an administrator's bond need not show the surrogate's jurisdiction, for the sureties are precluded from gaining saying it. Nor is it necessary to set forth the steps in the proceedings for an accounting, where the action is for a failure to account. It is sufficient for the plaintiffs to set forth that the administrators were at the proper time required to account; that they did account before the surrogate; that he found and decreed the balance in their hands; that he further decreed the distribution of such balance, and payment to the respective next of kin; that the administrators failed to comply with such decrees; that thereby the administration bond was forfeited; and that the surrogate thereupon ordered it to be prosecuted. It is not necessary that the declaration should aver notice to the sureties of any of these proceedings, nor an application to the surrogate to have the bond put in suit. *N. Y. Superior Ct.*, 1848, *People v. Falconer*, 2 *Sandf.*, 81.

977. Attachment bond. In an action on an attachment bond, executed on the discharge of a warrant, issued under the Absconding and Non-resident Debtor Act, it is not neces-

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sary to aver or prove that the attaching creditor resided in this State. The execution of the bond makes a *prima-facie* case on the part of the plaintiff. *N. Y. Com. Pl.*, 1848, *Dormday v. Kanouse*, 2 *N. Y. Leg. Obs.*, 830.

978. Non-imprisonment Act. In an action upon a bond given under the Non-imprisonment Act, conditioned that the debtor will apply in thirty days for a discharge from his debts, averring that he did not apply within thirty days, is sufficient, without averring that the discharge was not obtained. *N. Y. Com. Pl.*, 1847, *Bunn ads. Bradlie*, 5 *N. Y. Leg. Obs.*, 227.

979. Officer's bond to be relieved from attachment. In declaring on a bond given by an officer to be relieved from arrest on an attachment conditioned to appear at the return-day, and abide the order of the court, an allegation of non-appearance is sufficient. *Supreme Ct.*, 1837, *Thomas v. Cameron*, 17 *Wend.*, 59; 1839, *Hart v. Seixas*, 21 *Id.*, 40.

980. It is not necessary to aver that the attachment on which the defendant was arrested is returned, nor to allege that he was called on the return-day, and default entered. *Supreme Ct.*, 1837, *Thomas v. Cameron*, 17 *Wend.*, 59.

981. Where the process on which the defendant was arrested is a *pluries*, it is not necessary to set forth in the declaration the attachment and alias. *Id.*

982. In declaring upon a recognizance, it is not necessary to aver the existence of the particular facts which prove that the officer had jurisdiction to act in the particular case. *Supreme Ct.*, 1847, *People v. Kane*, 4 *Den.*, 530. Followed, 1849, *People v. Millis*, 5 *Barb.*, 511; qualifying *People v. Koeber*, 7 *Hill*, 89; and *People v. Young*, *Id.*, 44. To the same effect, *Ct. of Appeals*, 1848, *Champlain v. People*, 2 *N. Y. (2 Comst.)*, 82.

983. A declaration on a recognizance need not aver that defendant had an examination before giving it, for he may waive the right to an examination; and if the recognizance was extorted from him, that must be set up by way of defence. *Ct. of Appeals*, 1848, *Champlain v. People*, 2 *N. Y. (2 Comst.)*, 82.

984. In an action on a recognizance, it is not necessary to aver in the declaration the order of the court directing a prosecution. *Supreme Ct.*, 1837, *People v. Blankman*, 17 *Wend.*, 252; 1839, *Bank of Buffalo v. Boughton*, 21 *Id.*, 57.

985. A declaration on a recognizance to appear and answer an indictment, need not aver that an indictment was found. *Ct. of Appeals*, 1848, *Champlain v. People*, 2 *N. Y. (2 Comst.)*, 82.

986. A respite should not be noticed in pleading, but the default should be alleged on the original day. *Supreme Ct.*, 1845, *People v. Hainer*, 1 *Den.*, 454.

987. A declaration against the surety in a recognizance, need not aver that the principal committed the offence, a conviction for which is set forth in the recognizance; nor that the recognizance was delivered, for no delivery is made; nor that it was filed, in a case where it is merely required to remain with the justice who took it. It need not be averred, in express terms, that an action has accrued against the surety. *N. Y. Superior Ct.*, 1848, *People v. Mitchell*, 1 *Sandf.*, 191.

988. On a recognizance taken out of court, the declaration must aver that it was filed; also that the default of the principal for not appearing was entered of record, or at least that he was called and did not appear. *Supreme Ct.*, 1830, *People v. Van Eps*, 4 *Wend.*, 387; but compare *People v. Huggins*, 10 *Id.*, 464.

989. Debtor's recognizance. A declaration upon a recognizance, taken upon an adjournment granted to a debtor, who, on being arrested under the act to abolish imprisonment for debt, had controverted, before the officer, the facts on which the warrant was issued, is bad on demurrer, if it does not aver that a bond not to remove his property out of the jurisdiction was given by him, or that it was waived by the plaintiff. *N. Y. Superior Ct.*, 1850, *People v. Locke*, 3 *Sandf.*, 443.

39. Statutes.

990. In general. An action founded upon a statute must state specially the cause of action arising under the statute, unless the statute itself gives a particular form of declaration. *Supreme Ct.*, 1809, *Cole v. Smith*, 4 *Johns.*, 198; 1816, *Bigelow v. Johnson*, 18 *Id.*, 428; and see *People v. Brooks*, 4 *Den.*, 469.

991. Recital. In declaring upon a public statute it is not necessary to recite it, but only to state facts bringing the case within it, and to refer to it generally. *Supreme Ct.*, 1837, *Bayard v. Smith*, 17 *Wend.*, 88. To similar effect, 1834, *Carris v. Ingalls*, 12 *Id.*, 70.

992. In declaring on a penal statute, where

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the act prohibited is not an offence at the common law, it is not essential to conclude against the form of the statute, if the facts averred show that the act averred is an offence against the statute. [2 East, 883.] *Supreme Ct.*, 1826, *People v. Bartow*, 6 *Cow.*, 290.

993. In a declaration under the act against unlicensed banking, an allegation that the defendant kept an office of deposit "for the purpose of carrying on banking business and operations," without saying what, is not too general, as it follows the words of the statute. *Ib.*

994. That if a statute gives a new action, it must be recited in the writ or declaration; but it is not necessary to do so if an action at common law be given to a new case. *Supreme Ct.*, 1834, *Carris v. Ingalls*, 12 *Wend.*, 70.

995. Money deposited with defendant as stakeholder to abide the event of an illegal wager, may be recovered back under 1 Rev. Stat., 682, §§ 8, 9, though no demand was made of the stakeholder until the event upon which the bet depended was known. An omission in the declaration to refer to the statute, if this be a defect, is not available except on special demurrer. *Supreme Ct.*, 1849, *O'Maley v. Reese*, 6 *Barb.*, 658.

996. Provisos. Exceptions. In an action on a statute, a distinct proviso, whether in the same section or another, furnishing mere matter of excuse for the defendant, need not be negatived; though it would be otherwise of an exception incorporated in the very clause. *Supreme Ct.*, 1808, *Bennet v. Hurd*, 8 *Johns.*, 488; 1809, *Teel v. Fonda*, 4 *Id.*, 804; 1811, *Hart v. Cleis*, 8 *Id.*, 41. To similar effect, 1806, *Sheldon v. Clark*, 1 *Id.*, 518; 1824, *Burr v. Van Buskirk*, 3 *Cow.*, 268. Compare *Blasdel v. Hewit*, 8 *Cai.*, 187.

This rule applied to the limitation in § 8 of the statute giving jurisdiction to justices of the peace. *Supreme Ct.*, 1850, *Foster v. Hazen*, 13 *Barb.*, 547.

997. Where the exception made by the statute is contained in the enacting clause and not in the proviso, a declaration founded upon the statute must negative the exception. [1 T. R., 141; 1 B. & Ad., 94; 1 Ch. Pl., 206; Dwar. on Stat., 661; 4 Johns., 804.] *Supreme Ct.*, 1848, *First Baptist Church v. Utica & Schenectady R. R. Co.*, 6 *Barb.*, 818.

998. Condition. In pleading the ground of a forfeiture for neglect of a corporation to perform an act which is required only under

peculiar circumstances, the condition upon which the company incurred the obligation to do it must be specifically and substantially alleged. [9 *Wend.*, 378.] *Supreme Ct.*, 1840, *People v. Bristol & Rensselaerville Turnpike Co.*, 28 *Wend.*, 222.

999. *Scienter*. That in an action on a statute, it is not necessary to aver a *scienter* in the violation, unless the statute gives the action only for a knowing violation. *Supreme Ct.*, 1844, *Gaffney v. Colvill*, 6 *Hill*, 567.

1000. *Liability of stockholders*. Upon a note of a corporation given for its debt upon simple contract, the indorsee of the original holder may sue in his own name to enforce the individual liability of a stockholder; and an averment in the words of the charter creating such liability, that defendant was a stockholder at the time of the original contracting of the debt, may be deemed sufficient. *Supreme Ct.*, 1845, *Freeland v. McCullough*, 1 *Den.*, 414.

1001. — of director. In an action for the violation of the general statute by defendant as director of a private corporation, the charter need not be set out. *Supreme Ct.*, 1844, *Gaffney v. Colvill*, 6 *Hill*, 567.

1002. *Trespass on lands*. A plaintiff suing under 1 Rev. L., 525, for a trespass on lands, need not, as it is the only statute which can apply to the case, specifically refer to it by its title; nor need he negative the exceptions, as they are cases in which public officers are to sue. *Supreme Ct.*, 1828, *Beekman v. Chalmers*, 1 *Cow.*, 584.

1003. To entitle to treble damages under the act of Sess. 36, ch. 56, § 29, the declaration must refer to the act; otherwise the defendant cannot be prepared to narrow the claim, by bringing himself within the provisos of the act. *Supreme Ct.*, 1823, *Brown v. Bristol*, 1 *Cow.*, 176.

1004. *Right of plaintiff to sue*. That under a statute giving an action to certain persons, and in case they neglect to prosecute within a certain time, allowing any person to recover, the declaration in an action by one of the latter class must allege the neglect of the former to prosecute. *Supreme Ct.*, 1811, *Morrell v. Fuller*, 7 *Johns.*, 402.

1005. In an action to recover the statute penalty from a witness who fails to appear, the declaration must aver that the fees of the witness were paid or tendered to him; a gen-

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eral allegation that he was legally subpoenaed is insufficient. *N. Y. Superior Ct.*, 1828, *McKeon v. Lane*, 1 *Hall*, 819.

1006. Lands taken for local improvement. The declaration of an owner of land taken for local improvement, under the statutes relating to Albany, suing for the damages assessed, need not aver that the corporation has taken possession, for they are concluded by the confirmation of the assessment. *Supreme Ct.*, 1811, *Stafford v. Mayor, &c.*, of Albany, 7 *Johns.*, 541.

1007. Statute, how referred to. In actions of debt for penalty or forfeiture given by any statute, it is sufficient, without setting forth the special matter, to allege in the declaration that the defendant is indebted in the amount of such penalty or forfeiture to the officer, person, or body for whose use the same is given; whereby an action accrued according to the provisions of such statute, naming the subject-matter thereof in the following form: "According to the provisions of the statute concerning sheriffs," naming the section, title, and chapter of such statute, as the case may require, or in some other similar terms referring to such statute. 2 *Rev. Stat.*, 482, § 10.

1008. In assumpsit for any penalty given by any statute, it is sufficient, without setting forth the special matter, to allege in the declaration, that the defendant being indebted in the amount of such penalty, according to the provisions of such statute, referring to the same as prescribed in the last section, undertook and promised to pay the same. 2 *Rev. Stat.*, 482, § 11.

1009. In trover to recover any thing forfeited by the provisions of any statute, the declaration may allege that such goods or other things were forfeited according to the provisions of such statute, referring to it in the same manner, and that the defendant converted the same to his own use, without setting forth the special matter. 2 *Rev. Stat.*, 482, § 12.

1010. In an action for a number of penalties incurred for one act,—*e. g.*, in cutting down trees, contrary to a statute giving the penalty of \$25 for each tree cut down,—the plaintiffs may declare generally in one count without setting forth any special matter, and recover for so many penalties, not exceeding the debt claimed, as are proven. *Supreme Ct.*, 1835, *People v. McFadden*, 18 *Wend.*, 896.

1011. Under 2 *Rev. Stat.*, 482, §§ 10, 11, the particular section, title, and chapter, must be truly named. Where one of two sections pleaded was a provision of the Revised Statutes, and the other was a provision of a subsequent statute, which had been inserted in a later edition of the Revised Statutes;—*Held*, that referring to the latter as a section of the

Revised Statutes was a fatal error. *Supreme Ct.*, 1847, *People v. Brooks*, 4 *Den.*, 469.

1012. In an action against an officer to recover a penalty imposed by a general statute for any neglect or refusal to perform a duty, it is sufficient, under 2 *Rev. Stat.*, 482, § 10, to refer only to the statute imposing the penalty, though the particular duty in question was created by a subsequent statute. *Ct. of Errors*, 1846, *Morris v. People*, 8 *Den.*, 881.

1013. Under a statute, providing that in an action for a penalty under its sections, it should be lawful to declare generally in debt, &c., stating the section of the act, or the by-law, &c., "stating" is to be deemed equivalent to "referring to." *Supreme Ct.*, 1844, *City of Utica v. Richardson*, 6 *Hill*, 800.

1014. Pleas, &c. To every declaration for a penalty or forfeiture, defendant may plead the general issue; that he owes nothing, or that he did not undertake and promise, as alleged in such declaration; or that he is not guilty of the premises charged; as the case may require; and may give in evidence under such plea, any special matter, which, if pleaded, would be a bar to such action, or discharge the defendant therefrom, with the same manner and effect as if pleaded specially. 2 *Rev. Stat.*, 482, § 18.

1015. Replication. In any suit for a penalty or forfeiture, brought by any person other than the party aggrieved, or other than any public officer, if a former recovery, or acquittal, or other bar to such action be pleaded, plaintiff may reply that it was had by covin and fraud; and if such replication be confessed or established, plaintiff recovers. 2 *Rev. Stat.*, 482, § 14.

1016. Foreign law. A defendant who relies upon proceedings under the statute of another State, must in his plea set out the statute, that the court may see whether the proceedings were warranted by the statute or not, and the general allegation that the proceedings were pursuant to the statute, is not sufficient. [1 *Mass.*, 108.] *Supreme Ct.*, 1838, *Holmes v. Broughton*, 10 *Wend.*, 75.

1017. Usury. In an action of trover for goods, &c., received by defendant in violation of the statutes against usury, the declaration must conform to the statute, 2 *Rev. Stat.*, 852, § 8, requiring it to set forth "that such goods, &c., were converted by defendant contrary to the provisions of such statute," &c. *Ct. of Appeals*, 1848, *Schroeppehl v. Corning*, 2 *N. Y.* (2 *Comst.*), 182; affirming *S. C.*, 5 *Den.*, 286.

1018. In a complaint for a misdemeanor committed by the defendant in fraudulently removing, &c., his property, contrary to the

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act to abolish imprisonment for debt, an allegation that the defendant removed his property to places unknown, is not equivalent to a charge of secreting or removing it from the county. The value of the property must be stated. *Supreme Ct.*, 1888, *Thomas v. People*, 19 *Wend.*, 480.

1019. Proper form of avowry to a writ *de homine replegiando* setting up the law of another State and proceedings thereunder. *Jack v. Martin*, 12 *Wend.*, 811.

1020. The safest and best mode of pleading a defence founded upon a statute, is to follow the words of the law, since the same construction must be given to the words in the plea as in the statute. *N. Y. Superior Ct.*, 1849, *Ford v. Babcock*, 7 *N. Y. Leg. Obs.*, 270; S. C., less fully, 2 *Sandf.*, 518. Approved and followed, *Ct. of Appeals*, 1854, *Cole v. Jessup*, 10 *N. Y. (6 Sold.)*, 96; S. C., 10 *How. Pr.*, 515; overruling S. C., 2 *Barb.*, 809.

1021. A plea to avoid a contract by reason of 2 Rev. Stat., 2 ed., 581,—which forbids trading under the name of a fictitious firm,—must aver that the plaintiff's illegal transaction of business included the very contract in question. *Supreme Ct.*, 1842, *Hoyt v. Allen*, 2 *Hill*, 322.

1022. Construction and effect of pleas setting up that a contract between a banking company and a broker for the circulation of notes, was in violation of the banking law. *De Groot v. Van Duzer*, 20 *Wend.*, 890.

40. Trespasses.

1023. Injuries by animals. In an action of trespass or case for mischief done to the person or personal property of plaintiff, by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the declaration; or it must be alleged that the mischief was done by such animals while committing a trespass upon the close of the plaintiff, in which case he may recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed, &c. [4 *Burr.*, 2092.] *Ct. of Appeals*, 1848, *Van Leuven v.*

Lyke, 1 *N. Y. (1 Comst.)*, 515; affirming S. C., 4 *Den.*, 127. Followed, *Supreme Ct.*, 1851, *Dunckle v. Kocker*, 11 *Barb.*, 387.

1024. In trespass for seizing goods, a plea that they were seized by a deputy sheriff, by virtue of an attachment against a debtor, setting forth the proceedings under the act, and that plaintiff held the goods by a fraudulent conveyance from the debtor, and that defendant acted in aid of, and by the command of the deputy, is good. *Supreme Ct.*, 1807, *Patcher v. Sprague*, 2 *Johns.*, 462.

1025. In a transitory trespass, where the gist of the action is the taking and carrying away property, seeking to recover only its value, a general plea of *liberum tenementum* is bad; though defendant may, by justifying in a particular close, compel the plaintiff to new assign. *Supreme Ct.*, 1832, *Shank v. Cross*, 9 *Wend.*, 160.

1026. A plea that the goods were the property of a stranger, or of the defendant, is bad, because it amounts to the general issue. Averring, further, a justification by taking them as the property of a third person, does not give color impliedly, and is bad. *Supreme Ct.*, 1841, *Brown v. Archer*, 1 *Hill*, 266.

1027. In an action of trespass by one claiming under a sale from a debtor, a plea justifying under a justice's attachment against the debtor, and impeaching the sale as fraudulent, must aver the non-residence of the defendant in the attachment; and also that the plaintiff was a creditor of the defendant, as no one but a creditor has the right to impeach the defendant's prior sale. *Supreme Ct.*, 1844, *Van Etten v. Hurst*, 6 *Hill*, 811.

1028. Trespass on lands. Under a count for breaking and entering the plaintiff's close, and taking his goods there, the plaintiff must prove the entry into his close. Although the taking of goods is in its nature transitory, it is here so coupled with the breaking of the close, which is local, that both are made local; and both must be proved as laid. There should have been a count for the taking alone. [1 *T. R.*, 479.] *Supreme Ct.*, 1845, *Howe v. Willson*, 1 *Den.*, 181.

1029. *Locus in quo*. Where the town is subdivided, intermediate a trespass, and a suit therefor, the trespass may be laid to have been done in the original town. *Supreme Ct.*, 1808, *Renaudet v. Orooken*, 1 *Cai.*, 167; S. C., *Cal. & C. Cas.*, 219.

Rules peculiarly Applicable to—Trove;—Waste.

1030. Two counts for the same cause of action, alike except as to the town of the *locus in quo*, allowed. *Supreme Ct.*, 1846, *Doctor v. Kendall*, 2 *Hou. Pr.*, 240.

1031. If, in trespass *quare clausum fregit*, defendant pleads *liberum tenementum*, plaintiff must traverse the title; or, admitting the source of the derivative title, state a title in himself paramount to that of defendant. He cannot reply *de injuria sua propria* alone. [Lawes, 154.] If the defence set up be matter of excuse, as distinguished from matter of justification, it is put in issue by a replication of *de injuria*, &c. *Supreme Ct.*, 1809, *Hyatt v. Wood*, 4 *Johns.*, 150. Followed, *Wood v. Hyatt*, *Id.*, 818.

1032. If the defendant, in trespass to lands, plead a possessory title under a demise from a third person, he must give express color, or the plea will be bad, as amounting to the general issue. [1 *Chitt. Pl.*, 500.] *Supreme Ct.*, 1826, *Collet v. Flinn*, 5 *Cow.*, 466. Followed, 1834, *Underwood v. Campbell*, 18 *Wend.*, 78.

1033. Denial. In trespass *quare clausum fregit*, a plea that the act complained of was not committed where the plaintiff lays it, but in another lot, where the defendant was justified in committing such act, is bad on special demurrer, as amounting to the general issue. *Supreme Ct.*, 1847, *Dorman v. Long*, 2 *Barb.*, 214.

1034. New assigning. To a plea setting forth by metes and bounds the close in the declaration as defendant's, plaintiff should new assign. *Supreme Ct.*, 1804, *Hallock v. Robinson*, 2 *Cal.*, 233; 8 *O., Col. & C. Cas.*, 895.

1035. In trespass to real property, if to a declaration *quare clausum* generally in such a town, defendant pleads *liberum tenementum*, plaintiff must new assign, setting out the *locus in quo* with more particularity. *Supreme Ct.*, 1832, *Austin v. Morse*, 8 *Wend.*, 476.

1036. A new assignment of a trespass must allege that it is other and different from that justified in the plea. *Supreme Ct.*, 1839, *Hanna v. Rust*, 21 *Wend.*, 149.

41. Trover.

1037. Description of instrument. In trover for a bond, or other written instrument, the plaintiff need not give the date, or recite any part of it in his declaration but he must

show who are the parties to the contract. *Supreme Ct.*, 1842, *Pierson v. Townsend*, 2 *Hill*, 550.

1038. In trover for a note, if plaintiff cannot state its precise amount, he may state it to be of great value, to wit: of a certain sum. *Supreme Ct.*, 1821, *Bissel v. Drake*, 19 *Johns.*, 66.

1039. What is a sufficient description of bank-notes in an action of trover therefor *Dows v. Bignall*, *Hill & D. Supp.*, 407.

1040. That a part of numerous counts in trover will not be struck out on motion as unnecessary, when plaintiff expects to sustain each by proof. *Supreme Ct.*, 1843, *Dows v. Davis*, 5 *Hill*, 512.

1041. Plea. In trover, any special plea which does not admit that the plaintiff once had a good cause of action, is bad on demurrer. [Reviewing many cases.] *Supreme Ct.*, 1838, *Hurst v. Cook*, 19 *Wend.*, 463; 1842, *Briggs v. Brown*, 3 *Hill*, 87.

42. Waste.

1042. In an action of waste, under 2 Rev. Stat., 384, plaintiff must set forth in the declaration how and in what manner he is entitled to the inheritance, though it may be otherwise of an action on the case in the nature of waste. *Supreme Ct.*, 1834, *Carris v. Ingalls*, 12 *Wend.*, 70. Consult, also, WASTE.

PLEADING, IN EQUITY.

[Under this title we present the cases upon the form, sufficiency, and effect in pleadings in suits in equity. The subjects of AMENDMENT, VARIANCE, and VERIFICATION form separate titles; and the several heads of equitable relief should also be referred to for a discussion of what facts are necessary to make out each ground of relief or defence.]

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I. GENERAL RULES.

1. Relief must be according to the allegations. It is an invariable and universal rule of the Court of Chancery, to found its decrees on some matter put in issue between the parties by the bill and answer. In framing the bill, the matter of it must be plainly and succinctly alleged, with all necessary circumstances, as time, place, manner, and other incidents; and if material facts are denied, the complainant can put no interrogatory that does not arise from some fact charged; and the relief must be agreeable to the bill, and not different from it. *Ct. of Errors*, 1810, *James v. McKernon*, 6 *Johns.*, 543. Followed, 1823, *Woodcock v. Bennet*, 1 *Cow.*, 711; 1829, *Forsyth v. Clark*, 3 *Wend.*, 637. *S. P.*, *Ct. of Appeals*, 1849, *Kelsey v. Western*, 2 *N. Y.* (2 *Comst.*), 500. *Supreme Ct.*, 1848, *Thomas v. Austin*, 4 *Barb.*, 265; *Mickles v. Colvin*, *Id.*, 304.

2. Thus the court will not relieve against a contract, on the ground of fraud, unless fraud

is distinctly alleged. *Chancery*, 1821, *Gouverneur v. Elmendorf*, 5 *Johns. Ch.*, 79. *Ct. of Appeals*, 1852, *Chantauque County Bank v. White*, 6 *N. Y.* (2 *Seld.*), 286; reversing *S. C.*, 6 *Barb.*, 589. *Bailey v. Ryder*, 10 *N. Y.* (6 *Seld.*), 363.

As to necessity and effect of alleging **Fraud**, see, also, **FRAUD**, 40, 41.

3. So under a bill which charges that land is held, by resulting trust, by A. for B., the complainant cannot reach land held by A. in trust for B.'s children. *So held*, though the children were also parties. *Ct. of Appeals*, 1852, *Bailey v. Ryder*, 10 *N. Y.* (6 *Seld.*), 363.

4. That is a just and well-established rule, both in law and equity, that matter in avoidance must be stated with precision and certainty, so that the opposite party may not be surprised by evidence unwarranted by the pleadings. *Ct. of Errors*, 1822, *Slee v. Bloom*, 20 *Johns.*, 669. *Ct. of Appeals*, 1849, *Kelsey v. Western*, 2 *N. Y.* (2 *Comst.*), 500.

5. A defendant cannot open an account, unless a sufficient foundation, laid in the answer, has not been impeached. *Ct. of Errors*, 1822, *Slee v. Bloom*, 20 *Johns.*, 669.

6. In a suit to recover back usury, defendant cannot, at the hearing, avail himself of the limitation in the statute against usury, unless it is pleaded, or insisted on, by the answer. *Chancery*, 1816, *Dey v. Dunham*,* 2 *Johns. Ch.*, 182.

7. A trustee or guardian is not held to account for a default not charged in the bill. *Chancery*, 1820, *Smith v. Smith*, 4 *Johns. Ch.*, 281.

8. Usury. The defendant cannot avail himself of a defence of usury in a mortgage, or other specialty, under a general answer or plea denying the complainant's right as claimed by the bill. This defence must be expressly set up, and the terms of the usurious contract must be distinctly set out in detail, and proved as averred. [*Com. on Usury*, 208; 3 *Durn. & East*, 588.] *Chancery*, 1834, *Vroom v. Ditmas*, 4 *Paige*, 526; 1840, *N. O. Gas Light Co. v. Dudley*, 8 *Id.*, 452; 1848, *Snydam v. Bartle*, 10 *Id.*, 94; 1844, *Curtis v. Masten*, 11 *Id.*, 15. Followed, *V. Chan. Ct.*, 1841, *Luce v. Hinds*, *Clarke*, 458. *A. V. Chan. Ct.*, 1844 [citing also 5 *Leigh (Va.)*, 69; 8 *Id.*, 80], *Rowe v.*

* Reversed, on the point as to the sufficiency of the notice of the prior deed, 15 *Johns.*, 555.

General Rules.

Phillips, 2 *Sandf. Ch.*, 14; 1846, Farmers' Loan & Trust Co. v. Perry, 8 *Id.*, 389; Hetfield v. Newton, *Id.*, 564.

9. The same principle requires usury, when set up by the complainant, to be distinctly set forth in his bill. A bill stating that a mortgage for \$2,700, was executed, and that only \$1,700 was advanced upon it, but not averring any corrupt agreement at the time, though it subsequently denominates the agreement corrupt and usurious, does not sufficiently charge usury. *V. Chan. Ct.*, 1840, Cole v. Savage, *Clarke*, 361.

10. The same principle is applicable, though the party does not directly assail supposed usurious securities. *V. Chan. Ct.*, 1847, Hayes v. Heyer, 4 *Sandf. Ch.*, 485.

11. Proof of usury is inadmissible, unless the answer sets up that there was a loan, or that the transaction was a cover for a loan. *A. V. Chan. Ct.*, 1844, Holford v. Blatchford, 2 *Sandf. Ch.*, 149; 8 *N. Y. Leg. Obs.*, 311.

12. Averment of a sum reserved as usury equal to five per cent. on the nominal amount of the loan: proof of an agreement to deduct five per cent. from the loan;—*Held*, no variance, for the nominal amount of the loan was intended by the parties. *Supreme Ct.*, 1851, Morse v. Oloyes, 11 *Barb.*, 100.

13. Where the agreement is proved as alleged, a variance of ninety cents in the amount of usury actually paid may be disregarded. *Supreme Ct.*, *Chambers*, 1847, Lane v. Losee, 2 *Barb.*, 56.

14. On a bill to redeem under a mortgage, the owner of the land, if he has not set up the defence of usury in his answer, cannot object to the mortgage on that account, nor be benefited by that defence set up in the answer of a defendant who had sold to him with warranty. *Chancery*, 1834, Vroom v. Ditmas, 4 *Paige*, 526.

15. Where a bill seeks to set aside a conveyance, on the ground that it was given merely as security for an usurious loan, if the defendant would set up that it was a full and absolute purchase, his plea must state distinctly that it was an unconditional sale, and not a security for a loan or debt, and he must, by general averment, meet the allegations of the bill that it was a security, not a sale; and in his accompanying answer he must meet the allegations minutely, with precise and detailed statements, so as to be entirely free from lia-

bility to exceptions. *A. V. Chan. Ct.*, 1843, Stuart v. Warren, 1 *N. Y. Leg. Obs.*, 298.

16. Remedy at law. Defendant cannot object at the hearing that plaintiff has a complete remedy at law, unless he has set up the fact in his answer, or by demurrer. [2 *Paige*, 509.] *V. Chan. Ct.*, 1839, Holmes v. Dole, *Clarke*, 71. To the same effect [citing 4 *Paige*, 77], *Ct. of Appeals*, 1852, Truscott v. King, 6 *N. Y. (2 Seld.)*, 147.

17. Payments and set-offs. Under an answer alleging payments, defendant cannot avail himself of mere set-offs. A court of equity is restricted, as much as any other, to the issues made by the pleadings; and, while it endeavors to avoid technical and narrow grounds of objection, cannot admit evidence of a different case from that pleaded. *A. V. Chan. Ct.*, 1846, Green v. Storm, 3 *Sandf. Ch.*, 305.

18. Misnaming the ground of relief. When the facts stated in a bill justify the inference of undue influence, and the allegations are proven, the instrument may be set aside on that ground, though the bill may be erroneous in designating the ground upon which such relief is claimed as mistake, misapprehension, or fraud. *Supreme Ct.*, 1849, Brice v. Brice, 5 *Barb.*, 538.

19. Pleading legal effect. A bill or answer ought not, ordinarily, to set forth deeds *in hac verba*; and if the pleader sets forth only so much thereof as is material to the point in question, it is sufficient. [4 *Ves.*, 217.] *Chancery*, 1820, Hood v. Inman, 4 *Johns. Ch.*, 437.

20. Where execution was issued, by the consent of the defendant, without waiting for the expiration of the thirty days after judgment, given by the act of 1840,* and was made returnable in less than sixty days, a creditor's bill which alleged that the form of the execution as to its return, and the time at which it was taken out, were in pursuance of the defendant's agreement,—*Held*, sufficient, on demurrer, without setting out the legal effect, force, or form of the consent, by which such execution was issued and returned. *Supreme Ct.*, *Sp. T.*, 1849, Millard v. Shaw, 4 *How. Pr.*, 187.

21. Pleading evidence. Where an executor sets forth his inventory in accounting, copies of the appraisers' oath and his own,

* Since repealed; see *EXECUTION*, 87.

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and of the surrogate's certificate, are mere evidence, and not to be pleaded. *V. Chan. Ct.*, 1884, *Jolly v. Carter*, 2 *Edw.*, 209.

22. In pleading facts proven on a trial, they should be stated directly, and a reference for them to a case, or the judge's notes, is improper. *Chancery*, 1885, *Norton v. Woods*, 5 *Paige*, 260.

23. Statements merely tending to discredit a probable witness, are impertinent. *Id.*

24. **Averment of belief.** Averring a fact upon information, adding an averment of the belief of the party that the information is true, is a proper averment of the fact, in a sworn pleading. *Id.*

25. **An allegation of mere surplusage—i. e.,** a statement beyond what is necessary to constitute a cause of complaint or ground of defence—will not prejudice a plea in equity by rendering it multifarious or double. [Beames' Pl. in Eq., 20.] *Supreme Ct., Sp. T.*, 1847, *Davison v. Sohermerhorn*, 1 *Barb.*, 480.

26. **Repetition** not admissible. *McIntyre v. Union College*, 6 *Paige*, 289.

27. **Copies of pleadings** served on the adverse party should be perfect copies, including signature of counsel, the jurat, &c., and the party has a right to presume that they are so; and proceed accordingly. *Chancery*, 1882, *Littlejohn v. Munn*, 3 *Paige*, 280. To the same effect, 1884, *Lansing v. Pine*, 4 *Id.*, 639.

II. THE BILL.

1. In General.

28. **Different kinds.** An original bill, a supplemental bill, and an original bill in the nature of a supplemental bill, defined. *Butler v. Cunningham*, 1 *Barb.*, 85.

29. **A bill with a double aspect** is proper, only where, upon his case, the complainant is doubtful to which of two kinds of relief he is entitled; or where the particular relief depends upon a fact of which he is uncertain. *Chancery*, 1884, *Lloyd v. Brewster*, 4 *Paige*, 587. To the same effect, 1881, *Colton v. Ross*, 2 *Id.*, 396.

30. **A bill which is bad in part** is not, therefore, wholly bad. *Ct. of Errors*, 1799, *Laight v. Morgan*, 1 *Johns. Cas.*, 429.

31. **That some of the complainants show no right to participate in the relief sought**, is a fatal objection to the bill. [4 *Russ.*, 225; 5 *Sim.*, 895; 9 *Id.*, 299; 3 *Paige*, 386; 4 *M.*

& *C.*, 336; 1 *Turn. & Phill.*, 202; 5 *Lond. Jur.*, 458; 7 *Id.*, 119.] *A. V. Chan. Ct.*, 1844, *Cammeyer v. United German Lutheran Churches*, 2 *Sandf. Ch.*, 186.

32. **Naming defendants.** A bill must state clearly the persons who are made defendants; either by praying process against them, or by a distinct allegation designating the persons impleaded as defendants. *Chancery*, 1825, *Elmendorf v. Delancey*, *Hopk.*, 555; *S. P.*, 1831, *Verplanck v. Mercantile Ins. Co.*, 2 *Paige*, 438.

33. — **complainants.** Where a lunatic is a necessary party to a bill filed by the committee, a bill "of A., committee, &c., of B.," is deemed merely the committee's bill. *Chancery*, 1848, *Gorham v. Gorham*, 3 *Barb. Ch.*, 24.

34. A bill in equity must state complainant's residence. [Mitf., 73; 1 *Mont. Pl. in Eq.*, 76, n.; 1 *Danl. Ch. Pr.*, 463; *Stor. Eq. Pl.*, 21, § 26.] *Chancery*, 1869, *Howe v. Harvey*, 3 *Paige*, 78.

35. **Authority of plaintiff as trustee.** One coming into chancery and claiming a right as a substituted trustee, under a will, should state all the material facts distinctly, in his bill, to show that such a vacancy had occurred as to authorize his appointment. If the will provides two modes for the appointment of new trustees, he must state in which mode he was appointed. [Welf. Eq. Pl., 89; *Stor. Eq. Pl.*, 206, § 241; *Id.*, 214, § 257.] *Chancery*, 1844, *Cruger v. Halliday*, 11 *Paige*, 314.

36. **A bill may state any matter of evidence, or collateral matter**, the admission of which may be material in establishing its allegations, or to ascertain the nature and extent of the relief to which the complainant is entitled, or which may affect costs. *Chancery*, 1836, *Hawley v. Wolverton*, 5 *Paige*, 523.

So held, of a statement intended to affect the costs, by showing the temper in which the bill was filed, &c. *V. Chan. Ct.*, 1832, *Desplaces v. Goris*, 1 *Edw.*, 850.

37. *So held* of an averment in a wife's bill for a divorce for adultery, that the defendant had deserted, and failed to maintain her. *Supreme Ct., Sp. T.*, 1847, *Casey v. Casey*, 2 *Barb.*, 59.

38. **A bill should state its facts positively**, or upon information and belief. Mere intimations are not enough. *V. Chan. Ct.*, 1840, *Grim v. Wheeler*, 3 *Edw.*, 334.

39. A bill to be verified by an agent, or

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attorney, should be drawn in the same manner as bills which are sworn to by the complainant himself; stating those matters which are within the personal knowledge of such agent or attorney positively. And those which he has derived from the information of others should be stated or charged upon the information and belief of the complainant. And he should state in the verification that the bill is true, of his own knowledge, except as to the matters stated on the information or belief of the complainant, and as to those matters, that he believes it to be true. [1 Hoffm. Pr., 79, App., No. 20.] *Chancery*, 1841, *Bank of Orleans v. Skinner*, 9 *Paige*, 805.

40. Value of subject. If it does not appear by the bill that the value of the property in controversy does not exceed \$100, the defendant must raise the objection by plea or answer; or he may insist upon it at the hearing. But he cannot demur or move to dismiss. *Chancery*, 1844, *Thomas v. McEwen*, 11 *Paige*, 181.

41. If the bill is for other than a money-demand,—*e. g.*, for specific performance,—it need not aver that the property is worth more than \$100; and, in order to entitle him to prove it of less than that value, the defendant must set up the objection by plea or answer. [7 *Paige*, 62.] *V. Chan. Ct.*, 1841, *Church v. Ide*, *Clarke*, 494; distinguishing *Smets v. Williams*, 4 *Paige*, 864.

For Other cases on the question of jurisdiction as affected by the amount in controversy, see *CHANCERY*, 10-28; and *FORECLOSURE*, 114-117.

42. Multifariousness, properly speaking, is where disconnected matters are joined in a bill against several defendants, a part of whom have no interest in or connection with some of the matters. A mere misjoinder of different causes of action arising between the same parties is not multifariousness. *Chancery*, 1848, *Newland v. Rogers*, 8 *Barb. Ch.*, 432; *S. P.*, 1885, *Varick v. Smith*, 5 *Paige*, 187; and see *Brady v. McCosker*, 1 *N. Y. (1 Comst.)*, 214; affirming *S. C.*, 1 *Barb. Ch.*, 329. Compare *McDermott v. McGown*, 4 *Edw.*, 592.

43. A bill is not multifarious where it sets up one sufficient ground of relief, and another distinct, untenable claim. *Chancery*, 1835, *Varick v. Smith*, 5 *Paige*, 187; *S. P.*, 1841, *Many v. Beekman Iron Co.*, 9 *Id.*, 188. Compare *Butts v. Genung*, 5 *Id.*, 254.

44. A bill praying relief as well as discovery against certain of the defendants, against whom complainant is entitled only to discovery, is not multifarious. *Chancery*, 1841, *Many v. Beekman Iron Co.*, 9 *Paige*, 188.

45. A bill is not multifarious simply because it states facts, which show that the plaintiff may be entitled to two kinds of relief distinct from and inconsistent with each other, unless it also seeks relief in respect of such distinct and separate claims. If the object of the suit is single, and the prayer is for only one kind of relief, the bill is not multifarious. Nor is a bill defective for want of parties, if the plaintiff can obtain the specific relief for which he prays, without the addition of other parties, although facts are stated which, if made the foundation of the prayer for relief, would render the addition of other parties necessary. *N. Y. Superior Ct.*, 1850, *Mayne v. Griawold*, 3 *Sandf.*, 463; *S. C.*, 9 *N. Y. Leg. Obs.*, 25.

46. In a suit by several persons having distinct and separate interests, seeking an injunction to restrain a nuisance, the insertion in the prayer for relief of a prayer for an account and damages, does not render the bill multifarious, for it may be struck out. *Chancery*, 1845, *Murray v. Hay*, 1 *Barb. Ch.*, 59.

47. Where complainants have a common interest in all the matters of the bill, and defendants are interested only in portions, the objection of multifariousness is to be determined by convenience and expediency in the particular case. [1 *Myl. & Cr.*, 603.] *V. Chan. Ct.*, 1848, *Carroll v. Roosevelt*, 4 *Edw.*, 211.

48. In a bill against a debtor and his assignee, joining a claim against one of them for waste on land of the debtor purchased on execution sale, committed during the time allowed for redemption, makes it multifarious. *Chancery*, 1835, *Boyd v. Hoyt*, 5 *Paige*, 65.

49. A bill by a judgment-creditor of a decedent's estate for an account, and to reach land in the hands of a third person held in trust for the decedent in his lifetime, and to compel an account of moneys received by such third person from the administrator on a judgment fraudulently confessed by the decedent, is multifarious, if it shows that the administrator, who is one of the defendants, received sufficient assets. *Chancery*, 1848, *Jackson v. Forrest*, 2 *Barb. Ch.*, 576.

50. After dissolution of a firm, the bill of one partner against the others, joining a cred-

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itor to whom, as it charged, the others had assigned the assets in fraud of complainant's rights in the settlement of the partnership affairs, and which claimed an account and a receiver,—*Held*, not multifarious. *V. Chan. Ct.*, 1847, *Hayes v. Heyer*, 4 *Sandf. Ch.*, 485.

For Other cases on this subject, see PARTIES.

51. A bill against an executor for a legacy, and for an individual debt of the executor, is multifarious. *Chancery*, 1819, *Davoue v. Fanning*, 4 *Johns. Ch.*, 199.

52. The complainant may anticipate a defence by setting it up in the charging part of the bill as a pretence of the defendant, aver matters in opposition to it, and call for a discovery as to it and all such matters. [Mitf., 48; Lube's Eq. Pl., 241, 268.] *Chancery*, 1833, *Stafford v. Brown*, 4 *Paige*, 88.

53. A defect in the charging part of the bill cannot be supplied by a subsequent interrogatory. *Chancery*, 1832, *Mechanics' Bank v. Levy*, 3 *Paige*, 606.

54. Prayer for relief. Where the case made by the bill may entitle the complainant to one kind of relief or another, but not to both, or if he is in doubt as to the specific relief, the prayer should be in the disjunctive. If he prays for particular relief, and other relief in addition thereto, he can have no relief inconsistent with such particular relief, although founded upon the bill. *Chancery*, 1831, *Colton v. Rosa*, 2 *Paige*, 396. Followed, 1844, *Beach v. Beach*, 11 *Id.*, 161; S. O., 3 *N. Y. Leg. Obs.*, 202.

55. If a bill, besides the usual prayer for general relief, contains a prayer for specific relief, the plaintiff is entitled to other specific relief, provided it is consistent with the case stated in the bill. [13 Ves., 110, 120; 2 Atk., 141; 3 *Id.*, 182.] *Chancery*, 1814, *Wilkin v. Wilkin*, 1 *Johns. Ch.*, 111; 1831, *Colton v. Rosa*, 2 *Paige*, 396. *Ct. of Errors*, 1831, *Bailey v. Burton*, 3 *Wend.*, 339.

56. The rule seems to be that relief will be granted under the general prayer if it is consistent with the case made by the bill; and even if it is inconsistent with the specific relief prayed, it will be granted if consistent with the case made by the bill. *Ct. of Errors*, 1830, *Dyett v. Chapman*, cited in 1 *Hoffm. Ch. Pr.*, 50, note.

57. On a bill against an alleged partner for an accounting, if the complainant shows

an agreement which entitles him to an accounting, though it does not constitute a partnership, he may have an account under the general prayer for relief. *V. Chan. Ct.*, 1841, *Innes v. Evans*, 3 *Edw.*, 454.

58. In a bill for discovery, a prayer for an injunction to stay the proceedings at law until discovery, does not convert the bill into a bill for discovery and relief. [Stor. Eq. Pl., 256; Hare on Disc., 14.] *A. V. Chan. Ct.*, 1843, *Atlantic Ins. Co. v. Lunar*, 1 *Sandf. Ch.*, 91.

59. The word "direction," instead of "decree" should be inserted in the prayer of process upon a bill of discovery. [5 *Paige*, 245.] But a bill which contains no prayer, in the usual form, either for specific or general relief, may be considered as a bill of discovery merely, although the word *decree* is also used. *Chancery*, 1837, *McIntyre v. Union College*, 6 *Paige*, 239.

60. The bill charged a sale of property to the defendant, in trust to pay the complainant's debt; and the answer denied the trust, but averred an absolute purchase, accompanied with a bond of indemnity to the complainant against the debt. *Held*, that the prayer of the bill was controlled by the stating part, so that defendant could not be personally charged. *V. Chan. Ct.*, 1840, *White v. Jeffers*, *Clarke*, 206.

61. Signature. A bill, whether sworn or not, must be signed by counsel, before filing. *V. Chan. Ct.*, 1834, *Carey v. Hatch*, 2 *Edw.*, 190; 1836, *Partridge v. Jackson*, *Id.*, 520.

61 a. Signature by party, *Clarke*, 311.

2. Supplemental Bills and Answers thereto.

62. When proper. Matters arising before the finding of a bill should be brought forward by amendment, and such as arose after by supplemental bill. [Mitf. Pl., 60, 164; 3 Atk., 370, 317.] A supplemental bill incorporating such previous matters, is bad on plea or demurrer. *Chancery*, 1828, *Stafford v. Howlett*, 1 *Paige*, 200; and see *Candler v. Pettit*, *Id.*, 168.

63. But the objection is matter of form, and if not taken in pleading, cannot be started at the hearing. *Chancery*, 1833, *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 *Paige*, 127; and see *Lawrence v. Bolton*, 3 *Id.*, 294.

64. Although, wherever the same end can be obtained by amendment, the court will not permit a supplemental bill to be filed [Mitf., 62], yet new matters or events which have

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arisen since the filing of the original bill cannot be set up by amendment—and if they are intended to be invoked as a ground for relief, resort must be had to a secondary bill. *V. Chan. Ct.*, 1845, *Hope v. Brinkerhoff*, 4 *Edw.*, 660.

65. After an order of reference for an account, the complainant cannot set up, by way of supplement, matters known to him before the decree. *Chancery*, 1833, *Dias v. Merle*, 4 *Paige*, 259.

66. After issue, a supplemental bill cannot be filed merely to put in issue matter that might have been introduced by amendment. [4 *Sim.*, 76.] *Ib.*

67. Where facts occurring since the filing of the bill vary the relief to which the plaintiff was entitled under it, a supplemental bill may be filed. *Supreme Ct., Sp. T.*, 1848, *Hasbrouck v. Shuster*, 4 *Barb.*, 285.

68. — new cause of action. A new substantive cause of action cannot be set up by supplemental bill. *V. Chan. Ct.*, 1833, *Milner v. Milner*, 2 *Edw.*, 114.

69. — new party. One who succeeds to the interest of a party must be brought in by supplemental bill, not on petition. [6 *Mad.*, 58.] *V. Chan. Ct.*, 1831, *Carow v. Mowatt*, 1 *Edw.*, 9.

70. A purchaser, *pendente lite*, is bound by the decree, though not made a party; but may bring himself in by a supplemental bill. *A. V. Chan. Ct.*, 1844, *Greenwich Bank v. Loomis*, 2 *Sandf. Ch.*, 70.

71. A complainant will not be allowed, after decree, to file a supplemental bill to bring in a new party, where the answer showed such party's interest. *Chancery*, 1848, *Quackenbush v. Leonard*, 10 *Paige*, 181.

72. Substituted trustees, appointed after bill filed, may be brought in by supplemental bill, but it seems that it is not necessary to bring them in. *V. Chan. Ct.*, 1833, *North American Coal Co. v. Dyett*, 2 *Edw.*, 115.

73. It is not ground for requiring a supplemental bill to be filed, that the complainant has assigned his interest in the suit, where he is proceeding under an agreement with the assignee to prosecute it for the benefit of the latter. *So held*, where the assignment was before the suit, and the objection, therefore, should have been taken by plea or answer. *Chancery*, 1844, *Hathaway v. Scott*, 11 *Paige*, 178.

74. The complainant will not be permitted, after the hearing, to file a supplemental bill bringing in new parties, provided the defendants have waived the omission of such parties; and a decree can be made without them, between the parties already in the suit. *V. Chan. Ct.*, 1846, *Bogardus v. Trinity Church*, 4 *Sandf. Ch.*, 369.

75. An assignee of the subject-matter of a suit, claiming under an assignment executed before the suit was commenced by the assignor, cannot file an original bill in the nature of a supplemental bill. *Supreme Ct., Sp. T.*, 1847, *Butler v. Cunningham*, 1 *Barb.*, 85.

76. Where one of several defendants dies before appearing, a supplemental bill is the proper mode to make his successor in interest a defendant. *Supreme Ct., Sp. T.*, 1852, *Johnson v. Snyder*, 7 *How. Pr.*, 395.

77. — to avoid discharge. Where the defendant in a decree is discharged in bankruptcy, the proper remedy to enforce the decree and obtain satisfaction out of the bankrupt's subsequent acquisitions, is a supplemental bill, setting up the decree, stating the discharge by way of pretence, and charging the fraud invalidating it; and a *lis pendens* may be filed to bind real estate. *Chancery*, 1846, *Alcott v. Avery*, 1 *Barb. Ch.*, 347.

78. Leave. A supplemental bill cannot be filed without leave. Such leave, how granted and when. *Chancery*, 1831, *Eager v. Price*, 2 *Paige*, 383; 1832, *Lawrence v. Bolton*, 3 *Id.*, 294.

79. In a suit for divorce, a supplemental answer, setting up adultery on the complainant's part, should not be allowed unless the court is satisfied that the reasons assigned for the application are cogent and satisfactory; that the facts to be adduced are highly probable, if not certain; that they are material; that the party has not been guilty of negligence; and that the facts have come to his knowledge since the original answer was sworn to. [2 *Sumn.*, 583.] *Supreme Ct., Sp. T.*, 1848, *Burdell v. Burdell*, 2 *Barb.*, 473; *S. C.*, 3 *How. Pr.*, 216.

80. Leave granted at the hearing to bring in necessary parties by supplemental bill. *Jenkins v. Freyer*, 4 *Paige*, 47.

81. Original parties. Where a supplemental bill is filed merely to bring in parties, the original defendants need not be parties to it. [Redesd. Tr. Ch. Pl., 70.] *Chancery*, 1820,

The Bill;—Bills of Revivor;—Bills of Review.

Ensworth v. Lambert, 4 *Johns. Ch.*, 605. Followed, 1822, *McGown v. Yerks*, 6 *Id.*, 450.

82. Unnecessary allegations. A supplemental bill is not demurrable because it unnecessarily sets out the allegations of the original bill, if it does not require the new defendant to make answer to any except the supplemental bill. *Supreme Ct., Sp. T.*, 1852, *Johnson v. Snyder*, 7 *How. Pr.*, 895.

83. Defective bill. Matters occurring after bill filed and set up by supplemental bill, cannot sustain a wholly defective bill; but, if the bill be good, they may vary or extend the relief. *Chancery*, 1828, *Candler v. Pettit*, 1 *Paige*, 168.

84. Answer to supplemental bill. That a defendant who has once answered the original bill, and who is not a party to a supplemental bill, cannot file an answer to it. *Chancery*, 1845, *American Life Ins. & Trust Co. v. Bayard*, 5 *Oh. Sent.*, 47.

85. Where an original bill has been filed against all the necessary parties, and the interest of a defendant is transmitted to a third person,—e. g., by a bankrupt assignment,—the only matter proper to be put in issue upon the supplemental bill, unless some new matter of defence has arisen, is the supplemental matter stated in the new bill, to show the transmission of interest. *Chancery*, 1846, *American Life Ins. & Trust Co. v. Sackett*, 1 *Barb. Ch.*, 585.

3. Bills of Revivor.

86. An executor cannot revive a suit until he has proven the will. Nor can he revive a suit to redeem land. [9 *Mass.*, 422; 1 *Vern.*, 182; 9 *Johns.*, 612.] *Chancery*, 1881, *Douglas v. Sherman*, 2 *Paige*, 858.

87. After defendant has answered, his representatives, on his death, are entitled to the benefit of the answer, and a new bill, instead of a bill of revivor, is not proper. *Chancery*, 1817, *Nicoll v. Roosevelt*, 3 *Johns. Ch.*, 60.

88. Leave. Though a bill of revivor, when necessary, may be filed of course, without an order; a bill of revivor and supplemental bill in the nature of a bill of review, to interpose matters which arose before the decree, can be filed only on leave, and a deposit or security, and must be founded upon an affidavit showing the discovery of new matter. [Rule 178; 2 *Atk.*, 189, n.; 4 *Mitf. Pl.*, 91.]

Chancery, 1882, *Pendleton v. Fay*, 3 *Paige*, 204.

89. Before decree. If a cause abates by the death of a sole plaintiff, before decree or decretal order, by which a defendant becomes entitled to an interest in a continuance of the suit, neither he nor his representatives can revive by bill. *Chancery*, 1842, *Souillard v. Dias*, 9 *Paige*, 898. *S. P.*, *V. Chan. Ct.*, 1845, *McDermott v. McGown*, 4 *Edw.*, 592.

90. The only remedy is by petition, under 2 *Rev. Stat.*, 185, §§ 118, 119. *Supreme Ct.*, 1848, *Banta v. Marcellus*, 2 *Barb.*, 878.

91. Infant. It is no objection to a bill of revivor by the devisee of a complainant in partition, that the devisee is an infant. *Chancery*, 1846, *McCosker v. Brady*,* 1 *Barb. Ch.*, 329.

92. If the validity of the devise is not denied, the suit may be revived on motion, under the rule. *Id.*

93. When lands, against which a decree is sought to be enforced, have been transferred to persons who were not parties to the original suit and before the decree therein, that suit can only be revived by an original bill in the nature of a supplemental bill and bill of revivor; and such bill is subject to all the defences appertaining to an original bill; and such defences must be interposed, or they will be barred. *Supreme Ct., Sp. T.*, 1848, *Talman v. Varick*, 5 *Barb.*, 277.

4. Bills of Review.

94. Ground of. A bill of review must be either for error in point of law, apparent on the face of the decree, or for some new matter of fact relevant to the case discovered since publication passed in the cause, and which could not, with reasonable diligence, have been discovered before. [2 *Madd.*, 408.] *Chancery*, 1817, *Wiser v. Blachly*, 2 *Johns. Ch.*, 488; *Livingston v. Hubbs*, 8 *Id.*, 124.

95. The same restriction in respect to discovery of facts applies to actions to impeach a decree on the ground of fraud. Nor will the fact that the other party had parted with his interest in the original suit, while it was pending, justify an opening of the decree. *Supreme Ct., Sp. T.*, 1853, *Munn v. Worrall*, 16 *Barb.*, 221.

* Affirmed, *Ct. of Appeals*, 1848, 1 *N. Y. (1 Comst.)*, 214.

The Bill;—Cross-bills:

96. A bill of review for error apparent on the decree, must be for error in point of law, arising out of facts admitted by the pleadings, or recited by the decree. [3 Ball & B., 146; 1 Vern., 166.] It cannot be sustained on the ground that there was no proof of a fact which is stated in the decree as proved. [Freem. Oh., 182; Prax. Alm. Cur. Canc., 592, ch. 15; 4 Hayw., 88, 190; 6 Monr., 158.] *Chancery*, 1882, Webb v. Pell, 8 *Paige*, 366.

97. On a discovery of new evidence after decree, the application ought to be for a bill of review, and not for a rehearing. Though when the credit of witnesses examined is the cause of application, it ought to be by articles. [8 Atk., 648.] *Ch. of Errors*, 1804, Furman v. Coe, 1 *Cal. Cas.*, 96.

98. As to a bill to review, upon new evidence, a decree which has been affirmed or reversed. *Stafford v. Bryan*,* 2 *Paige*, 45.

99. Performance of decree. One who asks for a bill of review must show that he has performed the decree, and paid the costs, or that he is unable. [1 Vern., 117, 264; Coop. Eq. Pl., 90; 2 Bro. P. C., 24.] *Chancery*, 1817, Wiser v. Blachly, 2 *Johns. Ch.*, 488. Compare *Livingston v. Hubbs*, 8 *Id.*, 124.

100. Time. A bill of review must be brought within the time allowed by law for appealing. [10 Wheat., 146; Welf. Eq. Pl., 281; Rule 178.] *Chancery*, 1846, Boyd v. Vanderkemp, 1 *Barb. Ch.*, 278.

101. Distinction between a bill of review and a supplemental bill, in the nature of a bill of review. *Wiser v. Blachly*, 2 *Johns. Ch.*, 488.

102. A bill of review is proper after final decree enrolled; a supplemental bill in the nature of review, is proper before enrolment; but, in either case, the same leave and grounds are requisite. The party must show that he has performed the decree and paid the costs, or that he is unable to do so, and some error in law or newly discovered matter of fact. *Chancery*, 1817, Wiser v. Blachly, 2 *Johns. Ch.*, 488. To similar effect, 1817, *Livingston v. Hubbs*, 8 *Id.*, 124.

103. Leave to file a bill of review will not be granted for matters known, or which, with due diligence, might have been known to the party, before the decree; nor because the

chancellor who made the decree was a stockholder of the corporation complainant, if the decree was in fact taken without his doing any judicial act. *Chancery*, 1824, *Lansing v. Albany Ins. Co.*, *Hopk.*, 102.

104. Leave to file a bill of review is not necessary, except where it is brought upon the discovery of new matter. [Newl., 190; Mitf., 78.] But a deposit is necessary. *Chancery*, 1829, Webb v. Pell, 1 *Paige*, 564.

105. Enrolment of decree. To a bill of review which states that the decree has not been enrolled, defendant's demurrer cannot allege that it is enrolled, but he should plead the decree as enrolled, and demur to its being opened. [8 *Paige*, 370.] Nor can he insist upon irregularity in the filing of the bill by way of demurrer, but should move to take the bill from the files. *V. Chan. Ct.*, 1849, Tallmadge v. Lovett, 8 *Edw.*, 568.

As to the cases in which a bill of review may be Sustained, see BILL OF REVIEW.

5. Cross-bills.

106. Who may file. A purchaser, *pendente lite*, from a party to the suit, as well as an original party, may file a bill in the nature of a cross-bill. *Chancery*, 1847, Whitbeck v. Edgar, 2 *Barb. Ch.*, 106; affirming S. C., 4 *Sandf. Ch.*, 427.

107. When. In general, a cross-bill is only necessary when the defendant is entitled to some affirmative relief. *Supreme Ct.*, *Sp. T.*, 1848, *Braman v. Wilkinson*, 8 *Barb.*, 151.

108. What is. It is the character of the bill of complainant and of the relief sought, which determines whether it is an original or a cross bill, and it is immaterial whether it is called in the body of it a cross-bill. *Ct. of Appeals*, 1852, *Pollock v. National Bank*, 7 *N. Y. (3 Seld.)*, 274.

109. Subject-matter. A cross-bill is a defence. It cannot introduce new and distinct matters not embraced in the original suit; and no decree can be founded upon such matters. *Chancery*, 1828, *Galatian v. Erwin*,* *Hopk.*, 48. *A. V. Chan. Ct.*, 1846 [citing, also, 10 *Paige*, 319; 8 *Cow.*, 361; 7 *Johns. Ch.*, 250; 3 *J. J. Marsh*, 262], *Draper v. Gordon*, 4 *Sandf. Ch.*, 310.

110. A cross-bill in the nature of a plea

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

* Affirmed, *Ct. of Errors*, 1828, *sub nom. Galatian v. Cunningham*, 8 *Cow.*, 361.

Various Objections and Defences, how to be Interposed.

puis darrien continuance, is the proper mode of setting up a defence which arises after answer perfected. [10 Paige, 485; Welf. Eq. Pl., 227; Stor. Eq., 393; Mitf., 82; Willis, 364; Lube, 229.] *Chancery*, 1844, *Miller v. Fenton*, 11 Paige, 18; but compare *Scott v. Grant*, 10 *Id.*, 485; *Talmage v. Pell*, 9 *Id.*, 410.

111. A cross-bill is proper, where a defendant, in a bill to reinstate and foreclose a cancelled mortgage, which is apparently primarily chargeable on his land, admits the justice of the complainant's demand, but claims that other defendants and other lands are primarily chargeable. *A. V. Chan. Ct.*, 1846, *King v. McVickar*, 3 *Sandf. Ch.*, 192.

112. A cross-bill which seeks no discovery, and sets up no defence which is not available by answer, will be dismissed. *A. V. Chan. Ct.*, 1846, *Weed v. Smull*, 3 *Sandf. Ch.*, 278.

113. Prayer. A cross-bill prays that the causes may be heard together, and that one decree may be made in both; but, without this prayer, it is not necessarily demurrable. *V. Chan. Ct.*, 1832, *Wright v. Taylor*, 1 *Edw.*, 226.

114. Time of filing. A cross-bill must be filed before publication passed in the original cause; and leave will not be granted subsequently, after gross laches. *Chancery*, 1820, *Gouverneur v. Elmendorf*, 4 *Johns. Ch.*, 357; S. P., 1814, *Sterry v. Arden*, 1 *Id.*, 62. Compare *White v. Buloid*, 2 Paige, 164.

115. Testimony taken under a cross-bill, filed after publication passed, cannot be used in the original suit. *Chancery*, 1838, *Field v. Schieffelin*, 7 *Johns. Ch.*, 250.

116. The proper time for filing a cross-bill, where such a bill is necessary, is at the time of putting in the answer to the original bill, and before the issue is joined. *Chancery*, 1843, *Irving v. De Kay*, 10 Paige, 819.

117. Stay of proceedings.—Oath to bill. All the complainants in a cross-bill must join in the application to stay the proceedings, and the cross-bill must be sworn to by some person who knows the facts. *Chancery*, 1842, *Talmage v. Pell*, 9 Paige, 410.

118. Proceedings when and how stayed when a cross-bill is filed. *White v. Buloid*, 2 Paige, 164.

As to Abatement and Revival, see ABATEMENT.

As to all matters turning on a Defect or excess of parties, and changes of interest, see PARTIES.

III. VARIOUS OBJECTIONS AND DEFENCES, HOW TO BE INTERPOSED.

119. The objection of a misjoinder of complaints, should be taken by demurrer or answer, and cannot be first raised at the hearing. *Chancery*, 1834, *Trustees of Watertown v. Cowen*, 4 Paige, 510; S. P., 1842, *Talmage v. Pell*, 9 *Id.*, 410.

120. Non-joinder. Where a person becomes interested in the subject of controversy before the commencement of suit, the objection that he is a necessary party must be taken by plea or answer, not by motion to require supplemental bill, as is done in case of a complainant parting with his interest after commencement of suit. *Chancery*, 1844, *Hathaway v. Scott*, 11 Paige, 178.

121. A distinct defence,—e. g., payment,—if not alleged in pleading, is unavailing. *Ct. of Appeals*, 1852, *Field v. Mayor, &c. of N. Y.*, 6 *N. Y. (3 Seld.)*, 179.

122. Set-off. Unless a discovery is necessary, or there be some other special necessity for filing a cross-bill, a set-off should be insisted upon in equity by plea or answer. [2 Rev. Stat., 174, § 40.] *Chancery*, 1840, *Jennings v. Webster*, 8 Paige, 508; disapproving *Troup v. Haight*, *Hoph.*, 239. To similar effect, 1843, *Irving v. De Kay*, 10 Paige, 819.

123. In a suit between partners for an account, defendant cannot set off a judgment against the complainant, by answer, but only by cross-bill. But after the balance due has been liquidated by a master's report, and assigned, if the assignee files a supplemental bill, the set-off may be claimed by answer thereto. *Chancery*, 1848, *Gay v. Gay*, 10 Paige, 869.

124. A set-off accruing after a plea pleaded, should be set up by a bill in the nature of a supplemental cross-bill, and not by way of further plea. [Mitf., 329.] *V. Chan. Ct.*, 1841, *White v. Bullock*, 3 *Edw.*, 458.

125. Defence arising after bill filed. Matter of avoidance or defence arising after bill filed may be set up by the answer. *V. Chan. Ct.*, 1838, *Lyon v. Brooks*, 2 *Edw.*, 110.

126. — after answer. Matter of defence arising after answer, cannot be set up by a supplemental answer, but only by a cross-bill in the nature of a supplemental cross-bill. *V. Chan. Ct.*, 1833, *Taylor v. Titus*, 2 *Edw.*, 185. Followed, *Supreme Ct., Sp. T.*, 1848, *Burdell v. Burdell*, 2 *Barb.*, 473; S. C., 3 *How. Pr.*, 216;

The Defendant's Pleadings;—In General.

disapproving *Smith v. Smith*, 4 *Paige*, 482; but compare *Tripp v. Vincent* (1846), 3 *Barb. Ct.*, 618; where supplemental answer was said to be proper.

127. Coverture of the defendant at the time of bill filed cannot be pleaded in abatement; but the non-joinder of the husband may be set up by plea or by answer. *V. Chan. Ct.*, 1884, *Gardner v. Moore*, 2 *Edw.*, 818.

128. Denial. Where the bill sets forth a contract in writing, and conforming to the statute, a plea of the Statute of Frauds is bad. A mere denial should be by answer. *V. Chan. Ct.*, 1886, *Bailey v. Le Roy*, 2 *Edw.*, 514.

129. Matter apparent on the face of the bill cannot be objected by plea, but only by demurrer. *V. Chan. Ct.*, 1887, *Phelps v. Garrow*, 8 *Edw.*, 189.

130. Right of third party. Where the complainant sues for a fund, claiming it as administratrix of A., defendant may show in his defence that the fund belongs to B., but cannot insist upon B.'s being made a party. *V. Chan. Ct.*, 1842, *Crosby v. Berger*,* 3 *Edw.*, 588.

131. Jurisdiction. Where an objection on the ground of jurisdiction is not taken, either by demurrer or plea, before the defendant enters into his defence at large, the court having the general jurisdiction will exercise it. [4 *Cow.*, 727; 2 *Paige*, 509; 8 *Id.*, 318.] If defendant seeks to reserve the objection in an answer, he must expressly set it up. *A. V. Chan. Ct.*, 1843, *Ketchum v. Hawks*, 2 *N. Y. Leg. Obs.*, 884.

132. The court has jurisdiction, in general, to compel the delivery of securities wrongfully withheld, and, in order to oust that jurisdiction, on the ground that there is a sufficient remedy at law, the objection must be taken by demurrer or answer. *A. V. Chan. Ct.*, 1846, *Kobbi v. Underhill*, 3 *Sandf. Ct.*, 277.

133. On a bill for discovery merely, if the defendant submits to answer, he must answer fully, or demur to such parts of the bill as he deems do not call for an answer. *V. Chan. Ct.*, 1844, *Waring v. Suydam*, 4 *Edw.*, 426.

IV. THE DEFENDANT'S PLEADINGS.

1. In General.

134. Defendant may plead, answer, and demur to the same bill; but each of these

defences must refer to and profess, in terms, to be put in as a defence to separate and distinct parts of the bill. An answer commencing as to the whole bill, overrules a plea or demurrer to a part of the bill. *Chancery*, 1888, *Leacraft v. Dempsey*, 4 *Paige*, 124. Followed, *V. Chan. Ct.*, 1884, *Summers v. Murray*, 2 *Edw.*, 205; S. P., 1845, *Bruen v. Bruen*, 4 *Id.*, 640.

135. Whenever a plea or demurrer does not extend to the whole bill, or there is a demurrer as to one part and a plea to another part, or separate pleas to distinct parts of the bill, the plea or demurrer should clearly express what part of the bill it is intended to cover, or the particular facts to which each defence is intended to be applied. [Lube Eq. Pl., 386; 2 *Sch. & Lef.*, 199; 2 *Ves.*, 451.] *Chancery*, 1882, *Van Hook v. Whitlock*, 3 *Paige*, 409; 1845 [citing, also, 2 *Moll.*, 415; *Welf. Eq. Pl.*, 267, 298], *Jarvis v. Palmer*, 11 *Id.*, 650.

136. Amended bill. Where the complainant amends his bill, defendant has the right to plead, answer, or demur to such amended bill. *Chancery*, 1844, *American Bible Society v. Hague*, 10 *Paige*, 549; and see *Pardee v. De Cala*, 7 *Id.*, 182.

137. Demurrer, plea, and answer, to same matter. A defendant cannot plead or answer, and also demur to the same matter. [8 *P. Wms.*, 81; 2 *Atk.*, 284; *Coop. Tr. of Pl.*, 118; *Beames' Pl.*, 40.] *Chancery*, 1822, *Clark v. Phelps*, 6 *Johns. Ct.*, 214; and see *Bruen v. Bruen*, 4 *Edw.*, 640.

Nor can he answer or demur, and also plead. 1881, *Souzer v. De Meyer*, 2 *Paige*, 574.

138. Defendant cannot set up one valid full defence by plea, and another by answer. *Chancery*, 1884, *Fish v. Miller*, 5 *Paige*, 26.

139. If any part of the matter covered by a demurrer is also covered by a plea or answer, the whole demurrer is thereby overruled. [8 *P. Wms.*, 81.] *Chancery*, 1845, *Jarvis v. Palmer*, 11 *Paige*, 650; S. P., 1887, *Spofford v. Manning*, 6 *Id.*, 888.

140. An answer to a matter embraced by the plea wholly overrules the plea. *Chancery*, 1881, *Souzer v. De Meyer*, 2 *Paige*, 574; 1882, *Bolton v. Gardner*, 3 *Id.*, 273; 1842 [citing *Stor. Eq. Pl.*, 532, § 688], *Bangs v. Strong*,* 10 *Id.*, 11. Compare *Weed v. Small*, 7 *Id.*, 578.

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

* Affirmed on the merits, *Ct. of Errors*, 1843, 7 *Hill*, 250.

The Defendant's Pleadings;—Demurrer.

141. The answer can only overrule the plea when it relates to matters which the defendant, by his plea, declines to answer, submitting himself to the judgment of the court, whether, if the allegations in the plea are true, he ought to be compelled to answer as to those matters. *Chancery*, 1833, *Bogardus v. Trinity Church*,* 4 *Paige*, 178.

142. Plea instead of demurrer. Where the bill shows that the complainant has no right to an answer for any purpose, the defendant should demur instead of pleading; for a plea cannot be sustained by showing that the bill is demurrable. [2 *Paige*, 177.] *Chancery*, 1848, *Sperry v. Miller*, 2 *Barb. Ch.*, 682; 1840 [citing 1 *Mad.*, 280; 1 *Bibb*, 175; *Stor. Eq. Pl.*, 504, § 660], *Evertson v. Ogden*, 8 *Paige*, 275. S. P., *N. Y. Superior Ct.*, 1849, *Lawrence v. Pool*, 2 *Sandf.*, 540.

143. Answer instead of plea. That which is a good bar, if insisted on by way of plea, may be insisted on by way of answer. [2 *Ves.*, 491; 8 *P. Wms.*, 95; *Red. Tr.*, 244.] *Chancery*, 1820, *Goodrich v. Pendleton*, 4 *Johns. Ch.*, 549.

144. — instead of demurrer. A general clause at the end of an answer asking the same benefit as if defendant had demurred, if it does not point out the specific defect, cannot have the force and effect of a plea or demurrer. *V. Chan. Ct.*, 1839, *Manning v. Merritt*, *Clarke*, 98.

145. Leave to answer, given upon opening an order taking the bill as confessed, is analogous to an order of course entered in accordance with appearance, and includes leave to demur or plead. *V. Chan. Ct.*, 1845, *Garr v. Ogden*, 4 *Edw.*, 625.

146. A defendant cannot, without special leave, demur after obtaining a general order for further time to answer. [*Coop.*, 110; 4 *Bridg. Dig.*, tit. Ans., 8; *Dem.*, 7; 1 *Wils. Ch.*, 468; 8 *Swans.*, 688.] *Chancery*, 1831, *Burrall v. Raineteaux*, 2 *Paige*, 381. Compare *Lakens v. Fielden*, 11 *Id.*, 644; *Davenport v. Sniffen*, 1 *Barb.*, 228.

147. A voluntary stipulation extending the time to answer, includes time to demur; but does not sanction a frivolous demurrer.

Chancery, 1847, *Bedell v. Bedell*, 2 *Barb. Ch.*, 99.

148. Overruling. Where a demurrer to discovery, or a plea, is overruled on a point of form only, or because it covers too much, the right of the defendants to raise the question as to the materiality of the discovery, upon the reference of the exceptions to the master, is preserved. *Chancery*, 1837, *Kuypers v. Reformed Dutch Church*, 6 *Paige*, 570.

2. Demurrer.

149. A demurrer must be founded on some dry point of law, some certain and absolute proposition, denying the relief sought. [8 *Ves.*, Jr., 258.] If bad in part, it is wholly bad. Thus a demurrer to a demand for a discovery, and for the appointment of a receiver, is wholly bad; for the latter is not the subject of demurrer. *Chancery*, 1814, *Verplank v. Caines*, 1 *Johns. Ch.*, 57.

150. If any part of the discovery covered by a demurrer to an amended bill, appears to be material and proper, for any purpose of the suit, the demurrer will be overruled. Defendant cannot insist that the discovery called for is contained in his former answer. *Chancery*, 1847, *Chazournes v. Mills*, 2 *Barb. Ch.*, 466.

151. A demurrer is not aided by an averment in the answer, and if bad in part is bad for the whole. *Chancery*, 1837, *Kuypers v. Reformed Dutch Church*, 6 *Paige*, 570.

152. A general demurrer to the whole of a bill must be overruled if the plaintiff is entitled to an answer to any part of it. *Ct. of Errors*, 1798, *Le Roy v. Veeder*, 1 *Johns. Cas.*, 417; 1799, *Laight v. Morgan*, *Id.*, 429. *Chancery*, 1818, *Kimberly v. Sells*, 3 *Johns. Ch.*, 467; 1820, *Livingston v. Livingston*, 4 *Id.*, 294; 1832, *Robinson v. Smith*, 3 *Paige*, 222; *Bleeker v. Bingham*, *Id.*, 246.

153. Upon a general demurrer, if the complainant be entitled to any relief whatever, the demurrer must be overruled. *Chancery*, 1845, *Stuyvesant v. Mayor, &c., of N. Y.*, 11 *Paige*, 414.

154. Upon a general demurrer to the whole bill, the objection cannot be taken that some of the grounds of relief stated in the bill appear, upon its face, to be barred by time; but such question must be raised by a separate demurrer to such parts of the bill. *Chancery*, 1846, *Radcliff v. Rowley*, 2 *Barb. Ch.*, 28.

* Affirmed, *Ct. of Errors*, 1835, 15 *Wend.*, 111. The only opinion stated being that there was no error in the decree, either as to the matters of form, or on the merits.

The Defendant's Pleadings;—Demurrer.

155. If supplemental matter is improperly added in a bill of revivor and supplement, the demurrer should be to such matter only. *Chancery*, 1835, *Randolph v. Dickerson*, 5 *Paige*, 517.

156. Upon a demurrer to the whole bill, if it is not multifarious, defendant cannot insist that some allegations are unnecessary, or impertinent. *Chancery*, 1844, *Beach v. Beach*, 11 *Paige*, 161; S. C., 3 *N. Y. Leg. Obs.*, 202.

157. Demurrer to bills of discovery. If the evidence sought for, would be inadmissible upon the trial at law, a demurrer lies. *Chancery*, 1842, *Marsh v. Davison*, 9 *Paige*, 580. *Supreme Ct., Sp. T.*, 1848, *Bailey v. Dean*, 5 *Barb.*, 297; and see *Newkerk v. Willett*, 2 *Cai. Cas.*, 296.

158. If a bill is good for discovery, and not for relief, a general demurrer to the whole bill is bad. The defendant must give the discovery, and may demur to the relief. *Ct. of Errors*, 1799, *Laight v. Morgan*, 1 *Johns. Cas.*, 429. *Chancery*, 1821, *Higinbotham v. Burnet*, 5 *Johns. Ch.*, 184; 1842, *Marsh v. Davison*, 9 *Paige*, 580; *Wood v. Hathaway*, 2 *Ch. Sent.*, 12. Compare *Alston v. Jones*, 3 *Barb. Ch.*, 897.

159. A demurrer to a bill of discovery and relief, if well taken as to the relief, bars the discovery, if that be incidental to the relief. *V. Chan. Ct.*, 1837, *Souza v. Belcher*, 3 *Edw.*, 117.

160. Where the bill does not make a case entitling the complainant either to discovery or relief, the defendant should demur to the relief as well as to the discovery. *Chancery*, 1837, *Kuypers v. Reformed Dutch Church*, 6 *Paige*, 570.

161. If neither the bill of discovery nor the demurrer show why a forfeiture would be the consequence of the discovery demurred to, the demurrer is bad. *Chancery*, 1818, *Sharp v. Sharp*, 3 *Johns. Ch.*, 407.

162. A defendant in a bill to set aside a security for usury, may in some cases demur to the discovery and answer to the relief, or object to the discovery in the answer. *Chancery*, 1832, *Livingston v. Harris*,* 3 *Paige*, 528.

163. A demurrer cannot be sustained in part. A general demurrer to the discovery as well as to relief, must be overruled if the

bill is properly filed against other defendants. *Chancery*, 1841, *Many v. Beekman Iron Co.*, 9 *Paige*, 188.

164. That by demurring the defendants admit all the material facts stated in the bill, and all the legitimate conclusions of law deducible from those facts. *Ct. of Errors*, 1840, *Humbert v. Trinity Church*, 24 *Wend.*, 587.

165. *Ore tenus*. Where a demurrer of record is overruled, defendant may demur *ore tenus*; but must pay costs of the demurrer overruled, and complainant may amend. [1 *Swanst.*, 288.] *Chancery*, 1832, *Garlick v. Strong*, 3 *Paige*, 440; and see *Robinson v. Smith, Id.*, 222.

166. Objecting to previous pleading. The rule that upon the argument of a demurrer to any pleading the previous pleading of the party demurring may be shown to be bad, has never been adopted in equity. [2 *Barb. Ch.*, 682.] *N. Y. Superior Ct.*, 1849, *Lawrence v. Pool*, 2 *Sandf.*, 540.

167. What is ground of. Lapse of time is not ground of demurrer, for the delay may be accounted for, and the presumption of payment repelled. It is matter of evidence, and not an absolute bar; and, to be available, payment or the lapse of time must be set up in the answer. *Chancery*, 1822, *McDowl v. Charles*, 6 *Johns. Ch.*, 132. Followed, *Supreme Ct., Sp. T.*, 1848 [citing, also, 5 *Munr.*, 526; *Oow. & H. Notes*, 350; 10 *Johns.*, 417; 16 *Id.*, 210; 4 *Johns. Ch.*, 287; *Fellers v. Lee*, 2 *Barb.*, 488. *N. Y. Superior Ct.*, 1849 [citing, also, 3 *Den.*, 814], *Austin v. Tompkins*, 3 *Sandf.*, 22.

168. If it appears upon the face of the bill that the suit is *prima facie* barred by lapse of time by analogy to the Statute of Limitations, and the case is not brought within any of the exceptions of the statute by the allegations of the bill, the defendant may demur. *So held*, of a cause of action cognizable at law. [4 *Yerg.*, 94; 6 *Sim.*, 51; 4 *Bligh, O. S.*, 125; 4 *Wash. C. C.*, 681; 3 *Young & Coll.*, 266.] *Chancery*, 1838, *Humbert v. Trinity Church*, 7 *Paige*, 195; and S. C. affirmed, *Ct. of Errors*, 1840, 24 *Wend.*, 587. *Chancery*, 1839, *Van Hook v. Whitlock*,* 7 *Paige*, 378. Compare *Denston v. Morris*, 2 *Edw.*, 37.

169. To enable a defendant to take advantage of the Statute of Limitations, upon

* Affirmed, on other points, *Ct. of Errors*, 1833, 11 *Wend.*, 329.

* Affirmed on other grounds, *Ct. of Errors*, 1841, 26 *Wend.*, 48.

The Defendant's Pleadings;—Demurrer.

demurrer, it must distinctly appear, by the bill itself, that the complainant's remedy is barred by the lapse of time. Allying that the defendant obtained possession, &c., "in or about" a year named, which was more than ten years before the bill was filed, is not enough. *Chancery*, 1848, *Muir v. Leake & Watts' Orphan House*, 8 *Barb. Ch.*, 477; S. P., 1848, *Dias v. Bouchaud*,* 10 *Paige*, 445.

170. **Defect of parties.** If the objection that there are other persons who ought to have been made parties appears on the bill itself, the defendants may demur. *Chancery*, 1880, *Mitchell v. Lenox*, 2 *Paige*, 280; 1882, *Robinson v. Smith*, 3 *Id.*, 222.

171. If the defect of parties does not appear on the face of the bill, it can be taken advantage of only by plea or answer, showing who are the necessary parties, and making the objection explicitly. [2 *Paige*, 280; 1 *Monr. Kent*, 107; 1 *A. K. Marsh.*, 112; 1 *Hog.*, 70.] *Chancery*, 1882, *Robinson v. Smith*, 3 *Paige*, 222.

172. A demurrer for want of parties, must point out the necessary parties, either by name, or in such a manner as to point out to the complainant the objection to his bill, and thus enable him to amend by adding the proper parties. [*Coop. Eq. Pl.*, 187; *Welf. Eq. Pl.*, 279; *Stor. Eq. Pl.*, 416, § 548; 1 *Dan. Ch. Pr.*, 386; *Mitf. Pl.*, 180.] *Chancery*, 1848, *Dias v. Bouchaud*,* 10 *Paige*, 445; S. P., 1882, *Robinson v. Smith*, 3 *Id.*, 222.

173. Where the case made by the bill entitles the complainant to particular relief against the defendant, and would entitle him to further relief also if the necessary parties were before the court, and the prayer of the bill specifically asks for the more extended relief, to which he is not entitled in consequence of the defect of parties, the defendant may properly demur to the whole bill, for want of proper parties. [4 *Myl. & Or.*, 286.] *Chancery*, 1845, *Dart v. Palmer*, 1 *Barb. Ch.*, 92.

174. **The joinder of a complainant** who has no interest in the suit, and no equity against the defendant, is good ground of demurrer to the whole bill. [4 *Russ.*, 225.] *Chancery*, 1882, *Clarkson v. De Peyster*, 3 *Paige*, 386; 1848, *Dias v. Bouchaud*, 10 *Id.*, 445.

175. To sustain a bill filed by several com-

plainants, upon a general demurrer to such bill for want of equity, it must appear that all of such complainants have an interest in the subject-matter of the litigation. [4 *Russ.*, 225, 242.] *Chancery*, 1848, *Dias v. Bouchaud*,* 10 *Paige*, 445.

176. **Unnecessary defendant.** A defendant cannot demur because another defendant is not a necessary or proper party. *V. Chan. Ct.*, 1848, *Crosby v. Berger*, 4 *Edw.*, 210. *Chancery*, 1847, *Whitbeck v. Edgar*, 2 *Barb. Ch.*, 106; affirming S. O., 4 *Sandf. Ch.*, 427.

177. It is only where the complainant has some ground of relief against each defendant, and his claims are such as to make the bill multifarious, that a defendant can demur for the joinder of another improperly. *Chancery*, 1848, *Cherry v. Monroe*, 2 *Barb. Ch.*, 618; and see *Butts v. Genung*, 5 *Paige*, 254.

178. **Formal allegations.** An omission in a creditor's bill of the averments required by the standing rules of the court (denying collusion, &c.), is good ground of demurrer, for defect of form. *Chancery*, 1882, *McElwain v. Willis*,† 3 *Paige*, 505. *V. Chan. Ct.*, 1885, *Van Cleef v. Sickles*, 2 *Edw.*, 392.

179. In a creditor's bill against one of two joint-debtors, with an averment that the other was wholly insolvent, destitute, and irresponsible, an allegation that the bill was not exhibited by collusion with the defendant, is sufficient under the rule. *V. Chan. Ct.*, 1887, *Conant v. Sparks*, 3 *Edw.*, 104.

180. **Formal defect.** It is no longer a ground of demurrer, that the bill does not state the complainant's occupation or addition; nor is the omission of the signature of solicitor or counsel. Otherwise of the omission to verify the bill, or to waive an answer on oath. [Rule 17.] *V. Chan. Ct.*, 1846, *Gove v. Pettis*, 4 *Sandf. Ch.*, 408.

181. **Uncertainty.** A bill which is not sufficiently full and certain to enable the court, upon proof or admission of the facts contained in it, to grant the relief sought, is bad on demurrer. *So held*, of a bill praying that the defendant might be decreed to satisfy a quit-rent and have it cancelled, but not describing it with any certainty, nor stating its amount, and how and when payable, nor whether the owner of the charge would consent to release

* Reversed on other points, 1 *N. Y. (1 Comst.)*, 201.

* Reversed on other points, 1 *N. Y. (1 Comst.)*, 201.

† Affirmed, *Ct. of Errors*, 1882, 9 *Wend.*, 548.

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it. *N. Y. Superior Ct.*, 1850, *Tallman v. Green*, 8 *Sandf.*, 487.

182. Multifariousness. Where a joint claim against two is improperly joined with a separate claim against one, either or both may demur for multifariousness. [2 *Anst.*, 469.] *Chancery*, 1835, *Boyd v. Hoyt*, 5 *Paige*, 65. To the same effect, 1836 [citing, also, 2 *Gill & J.*, 29], *Swift v. Eckford*, 6 *Id.*, 22.

183. The demurrer of one of several defendants to the whole bill, can only be sustained by establishing a misjoinder of actions or parties, to which species of multifariousness it is alone adapted. [*Stor. Eq. Pl.*, § 284; 1 *Myl. & Cr.*, 608; 2 *Anstr.*, 469.] If the bill is defective in praying for relief not justified by the case, or contains irrelevant matter, unconnected with the case properly presented, the demurrer should be confined to the parts really objectionable, and not extended to the whole bill. *Ct. of Appeals*, 1848, *Brady v. McCosker*, 1 *N. Y.* (1 *Comst.*), 214; affirming *S. C.*, 1 *Barb. Ch.*, 329.

184. If the prayer for relief is too broad, defendant cannot demur to the whole bill, but only to that part of it which is not warranted by the case made by the bill. *Chancery*, 1847, *Whitbeck v. Edgar*, 2 *Barb. Ch.*, 106; affirming *S. C.*, 4 *Sandf. Ch.*, 427.

185. The defendant cannot demur to relief demanded in the alternative, if the complainant is entitled on his case to either kind. *Chancery*, 1828, *Western Ins. Co. v. Eagle Fire Ins. Co.*, 1 *Paige*, 284.

3. Plea.

186. A plea may be good in part and bad in part; and where a plea is more extensive than the subject-matter to which it relates, it may be ordered to stand as to so much of the bill to which it properly applies, and the defendant must answer as to the residue. [2 *Atk.*, 282; *Hard.*, 216.] *Chancery*, 1821, *French v. Shotwell*, 5 *Johns. Ch.*, 555.

187. New matter. A plea setting forth no new matter, is bad. [1 *Mad.*, 280; 1 *Bibb*, 175; 8 *Bro. O. C.*, 400.] *Chancery*, 1830, *Cozine v. Graham*, 2 *Paige*, 177. Compare *Jarvis v. Palmer*, 11 *Id.*, 650.

188. Parties. Proper form of plea that necessary parties are omitted. *Cook v. Mancius*, 3 *Johns. Ch.*, 427.

189. Plea to part of bill. The rule that a plea must state explicitly to what parts of the

bill it is intended to apply, so that the court can distinguish them; is satisfied if the plea professes to extend to the whole bill, with an exception which is clearly and definitively expressed. *Supreme Ct., Sp. T.*, 1847, *Davison v. Schermerhorn*, 1 *Barb.*, 480.

190. Waiving oath. Though a plea is deemed an answer for some purposes, it is not so within the statute as to waiving an answer on oath. *Chancery*, 1832, *Heartt v. Corning*, 3 *Paige*, 566.

191. Single. A plea must rest the defence on a single point, and upon that point create a bar to the suit. [1 *Bro.*, 404; 6 *Ves.*, 17.] *Chancery*, 1818, *Goodrich v. Pendleton*, 3 *Johns. Ch.*, 884.

But where a multifarious plea disclosed the fact that necessary parties were omitted in the bill, it was not overruled. *Cook v. Mancius*, 3 *Id.*, 427.

192. Two distinct pleas in bar cannot be pleaded together without previous leave of the court. All the facts may be set up by answer. [1 *Bro.*, 404; 2 *Ves. & B.*, 153, n.; 2 *Ves.*, 84; 6 *Id.*, 17; 3 *Madd. Ch.*, 8; 4 *Id.*] *Chancery*, 1828, *Saltus v. Tobias*, 7 *Johns. Ch.*, 214.

And leave will not be granted except on very special reasons. 1844, *Didier v. Davison*, 10 *Paige*, 515; *Bruen v. Hone*,* 4 *Ch. Sent.*, 2.

193. A plea must be perfect in itself, so that, if true, it will put an end to the cause. If the bill charges fraud in the procurement of a release, a plea setting up the release, without denying the fraud, is bad. *Chancery*, 1820, *Allen v. Randolph*, 4 *Johns. Ch.*, 698; *S. P.*, 1832, *Bolton v. Gardner*, 3 *Paige*, 278.

194. A plea, whether affirmative or negative, should in itself be perfect, and make an absolute bar with a view not only to its legal operation, if no matters are stated in the bill to displace it, but with a view to the effect of such matters upon it. It should not, however, proceed to meet special allegations of circumstances, tending to prove the matter of equity relied on to destroy the legal bar. That must

* In this case it is said that, in general, leave is given, 1. Where the complainant calls upon the defendant to set out long accounts in his answer; and, 2. Where the discovery of matters sought for by the bill might be productive of injury to the defendant in his business, or otherwise, if he were required to put in a full answer.

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be done in the answer. [Citing many cases.] *A. V. Chan. Ct.*, 1848, *Stuart v. Warren*, 1 *N. Y. Leg. Obs.*, 298.

195. To a charge in a bill for an account, that a release was fraudulently obtained without an accounting, a plea setting up the release reciting an accounting, is bad. It should aver an accounting. *Chancery*, 1884, *Fish v. Miller*, 5 *Paige*, 26.

196. To a bill for the recovery of lands, the plea of a defendant that he is a *bona-fide* purchaser of a part, without disclaiming as to the residue, is bad on demurrer, if it professes to cover the whole bill. *A. V. Chan. Ct.*, 1848, *Tompkins v. Anthon*, 4 *Sandf. Ch.*, 97.

197. To a bill for a partition of land, which alleges that the legal title is in a trustee for the complainant and defendants, a plea that neither the complainant nor the trustee was in possession when the bill was filed, does not exclude the idea that the defendants were. *Chancery*, 1845, *Bradstreet v. Schnyler*, 3 *Barb. Ch.*, 608.

198. Negative averments in a plea must tender an issue, directly. *Chancery*, 1882, *Bolton v. Gardner*, 3 *Paige*, 278.

199. A want of equity in the bill cannot be objected in support of a plea. A plea must stand upon its own merits alone. [1 *Vern.*, 78.] *Chancery*, 1882, *Van Hook v. Whitlook*, 3 *Paige*, 409; *S. P.*, 1880, *Cozine v. Graham*, 2 *Id.*, 177.

200. Overruling. Where a plea contains distinct allegations of fact, all must be proven, or the plea must be overruled as false. No replender is awarded upon an immaterial issue joined upon a plea. The materiality of the plea is never inquired into where issue is taken, but if the plea is proved, the bill is dismissed; if not proved, the complainant is entitled to a decree. *Chancery*, 1886, *Dows v. McMichael*, 6 *Paige*, 189. *S. P.*, *Supreme Ct.*, *Sp. T.*, 1848, *Mann v. Fairchild*, 5 *Barb.*, 108.

201. For a mere formal defect, a plea should be overruled without prejudice to the defendant's right to insist upon the same matters in his answer. *Chancery*, 1845, *Jarvis v. Palmer*, 11 *Paige*, 650.

202. Allowing plea to stand as answer. As an answer to a bill which waives an answer on oath is sufficient, as a pleading, to put in issue every material allegation not answered and admitted by the defendants [Rule

40], the allowing of a plea to such a bill to stand as an answer, has the same effect as if the same defence had originally been put in, by the defendants, in the form of an answer. *Chancery*, 1845, *McCormick v. Chamberlin*, 11 *Paige*, 548.

203. Duplicitty. A plea embodying two defences is bad for duplicity. [Welf. Eq. Pl., 292; Lube, 268; Co. Litt., 804, a; Euer's Syst. of Pl., ch. 86; Stor. Eq. Pl., 498; 14 Pet., 211; 4 *Paige*, 178.] *Chancery*, 1844, *Didier v. Davison*, 10 *Paige*, 515.

204. It is the pleading of a double bar which constitutes duplicity in a plea. A plea is not rendered double by the mere insertion of averments therein, which are necessary to exclude conclusions arising from allegations, in the bill, intended to anticipate and defeat the bar which might be set up in the plea. For upon argument of a plea, every fact stated in the bill, and not denied by the plea and by the answer in support of it, must be taken as true. [2 *Sch. & Lef.*, 726; *Mitt.*, 243.] *Chancery*, 1888, *Bogardus v. Trinity Church*,* 4 *Paige*, 178.

205. The complainants sued as assignees in trust of a foreign corporation. The plea denied that they were such assignees, and then set forth a decree of a court of the foreign State (averring its jurisdiction), which declared the assignment to the complainants fraudulent and void, and appointed receivers. *Held*, that the plea was not double, nor bad for want of a formal averment that the decree was in full force. *V. Chan. Ct.*, 1845, *Southern Life Ins. & Trust Co. v. Davis*, 4 *Edw.*, 588.

206. Limitations. To a bill seeking to open a settled account, upon the ground of fraud, a plea that the bill was not filed within ten years after action accrued, and that the facts alleged as constituting fraud were discovered by the plaintiff more than six years before bill filed, is not double, but is good. [8 *Sim.*, 885.] *N. Y. Superior Ct.*, 1849, *Boggs v. Forsyth*, 2 *Sandf.*, 588.

207. A plea of the Statute of Limitations, which sets up two facts, either of which fully supports it, is not double. [1 *Bro. O. O.*, 404.] *A. V. Chan. Ct.*, 1844, *Didier v. Davi-*

* Affirmed, *Ct. of Errors*, 1885, 15 *Wend.*, 111; the only opinion stated being that there was no error in the decree, either as to matters of form or on the merits.

The Defendant's Pleadings;—Answer.

son,* 2 *Sandf. Ch.*, 61. S. P., *Supreme Ct.*, *Sp. T.*, 1847, *Davison v. Schermerhorn*, 1 *Barb.*, 480.

208. Practice in putting in plea when in contempt for want of answer. *Wallis v. Talmadge*, 10 *Paige*, 448.

4. Answer.

209. Where a husband and wife are sued together, the husband cannot answer separately without leave of court. *Chancery*, 1829, *Leavitt v. Oruger*, 1 *Paige*, 421. Followed, 1848, *Farmers' Loan & Trust Co. v. Jewett*, 8 *Ch. Sent.*, 58.

210. A married woman's separate answer, without leave of the court, is irregular. If she wishes to answer separately, she should apply for leave; and the party who desires such an answer should move. If the bill has been taken as confessed against the husband, a common order that she answer, means that she should obtain leave, and answer alone. *V. Chan. Ct.*, 1846, *Toole v. De Kay*, 4 *Sandf. Ch.*, 385.

211. Answer must be full. It is a general rule that if the defendant attempts to make his defence by answer, instead of pleading or demurring to the bill, he must answer fully. *Chancery*, 1839, *Bank of Utica v. Messereau*, 7 *Paige*, 517.

212. In general, if a defendant has a defence which will excuse him from a discovery as to the whole or any material parts of the bill, he must make such defence by plea or demurrer. And if he submits to answer, he must answer fully. [*Mif.*, 807, n. h.] *Chancery*, 1832, *Cuyler v. Bogert*, 8 *Paige*, 186. *V. Chan. Ct.*, 1834, *Champlin v. Champlin*, 2 *Edw.*, 362.

213. Thus, if one is sued as executor for a debt against his testator, and the bill prays an account, he must render it. Consenting to be personally liable if the complainant succeeds in the suit, will not protect him from accounting. *Chancery*, 1843, *Disosway v. Carroll*, 8 *Ch. Sent.*, 57.

214. A party who answers must answer fully, but need do no more even if he adds explanations by way of avoidance of his admissions, or in support of his denials. *V. Chan. Ct.*, 1832, *Whitney v. Belden*, 1 *Edw.*, 386.

215. In answering a bill which charges

fraud, and exhibits suspicious circumstances of fraud and collusion, the defendant must disclose not only his motives, but his secret designs. *V. Chan. Ct.*, 1832, *Mechanics' Bank v. Levy*, 1 *Edw.*, 316.

216. Where the answer admitted the alleged partnership, but denied that the goods specified in the bill were within the agreement,—*Held*, that the defendant was bound to set forth documents which the answer showed to be in his possession, and which would be the means of throwing some light upon the point in dispute. *V. Chan. Ct.*, 1832, *Deplaces v. Goris*, 1 *Edw.*, 350.

217. A defendant who denies all interest in property after a certain time, cannot be compelled to answer as to its after value or contents. *V. Chan. Ct.*, 1842, *Tooker v. Slosson*, 4 *Edw.*, 114.

218. Several defences. A defendant may set up by answer as many defences as he pleases; and though, when he swears to it, he cannot set up two defences which cannot both be true in fact, he may deny the allegations of the bill, and set up any other matters, not wholly inconsistent with such denial, as a distinct or separate defence to the claim for relief made by the bill, or to some part thereof. *Chancery*, 1844, *Hopper v. Hopper*, 11 *Paige*, 46.

219. What must be answered. The defendant is not bound to answer an allegation in the bill which is not material. [*Coop.*, 212; *Rule 106.*] *Chancery*, 1832, *Utica Ins. Co. v. Lynch*, 8 *Paige*, 210; 1848, *Wiswall v. Wandell*, 8 *Barb. Ch.*, 312.

220. A mere formal allegation, which, though required by rule of court, is one not necessary for the complainant to prove, need not be answered. *Supreme Ct., Sp. T.*, 1847, *Batterson v. Ferguson*, 1 *Barb.*, 490. Compare *Morrell v. Morrell*, 8 *Id.*, 236.

221. A matter stated by way of recital and not positively, if the bill have no interrogatory concerning it, need not be admitted or denied. *Chancery*, 1832, *Mechanics' Bank v. Levy*, 3 *Paige*, 606. Followed, 1836, *Gram v. Stebbins*, 6 *Id.*, 124.

222. If matters are charged as evidence of a main fact, the answer may disregard them if it admit the fact. *Chancery*, 1832, *Mechanics' Bank v. Levy*, 3 *Paige*, 606.

223. Discovery. If a defendant submits to answer a bill of discovery, &c., he must, in

* Affirmed, without passing on this point, 2 *Barb. Ch.*, 477.

The Defendant's Pleadings;—Answer.

general, answer fully. If he rests on a fact, as an objection to a further discovery, it ought to be such a fact as, if true, would at once be a complete bar. He is bound to admit or deny all the facts stated in the bill, with all their special circumstances, without any special interrogatories in the bill. *Chancery*, 1814, *Methodist Episcopal Church v. Jaques*, 1 *Johns. Ch.*, 65.

224. Defendant need not answer an arithmetical proposition. *Chancery*, 1837, *McIntyre v. Union College*, 6 *Paige*, 289.

225. The defendant cannot insert in his answer to a pure bill of discovery, any thing more than a full response to the bill. *V. Chan. Ct.*, 1837, *Hamilton v. Wood*, 8 *Edw.*, 184.

226. *Inspection of documents.* If the complainant, upon request, refuses to permit the defendant to inspect books or documents, to enable the latter to answer, he cannot afterwards object that the answer is insufficient in not stating their contents. And where they are material, the defendant must file a cross-bill for discovery of them. *Chancery*, 1835, *Corning v. Heartt*, cited in *Kelly v. Eckford*, 5 *Paige*, 548.

227. The answer must not go out of the bill to state that which is not material or relevant to the case made out by the bill. *Chancery*, 1814, *Woods v. Morrell*, 1 *Johns. Ch.*, 108.

228. An answer setting up a bankrupt's discharge, need not set forth the proceedings with all the precision required in a plea at law; and it is not necessary to allege that the complainant's debt was not within the classes of debts excepted from the operation of the law. Less certainty and precision is required in an answer than in a plea. *A. V. Chan. Ct.*, 1845, *McCabe v. Cooney*, 2 *Sandf. Ch.*, 814.

229. An answer to an amended bill, should not repeat the matter of the former answer. *Chancery*, 1830, *Bennington Iron Co. v. Campbell*, 2 *Paige*, 159; 1846, *Bard v. Chamberlin*, 5 *Ch. Sent.*, 78.

Unless the grounds of the suit and the defence are varied in substance. 1836, *Bowen v. Idley*, 6 *Paige*, 46.

230. Where an answer on oath to an amended bill is waived, a mere formal answer is enough; except where new and distinct matters are to be set up. *Chancery*, 1846, *Bard v. Chamberlin*, 5 *Ch. Sent.*, 78.

231. *Officer of corporation.* In an action against a corporation and an officer thereof,

if there is either a general or a special prayer for relief which is applicable to the officer of the corporation as well as to other defendants, he is entitled to put in an answer containing a full defence. *Chancery*, 1837, *McIntyre v. Union College*, 6 *Paige*, 289.

232. *Answering anew.* After proofs taken, it is irregular for a defendant to attempt to answer anew, or to put in an answer to a supplemental bill to which he is not a party. *Chancery*, 1845, *American Life Ins. & Trust Co. v. Bayard*, 8 *Barb. Ch.*, 610.

233. An infant, after answer by guardian, becoming of age before decree, may have leave to answer anew, upon cause shown. But complainant may amend, and waive answer upon oath. *Chancery*, 1837, *Stephenson v. Stephenson*, 6 *Paige*, 353.

234. Where there is a clear mistake in the answer, of a matter of fact, it should be corrected by obtaining leave to file an additional or supplemental answer. [8 *Ves.*, 79; 10 *Id.*, 285, 401; 1 *Wight.*, 82; 8 *Price*, 88.] *Chancery*, 1820, *Bowen v. Cross*, 4 *Johns. Ch.*, 875.

235. An answer not signed by the defendant, but only by his solicitor and counsel, is not sufficient, though the bill waived an answer on oath. *Chancery*, 1839, *Denison v. Bassford*, 7 *Paige*, 870; 1848, *Farmers' Loan & Trust Co. v. Jewett*, 3 *Ch. Sent.*, 58. To the contrary was (*V. Chan. Ct.*, 1839) *Hatch v. Eustaphie*, *Clarke*, 83.

236. *Impertinence.* If the matter of an answer is relevant,—i. e., if it can have any influence whatever in the decision of the suit, either as to the subject-matter of the controversy, the relief, or the costs,—it is not impertinent. *Chancery*, 1833, *Van Rensselaer v. Brice*, 4 *Paige*, 174.

237. *Denials.* To so much of the bill as is material and necessary for the defendant to answer, he must speak directly, without evasion, and not by way of negative pregnant. He must not answer the charges merely literally, but he must confess or traverse the substance of each charge positively and with certainty; and particular precise charges must be answered particularly and precisely, and not in a general manner. To a fact in the defendant's own knowledge, he must answer positively; to facts not within his knowledge, he must answer as to his information or belief, and not to his information or hearsay merely,

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without stating his belief one way or the other. [Boh. Cur. Can., 111; Wy. P. Reg., 18; 1 Har. Ch. Pr., 808; Mitf., 247; Coop. Eq. Pl., 814.] *Chancery*, 1814, *Woods v. Morrell*, 1 *Johns. Ch.*, 108. S. P., *Ct. of Errors*, 1835, *Leaycraft v. Dempsey*, 15 *Wend.*, 83. *Chancery*, 1821, *Smith v. Lasher*, 5 *Johns. Ch.*, 247. Compare *Morris v. Parker*, 3 *Id.*, 297.

As to what expressions sufficiently import ignorance, see *King v. Ray*, 11 *Paige*, 235.

238. The court will dispense with so positive an answer, where there is room to doubt whether the defendant can so answer, without doing violence to his conscience. [1 *Vern.*, 470.] *Chancery*, 1829, *Hall v. Wood*, 1 *Paige*, 404. Compare *Utica Ins. Co. v. Lynch*, 3 *Id.*, 210.

239. An answer that the defendant has no knowledge or information of certain facts except from certain documents, is insufficient if they are not set forth and not answered according to belief. *Chancery*, 1832, *Cuyler v. Bogert*, 3 *Paige*, 186.

240. As to documents set forth historically in the stating part of the bill, defendant is bound to answer only as to their existence, and not as to the facts contained in them. *Chancery*, 1818, *Morris v. Parker*, 3 *Johns. Ch.*, 297.

241. The defendant cannot excuse himself from answering by alleging that he has no knowledge except what is derived from the allegations of the bill. He may have information. *V. Chan. Ct.*, 1834, *Tradesmen's Bank v. Hyatt*, 2 *Edw.*, 195.

242. When a defendant answers that he has no knowledge or information of the facts charged in the bill, he is not bound to admit or deny them, or to express any belief as to them. *Chancery*, 1818, *Morris v. Parker*, 3 *Johns. Ch.*, 297. Compare *Utica Ins. Co. v. Lynch*, 3 *Paige*, 210.

If, however, the facts are charged as the acts of defendant, he is bound to admit or deny. 1832, *Sloan v. Little*, 3 *Paige*, 108.

243. In general, when the charge in the bill embraces several particulars, the answer should be in the disjunctive to each particular. *Chancery*, 1830, *Davis v. Mapes*, 2 *Paige*, 105; 1844, *King v. Ray*, 11 *Id.*, 235.

244. An answer that the defendant does not know or believe, is insufficient. He must answer as to his information. *V. Chan. Ct.*, 1840, *Robinson v. Woodgate*, 3 *Edw.*, 422.

245. If the defendant denies all knowledge, but admits his belief of the fact charged, he need not deny information. *Chancery*, 1830, *Davis v. Mapes*, 2 *Paige*, 105.

246. Where he has no knowledge or information as to any of the facts charged in the bill, he may so state generally, without answering each allegation separately, and put the whole matter in issue by the general traverse. *Chancery*, 1832, *Utica Ins. Co. v. Lynch*, 3 *Paige*, 210.

247. Negative averments in the plea of an executor, relating to acts of others, may be sworn to on belief. [2 *Ves. & B.*, 160.] *Chancery*, 1882, *Heartt v. Corning*, 3 *Paige*, 566.

248. Where fraudulent intent is denied in the answer, the denial repels the presumption of fraud from the facts, unless those facts are a conclusive evidence of fraud. [11 *Wend.*, 240.] *Supreme Ct.*, 1848, *Wight v. Prescott*, 2 *Barb.*, 196.

249. — **negative pregnant.** The bill charged a sale to M. on credit, and without taking security, and the answer admitted the sale on credit, and added, "but not without taking any security." *Held*, a negative pregnant: the defendant was bound to set forth what the security was. [1 *Johns. Ch.*, 76.] *V. Chan. Ct.*, 1840, *Robinson v. Woodgate*, 3 *Edw.*, 422.

250. The defendant must not merely answer the several charges in the bill literally, but he must admit or answer as to the substance of each charge; not by way of negative pregnant [Mitf. Pl., 250; *Welf. Eq. Pl.*, 865; *Stor. Eq. Pl.*, 654], but generally in the disjunctive. *Chancery*, 1844, *King v. Ray*, 11 *Paige*, 235.

251. A plea denying notice "of the facts and circumstances charged," would be evasive and insufficient, but is cured by a subsequent averment that the defendant was without notice "of the matters above alleged, or of any of them." *A. V. Chan. Ct.*, 1846, *Tompkins v. Anthon*, 4 *Sandf. Ch.*, 97.

252. **Matters held impertinent.** Where the executor being sued for an account, in his answer alleged, as to a certain part of the property of the testator, that it was held by the complainant under a forged assignment,—*Held*, not impertinent. *V. Chan. Ct.*, 1834, *Jolly v. Carter*, 2 *Edw.*, 209.

253. If the complainant claims that some of the devisees are aliens, and therefore cannot take under the will, an allegation that he also

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is an alien is not impertinent. So of an allegation of fraudulent and corrupt means used by him in obtaining his naturalization papers. *Id.*

254. A statement in the answer, that the complainant, who was an administrator, was defendant's professional adviser at the time of the execution of the mortgage sued on,—*Held*, not impertinent, though defendant should have objected before the surrogate to his appointment. *V. Chan. Ct.*, 1844, *Lawrence v. Lawrence*, 4 *Edw.*, 357.

255. Useless repetition,—*Held*, impertinent. *V. Chan. Ct.*, 1844, *Waring v. Suydam*, 4 *Edw.*, 426.

256. Where insolvency is positively alleged, an allegation to the contrary by hypothetical statements, and the opening of long-settled accounts and adjusted balances, is impertinent. *V. Chan. Ct.*, 1845, *Jones v. Roberts*,* 4 *Edw.*, 611.

257. Answer in support of plea. Where complainant waives an answer on oath, no answer in support of a plea is necessary. *Chancery*, 1884, *Fish v. Miller*, 5 *Paige*, 26; 1889, *Weed v. Smull*, 7 *Id.*, 578.

258. A negative plea denying a partnership, is not sufficient. It should be accompanied and supported by an answer. [Lube on Pl., 284, 346.] *V. Chan. Ct.*, 1841, *Innes v. Evans*, 3 *Edw.*, 454.

259. A defendant who puts in a plea denying a copartnership, must support it by an answer and discovery as to every circumstance charged as evidence of a copartnership. [Mad. & Geld., 61.] *Chancery*, 1843, *Everit v. Watts*, 10 *Paige*, 82; affirming S. C., 8 *Edw.*, 486.

260. An answer supporting a plea, must answer those facts in the bill, and those only, which, if true, would disprove or invalidate the plea, and all the matters which are specially alleged as evidence of those facts. *Supreme Ct., Sp. T.*, 1847, *Davison v. Schermerhorn*, 1 *Barb.*, 480; and see *Bogardus v. Trinity Church*, 4 *Paige*, 178.

261. A defendant pleading a release, judgment, or decree, which the complainant seeks to impeach upon equitable circumstances, must, in his answer supporting the plea, make a full discovery as to every material circumstance relied on to avoid the bar. *Chancery*, 1882, *Bolton v. Gardner*, 3 *Paige*, 278. *N.*

Y. Superior Ct., 1849, *Lawrence v. Pool*, 2 *Sandf.*, 540.

262. — after plea overruled. After a plea of the Statute of Limitations, supported by an answer, has been overruled, and the defendant ordered to put in a full answer, he cannot repeat in his second answer, the matter in the plea, but must answer fully to all the matters contained in the bill. [Reviewing many authorities.] *Ct. of Errors*, 1825, *Murray v. Coster*, 4 *Cow.*, 617; affirming S. C., 7 *Johns. Ch.*, 167. *Chancery*, 1881, *Townsend v. Townsend*, 2 *Paige*, 418.

263. An application, after plea, to set up a new defence, by answer, will be denied where a most material witness for the plaintiff has died since the plea; or where the defendant has virtually tried his other defence and failed upon it. *Supreme Ct., Sp. T.*, 1847, *Willet v. Fayerweather*, 1 *Barb.*, 72.

264. An entire new answer after exceptions is not to be treated as an answer merely to the exceptions. *Chancery*, 1829, *Hall v. Wood*, 1 *Paige*, 404.

265. Enforcing an answer. *Brownson v. Reynolds*, *Hopk.*, 416.

266. Where defendant answers a part of the bill, denying combination, and also demurs, and the demurrer is overruled, if the complainant wants a further answer he must file exceptions. *Chancery*, 1841, *Many v. Beekman Iron Co.*, 9 *Paige*, 188. Compare *Siffkin v. Manning*, *Id.*, 222.

267. Where, after order to answer the bill, but before answer, plea, or demurrer, amendments are served, the complainant should enter and serve new order to answer. *Chancery*, 1844, *Cowman v. Lovett*, 10 *Paige*, 559.

268. Defendant may serve his answer at any time before default actually entered. *V. Chan. Ct.*, 1841, *Hoxie v. Scott*, *Clarke*, 457.

269. After demurrer overruled with leave to answer, further time must be applied for on notice. *Chancery*, 1842, *Hurd v. Haynes*, 9 *Paige*, 604; *Atl. Ins. Co. v. Lemar*, 10 *Id.*, 385.

270. Amending. Answers are not permitted to be amended, nor supplemental answers to be filed, without great caution, and the original answer must remain upon file. Amendments entirely changing the basis of the defence, though the facts constituting it were discovered after putting in the answer, are not allowed. *V. Chan. Ct.*, 1840, *Western Reserve Bank v. Stryker*, *Clarke*, 380.

* See this case in table of CASES CITED, Vol. I., *Ante*.

Replication.

271. A supplemental answer to correct a mistake may be permitted where it is evident there has been an actual mistake, and where the justice of the case requires it. But the order should expressly provide that the testimony already taken in the cause might be used upon the hearing. *Chancery*, 1841, *Hughes v. Bloomer*, 9 *Paige*, 269.

272. To set up discharge. Defendant may have leave to set up a personal discharge, obtained after answer, by supplemental answer. *Chancery*, 1828, Anonymous, *Hopk.*, 27.

5. Disclaimer.

273. Defendant cannot, by a disclaimer, deprive the complainant of a right to a full answer, unless it is evident that the defendant ought not, after such disclaimer, to be continued a party to the suit. [Welf. Eq. Pl., 255; 2 Russ., 458.] Where the disclaimer is accompanied by an insufficient answer, the proper course is to except to the answer, on the ground of insufficiency. *Chancery*, 1843, *Ellsworth v. Ourtia*, 10 *Paige*, 105.

274. Disclaiming title. To a bill filed against A. and B., to stay an ejectment-suit brought by them, and for relief, A. answered, that before the commencement of the suit he had sold and conveyed all his interest in the land to B., and disclaimed all title therein. *Held*, sufficient. *V. Chan. Ct.*, 1835, *Spofford v. Manning*, 2 *Edw.*, 358.

V. REPLICATION.

275. A replication must be put in within ten days after the answer is deemed sufficient, and without reference to the manner in which the answer was served. *Chancery*, 1835, *Kane v. Van Vranken*, 5 *Paige*, 62.

276. Leave to file afterwards, on what grounds granted. *Sea Ins. Co. v. Day*, 9 *Paige*, 247. See, also, *Smith v. West*, 3 *Johns. Ch.*, 363.

277. A special replication cannot be filed without leave of the court. [Hinde, 285; 1 Brown's Pr., 58.] The proper course is usually to amend the bill. *V. Chan. Ct.*, 1832, *Storms v. Storms*, 1 *Edw.*, 358.

278. Where complainant amends after answer, a replication to the first answer should not be filed before the time for answering the amendments has expired. [Rule 45.] *Chancery*, 1835, *Richardson v. Richardson*, 5 *Paige*, 58.

279. Withdrawal of replication, when allowed. *Brown v. Ricketts*, 2 *Johns. Ch.*, 425.

Admissions.

VI. ADMISSIONS.

280. Not denying. The rule that an allegation not denied is admitted, applies, though the allegation is in the charging part of the bill. *Supreme Ct.*, 1848, *Thomas v. Austin*, 4 *Barb.*, 265.

281. Limitations. An answer admitting the complainant's claim to be subsisting and unsatisfied,—*Held*, to be a sufficient acknowledgment to defeat the effect of an accompanying plea of limitations. *Ct. of Errors*, 1822, *Murray v. Cooster*, 20 *Johns.*, 576; affirming S. C., 5 *Johns. Ch.*, 522.

282. Account. Charges contained on the debit side of an account rendered by the answer to a bill for a discovery, must be allowed, unless disproved or falsified. *Ct. of Errors*, 1817, *Ten Eyck v. Hart* (cited in *Woodcock v. Bennet*), 1 *Cow.*, 711, 743; reversing S. C., 2 *Johns. Ch.*, 62. Questioned in *Dunham v. Gates*, *Hoffm.*, 185.

283. Fraud in law. An answer denying fraud in an assignment which is void for fraud in law on its face, is not sustained by complainant's omission to reply. It is the duty of the court to find the fact according to the evidence. *Ct. of Errors*, 1838, *Ounningham v. Freeborn*, 11 *Wend.*, 240; affirming S. C., 8 *Paige*, 557; 1 *Edw.*, 256.

284. Omission to account. Where a bill is filed for an account and payment of a legacy, and the executors neither admit assets sufficient to pay it, nor set forth an account, the estate will be deemed sufficient, and payment decreed. *Chancery*, 1838, *Smith v. Smith*, 4 *Paige*, 271; affirming S. C., 1 *Edw.*, 189.

285. Written instrument. The bill set forth a note, indorsed by defendant,—*Held*, that his answer admitting the indorsement, precluded him from proving that the terms of the note, so set forth in the bill, included an alteration made after his indorsement. *A. V. Chan. Ct.*, 1846, *Smedberg v. Whittlesey*, 8 *Sandf. Ch.*, 320.

286. Where a bill filed for discovery and relief upon a lost contract, charged that the contract was executed by both parties, and set out what were claimed to be its terms, and the defendant answered that he never executed such a contract, nor any contract for the purchase of the lands except one executed by himself alone,—*Held*, that this was to be deemed an admission that the terms of the

Of the Pleadings as Evidence.

contract were as charged in the bill. The defendant in such a case may be held to greater strictness in his answer, than if the contract could be produced. *Ct. of Appeals*, 1848, *Crary v. Smith*, 2 *N. Y. (2 Comst.)*, 60.

287. Where a cause is heard on bill and answer without a replication, the answer is to be taken as true in all points. [Bac. Rules, 64; 2 Ch. Cas., 21; Boh. Our. Canc., 149; 1 Vern., 140.] *Chancery*, 1828, *Brinckerhoff v. Brown*, 7 *Johns. Ch.*, 217. *Ct. of Errors*, 1823, *Dale v. McEvers*, 2 *Cow.*, 118.

288. Entire statement must be taken. A defendant relying upon a statement in the bill to establish his defence, must take the whole of it. Thus where a bill to foreclose a mortgage expressed to be in consideration of \$18,000, averred that it was in fact given to secure an actual advance of \$5,000, and advances to be made, and that the whole amount advanced was but \$18,000;—*Held*, that the defendant could not take hold of the admission that only \$18,000 was advanced, and at the same time require the complainant to prove that the mortgage was given to secure future advances. *A. V. Chan. Ct.*, 1844, *Craig v. Tappin*, 2 *Sandf. Ch.*, 78. *S. P.*, *Supreme Ct.*, *Sp. T.*, 1848, *Stuart v. Kissam*, 2 *Barb.*, 498.

289. The complainant cannot take hold of part of new matter set up, for the purpose of making a new case for relief, and reject matter connected therewith tending to a defence. *Chancery*, 1848, *Miller v. Avery*, 2 *Barb. Ch.*, 582.

290. Whenever a tender is made, and is insisted on in the pleadings, the creditor is at least entitled to that amount. [18 *Wend.*, 390; 1 *Saund.*, 38, n. 2; 1 *Durn. & East*, 464.] *Supreme Ct.*, 1847, *Wood v. Perry*, 1 *Barb.*, 114.

291. The issue. Facts charged in the bill, but neither admitted nor denied by the answer, will not upon the hearing be taken as admitted, being put in issue by the formal traverse at the conclusion of the answer. *Chancery*, 1882, *Brockway v. Copp*, 3 *Paige*, 539.

292. A full denial, though upon information and belief, raises an issue. *A. V. Chan. Ct.*, 1839, *Dunham v. Gates*, *Hoffm.*, 185.

293. In a plea setting up the defence that the cause of action was purchased by the plaintiff who was an attorney, contrary to the statute, the allegation that the purchase

was with intent to injure, oppress, and aggrrieve, is not traversable. But the intent to sue, is. *Supreme Ct.*, *Sp. T.*, 1848, *Mann v. Fairchild*, 5 *Barb.*, 108.

294. On sustaining a plea showing necessary parties omitted, plaintiff had leave to amend, instead of doing which he took issue on the plea. *Held*, that he could not show that the parties had become unnecessary since the plea. *Chancery*, 1819, *Cook v. Mancius*, 4 *Johns. Ch.*, 166.

VII. OF THE PLEADINGS AS EVIDENCE.

295. An answer responsive to the charging part of the bill, is evidence in favor of the defendants; for the charging part of a bill is as necessary to be answered as the stating part. *Chancery*, 1834, *Smith v. Clark*, 4 *Paige*, 868.

296. The answer of infants by their guardian is a pleading merely, and not evidence. *Chancery*, 1886, *Bulkley v. Van Wyck*, 5 *Paige*, 536.

297. Where an answer on oath is waived, although as a pleading the complainant may avail himself of admissions and allegations in the answer which go to establish the case made by the bill, such answer is not evidence in favor of the defendant for any purpose. *Chancery*, 1834, *Bartlett v. Gale*, 4 *Paige*, 508.

298. A responsive answer, under oath, is equal to the testimony of one witness in conflict with it, unless one or the other is unreasonable or evasive. *Ct. of Appeals*, 1851, *Jacks v. Nichols*, 5 *N. Y. (1 Seld.)*, 178.

299. The rule of equity, making it necessary to establish by the testimony of more than one witness, a fact denied, can only be applied to cases where the answer is a clear and positive denial of fact. [1 *Ves.*, 66.] *Ct. of Errors*, 1805, *Wetmore v. White*, 2 *Cai. Cas.*, 87; and see *Harris v. Knickerbacker*, 5 *Wend.*, 638, 651.

300. Where two defendants united in an answer, and the one, an assignor, met the allegations of the bill on his own knowledge; the other, an assignee, on information and belief;—*Held*, that the answer of the latter was not within the rule requiring two witnesses to prevail against it. Nor could it be aided by the answer of the other. *A. V. Chan. Ct.*, 1839, *Dunham v. Gates*, *Hoffm.*, 185.

301. What is responsive. To a bill for a discovery, the answer stated that the moneys received were paid over, but did not specify

Exceptions.

the amount. *Held*, that the amount being subsequently proven, the answer was to be deemed responsive. *Chancery*, 1824, Methodist Episcopal Church v. Jaques, *Hopk.*, 458.

302. A bill to redeem, charged that the property was pledged for a demand of \$500; and the answer set up that it was pledged for that and another demand of \$800. *Held*, responsive to the bill, and not new matter. *Ct. of Errors*, 1880, Dunham v. Jackson, 6 *Wend.*, 22. Compare Green v. Hart, 1 *Johns.*, 580.

303. To a bill stating two usurious loans by the defendant, upon pledges of stocks, and a renewal of one of them, the answer admitted the two loans, and averred that the alleged renewal was a further loan without security. *Held*, responsive. *Ct. of Errors*, 1883, Jackson v. Hart, 11 *Wend.*, 843.

304. If the answer is responsive to a special interrogatory, and the interrogatory would be proper on a trial of the issue at law, the answer is responsive. *A. V. Chan. Ct.*, 1889, Dunham v. Gates, *Hoffm.*, 185.

VIII. EXCEPTIONS.

305. Form. Exceptions should be specific. *Chancery*, 1829, Whitmarsh v. Campbell, 1 *Paige*, 645; 1833, Stafford v. Brown, 4 *Id.*, 88. *V. Chan. Ct.*, 1844, McKeen v. Field, 4 *Edw.*, 379; 1837, Baker v. Kingsland, 3 *Id.*, 188.

306. Separate exceptions to the same matter, as scandalous and as impertinent, are not permitted. *Chancery*, 1837, McIntyre v. Union College, 6 *Paige*, 239.

307. Proper form of exceptions to answer referring to schedules annexed. Seymour v. Brewster, 2 *Ch. Sent.*, 63.

308. Trivial exceptions overruled with costs. Baggot v. Henry, 1 *Edw.*, 7; Desplaces v. Goris, *Id.*, 350.

309. Exception for impertinence, founded on a few unnecessary words, should be disallowed, unless they may lead to the introduction of improper evidence. *Chancery*, 1836, Hawley v. Wolverton, 5 *Paige*, 522; 1837, McIntyre v. Union College, 6 *Id.*, 239.

310. Mere repetition and useless detail, impertinent: if inextricably blended with pertinent matter, the whole to be rejected. Norton v. Woods, 5 *Paige*, 260.

311. An exception for impertinence in matter, a part of which is pertinent, must be overruled. [1 *Russ. & Myln.*, 30.] *Chancery*, 1833, Van Rensselaer v. Brice, 4 *Paige*, 174;

1844, Curtis v. Masten, 11 *Id.*, 15; 1845, Balcom v. N. Y. Life Ins. & Trust Co., *Id.*, 454. *V. Chan. Ct.*, 1882, Desplaces v. Goris, 1 *Edw.*, 350.

312. If expunging matter excepted to for impertinence makes the clause senseless or untrue, the exception will be overruled. *Chancery*, 1834, Franklin v. Keeler, 4 *Paige*, 382; 1837, McIntyre v. Union College, 6 *Id.*, 239; German v. Machin, *Id.*, 288.

313. That an infant's answer cannot be excepted to for insufficiency. *Chancery*, 1831, Leggett v. Sellon, 3 *Paige*, 84.

314. Immateriality. If an answer sets up immaterial facts, the complainant may except or object at the hearing. [2 *Madd. Ch.*, 355.] *Chancery*, 1829, Spencer v. Van Duzen, 1 *Paige*, 555; 1833, Stafford v. Brown, 4 *Id.*, 88.

315. Generality. To matter purely of defence stated without sufficient particularity to lay the foundation for proofs, plaintiff cannot except. *V. Chan. Ct.*, 1884, Jolly v. Carter, 2 *Edw.*, 209.

316. Exceptions for insufficiency cannot be sustained unless some material allegation, charge, or interrogatory of the bill, is not fully answered. [Mitf., 315; Coop. Pl., 319; 1 *Newl. Pr.*, 259; Lube's Eq. Pl., 87.] *Chancery*, 1833, Stafford v. Brown, 4 *Paige*, 88.

317. Answer accompanied by a plea or demurrer, how excepted to. Siffkin v. Manning, 9 *Paige*, 222; Stuart v. Warren, 1 *N. Y. Leg. Obs.*, 293.

318. Where a plea is ordered to stand for an answer, plaintiff cannot except to it without special leave. [Mose., 78; 3 *P. Wms.*, 239; 3 *Atk.*, 814.] *Chancery*, 1822, Kirby v. Taylor, 6 *Johns. Ch.*, 242.

319. Extension of time to except to an answer, must be on motion with notice. *Chancery*, 1835, Wakeman v. Gillespy, 5 *Paige*, 112.

320. Effect of excepting. Excepting to answer for insufficiency, admits that it is valid and properly before the court. *V. Chan. Ct.*, 1846, Vermilya v. Christie, 4 *Sandf. Ch.*, 376.

321. If it was accompanied by a plea or demurrer, the exceptions admit the latter to be good. But putting the cause on the calendar for argument on the plea or demurrer, waives the exceptions. *Chancery*, 1843, Brownell v. Curtis, 10 *Paige*, 210.

322. Practice on exceptions to answers. Woods v. Morrell, 1 *Johns. Ch.*, 103; Mackie

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ads. Cairns, Hopk., 9; *Byington v. Wood*, 1 *Paige*, 145; *Noble v. Wilson, Id.*, 164; *Bennington Iron Co. v. Campbell*, 2 *Id.*, 159; *Leggett v. Dubois*, 3 *Id.*, 477; *Peale v. Bloomer*, 8 *Id.*, 78; *Higbie v. Brown*, 1 *Barb. Ch.*, 820.
— on submitting to exceptions to an answer, *Sanford v. Bissell*, 1 *Johns. Ch.*, 888.

— in excepting to report of master on the insufficiency of an answer. *Myers v. Bradford*, 4 *Id.*, 484; *N. Y. Fire Ins. Co. v. Lawrence*, 6 *Paige*, 511; *Candler v. Petit*, 1 *Id.*, 427; *Franklin v. Keeler*, 4 *Id.*, 882.

323. Further answer to exceptions, and exceptions to the further answer. *Alderman v. Potter*, 6 *Paige*, 658; *Eager v. Wiswall*, 2 *Id.*, 369; *Hart v. Small*, 4 *Id.*, 888.

IX. RULES APPLICABLE TO PARTICULAR SUBJECTS, CAUSES OF ACTION, OR DEFENCES.

1. Accounting.

324. Against devisees. A bill filed for an account, passing by the executors and seeking to obtain payment out of the property in the hands of the devisees in remainder, should show, affirmatively, by direct allegation, that the money never came to the hands of the executors, and still remains a charge upon the estate. *V. Chan. Ct.*, 1836, *Olason v. Lawrence*, 3 *Edw.*, 48.

325. Defendants having no interest. A bill for an account, charging that some of the defendants pretend to have an interest in the fund, but in truth have none whatever, is bad as to such defendants. *Chancery*, 1848, *Muir v. Leake & Watts Orphan House*, 3 *Barb. Ch.*, 477.

326. Plea of title. To a bill for an account of rents and profits of property alleged to belong to the plaintiffs and defendant, and charging that defendant declines to account on pretence of an exclusive title in himself, a plea that the title may come in question, suggesting that the plaintiff must be put to establish his title at law, is bad. The defendant must set up his title. *Chancery*, 1817, *Livingston v. Livingston*, 3 *Johns. Ch.*, 51.

327. Form of offer to redeem. In a bill for an accounting and redemption, a distinct offer to pay the amount due is not necessary. The form is, that, on the payment of what, if any thing, shall be found due, the mortgagee may be decreed to deliver possession, &c. *A. V. Chan. Ct.*, 1840, *Quin v. Brittain, Hoffm.*, 358.

328. An offer to pay what may be found due on an account to be taken, is not necessary to enable complainant to redeem, where the amount is liquidated, and a mere computation of interest is called for. *A. V. Chan. Ct.*, 1846, *Barton v. May*, 3 *Sandf. Ch.*, 450.
328 a. Alleging demands, *Clarke*, 311.

2. Account Stated.

329. A party cannot surcharge and falsify an account stated, except on the ground of mistake or error, distinctly charged. *Chancery*, 1816, *Stoughton v. Lynch*, 2 *Johns. Ch.*, 209. To similar effect, *Ct. of Errors*, 1885, *Leycraft v. Dempsey*, 15 *Wend.*, 88.

330. Annexing copy. The rule that if a bill impeaches a stated account, and alleges that plaintiff has no counterpart, defendant, if he pleads the account in bar, must annex a copy to his answer in support of the plea, does not apply to a general bill for account. *Chancery*, 1889, *Weed v. Smull*, 7 *Paige*, 578.

3. Bona-fide Purchase. Want of Notice.

331. A party claiming as a bona-fide purchaser, without notice, must deny notice positively, and not evasively, though it be not charged in the bill, and every fact from which notice may be inferred. *Chancery*, 1814, *Frost v. Beekman*,* 1 *Johns. Ch.*, 288; 1815 [citing 1 *Vern.*, 179; 2 *Vent.*, 861; 8 *P. Wms.*, 244; 2 *Ves.*, 458; 9 *Id.*, 82], *Murray v. Ballou, Id.*, 566; 1816, *Murray v. Finster*, 2 *Id.*, 155; 1818 [citing, also, *Proc. in Ch.*, 226; 2 *P. Wms.*, 491], *Denning v. Smith*, 3 *Id.*, 382. *Ct. of Errors*, 1826, *Gallatian v. Cunningham*, 6 *Cow.*, 861; affirming *S. C.*, *sub nom. Galatian v. Erwin, Hopk.*, 48. *S. P.*, *Chancery*, 1837, *Manhattan Co. v. Evertson*, 6 *Paige*, 457; 1839, *Harris v. Fly*, 7 *Id.*, 421; 1845, *Balcom v. N. Y. Life Ins. & Trust Co.*, 11 *Id.*, 454; 1848, *Lowry v. Tew*, 3 *Barb. Ch.*, 407.

332. A plea setting up a bona-fide purchase, must state to whom the consideration was paid on the purchase, and defendant should not put in issue any fact stated in the bill which does not go to countervail the purchase in good faith, the valuable consideration paid, or the want of notice of the complainant's equities; and when the truth of the fact alleged to charge him with notice, actual or

* Reversed on other grounds, *Ct. of Errors*, 1820, 18 *Johns.*, 544.

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constructive, is not within his personal knowledge, he must merely deny notice of it, and not its existence. *V. Chan. Ct.*, 1847, *Tompkins v. Ward*, 4 *Sandf. Ch.*, 594.

333. To support the plea of a bona-fide purchase, without notice, the defendant must aver and prove, not only that he had no notice before his purchase, but that he had actually paid the purchase-money before such notice. [1 *Atk.*, 588; 2 *Id.*, 680; 3 *Id.*, 804.] *Chancery*, 1828, *Jewett v. Palmer*, 7 *Johns. Ch.*, 65.

334. Circumstances. A defendant whose title is impeached by a creditor of one from whom he derives title, must answer as to all the circumstances alleged in the bill to show that his deed is merely colorable and fraudulent as to creditors, though he answers that he is a purchaser without notice and for a valuable consideration. [7 *Paige*, 517.] *V. Chan. Ct.*, 1886, *Wyckoff v. Sniffen*, 2 *Edw.*, 581.

335. Agent. Although a plea which omits to deny notice to any agent, is bad, yet if the bill charges that a deed was executed to the defendant, he having notice, and the answer denies that the defendant had notice, and a replication is filed, this puts notice in issue. *Chancery*, 1841, *Griffith v. Griffith*, 9 *Paige*, 315; *S. C.* below, *Hoffm.*, 153.

336. Possession. A. was the owner of land, and continued to occupy it after B. acquired his title; and C., without any actual notice of A.'s possession, took a mortgage from B. *Held*, in a foreclosure-suit by B., that if A. relied on his possession as being notice to the complainants, he must state in his answer that he was in possession of the land at the date of the mortgage, claiming it as his own; and prove the character of his possession accordingly. *A. V. Chan. Ct.*, 1845, *N. Y. Life Ins. & Trust Co. v. Cutler*, 8 *Sandf. Ch.*, 176.

337. A plea of bona-fide purchaser, &c., should aver that the defendant's grantor was in the actual possession; but an averment that the one under whom his grantor claimed was so, may be equivalent. *A. V. Chan. Ct.*, 1846, *Tompkins v. Anthon*, 4 *Sandf. Ch.*, 97.

338. If discovery is waived, a plea that the defendant was a purchaser in good faith need not specially deny the facts charged. *Id.*

4. Creditors' Suits.

339. Original bill on second judgment. After a creditor's bill was filed, the debtor and a third person gave their note for the

debt, upon which a judgment was obtained against both. *Held*, not a proper case for the filing of an original bill, upon the last judgment, and at the same time continuing the first suit; but complainant should either dismiss the first bill, or file a supplemental bill. *Chancery*, 1846, *Winslow v. Pitkin*, 1 *Barb. Ch.*, 402.

340. Existence of real estate. A bill to remove obstructions to the satisfaction of a judgment by execution, must specifically and distinctly allege that there is real estate which is subject to the judgment, or personal property liable to the execution. If the bill is ambiguous in this essential particular, it should be construed against the complainant, for he is bound to state his case in proper form, and in a manner to be understood without resort to doubtful construction. *Ct. of Errors*, 1832, *McElwain v. Willis*, 9 *Wend.*, 548; affirming *S. C.*, 3 *Paige*, 505.

341. Value. Under 2 *Rev. Stat.*, 178, § 89, and Rule 189, a creditor's bill should aver that the value of defendant's equitable interests, &c., "exceeds," or "is more than," \$100. *Chancery*, 1888, *Bradt v. Kirkpatrick*, 7 *Paige*, 62.

342. An averment that defendant has debts due to him of the amount of several hundred dollars, is not sufficient, for it does not necessarily imply that they are of any value. *Chancery*, 1842, *Waldo v. Doane*, 2 *Ch. Sent.*, 7.

343. Insolvency of co-debtor. A defendant in the judgment, if he is utterly destitute of property applicable thereto, need not be made a defendant. But that fact must be distinctly averred in the bill. *Chancery*, 1885, *Van Cleef v. Sickles*, 5 *Paige*, 505; reversing *S. C.*, 2 *Edw.*, 392.

344. Judgment, &c. A creditor's bill may state the judgment, execution, &c., upon information of the attorney. *Chancery*, 1889, *Hamersley v. Wyckoff*, 8 *Paige*, 72.

345. That in a creditor's bill, the proper mode is to set forth the recovery of the judgment as of the proper term, and then allege that on such a day it was signed, filed, and docketed. A technical error in this respect disregarded. *A. V. Chan. Ct.*, 1840, *Baggott v. Eagleson*, *Hoffm.*, 877.

346. Where an inferior court whose jurisdiction is limited to \$100, has jurisdiction exceeding that, in a particular class of cases, and a creditor's bill is filed founded on a judgment of such court, a plea denying its jurisdiction

Rules Applicable to—Discharges;—Discovery. Injunction.

must show that the cause of action was not one of that particular class. *V. Chan. Ct.*, 1832, *Storms v. Storms*, 1 *Edw.*, 586.

347. Issue of execution. A creditor's bill on a judgment of the Supreme Court must aver that the execution was issued to the county where, at the time, the defendant resided. *Chancery*, 1839, *Reed v. Wheaton*, 7 *Paige*, 668. *V. Chan. Ct.*, 1840, *Smith v. Fitch*, *Clarke*, 265; *Wilbur v. Collier*, *Id.*, 315.

348. An allegation in a creditor's bill that an execution was sued and prosecuted out of the court, and that it was indorsed, &c., before delivery to the sheriff, and then delivered to him,—*Held*, tantamount to an averment of delivery to him before the return-day. *V. Chan. Ct.*, 1837, *Conant v. Sparks*, 3 *Edw.*, 104.

349. — its return. In a creditor's bill against two defendants, a statement that the sheriff returned that the defendants had no goods, &c., is sufficient, for it may be construed as referring to their several as well as joint property. *Id.*

350. A creditor's bill which states the return and filing of the execution as of a day after the commencement of the suit, will be dismissed at the hearing, though the objection is not taken in the answer. *Chancery*, 1838, *Pardee v. De Cala*, 7 *Paige*, 132. Compare *Baggott v. Eagleson*, *Hoffm.*, 377.

351. Residence of debtor. A creditor's bill on a judgment of a Court of Common Pleas, filed to reach things in action, on the return of an execution unsatisfied, must, since the act of 1840, allege either that the debtor resided, at the time the execution issued, in the county in which the judgment was recovered, or that the judgment had been docketed and an execution issued in some other county where the defendant was residing, or an excuse for not so doing. [4 *N. Y. Leg. Obs.*, 258; 4 *Barb. Dec. of Ch.*, 19; 6 *Id.*, 22.] *A. V. Chan. Ct.*, 1846, *Wheeler v. Heermans*, 8 *Sandf. Ch.*, 597.

352. A demurrer does not lie to a creditor's bill on the ground that the bill does not show that a transcript of the judgment was docketed in the county where one of the defendants resides, if it does not appear upon the face of the bill that the judgment-debtor had real estate subject to the lien of the judgment in that county. *Supreme Ct., Sp. T.*, 1849, *Milard v. Shaw*, 4 *How. Pr.*, 187.

353. The answer to a creditor's bill must

refer to the time of filing the bill. Denying that he "has" property, is insufficient. *V. Chan. Ct.*, 1838, *Trotter v. Bunce*, 1 *Edw.*, 578.

354. In an answer to a creditor's bill, alleging that, at the time of the rendition of the judgment, the defendant had not, and that he had not had at any time since, any interest, &c., sufficiently imports that he had not at the time of filing the bill. *Supreme Ct., Sp. T.*, 1847, *Wendell v. Shaw*, 1 *Barb.*, 462.

355. To a creditor's bill calling upon defendant to state whether, at the time of filing such bill, he possessed, owned, or had any interest in, any real estate, or chattel real, or any personal property, an answer stating that since the recovery of the plaintiff's judgment the defendant had not been interested in any property of any kind; and that no person had held any real estate or personal property, or interest therein, in trust for him or for his benefit, in possession or otherwise, substantially meets the inquiry. *Id.*

5. Discharges.

356. A plea of a discharge under the act of 1813, must distinctly aver every fact which was necessary to give the officer jurisdiction in the first instance. It must show that the petition was presented in the proper county, and that two-thirds of the creditors joined. These requisites cannot be supplied by mere recitals in the discharge. [7 *Johns.*, 75; 1 *Cow.*, 316; 3 *Wend.*, 247; 6 *Id.*, 438.] *Chancery*, 1832, *Salters v. Tobias*, 3 *Paige*, 338. Compare *supra*, 228.

357. A plea, to show that A. was legally declared a bankrupt, under the voluntary provisions of the act of 1841, so as to vest his property in the official assignee, must aver all the facts necessary to give the district court jurisdiction. It must aver that his petition set out a list of his creditors, and an inventory of his property, and that it was duly verified. It should, also, distinctly appear that he owed debts which had not been created in consequence of a defalcation as a public officer, or as an executor, &c.; so as to bring him within the description of persons authorized to apply for the benefit of the act. *Chancery*, 1848, *Seaman v. Stoughton*, 3 *Barb. Ch.*, 344.

6. Discovery. Injunction.

358. A bill of discovery in aid of an action at law, must disclose a case which would

Rules Applicable to—Divorce.

enable complainant to recover in the action, and must set out so much of the pleadings as will enable the court to see that the facts alleged in the bill, of which discovery is sought, are material. [Stor. Eq. Pl., 819, 324, 558; Mitf. Pl., 187; Hare on Disc., 43; 3 Johns. Ch., 47; 9 Paige, 622.] *Supreme Ct., Sp. T.*, 1848, *Bailey v. Dean*, 5 *Barb.*, 297.

359. Showing merely that the plaintiff is apprehensive that he should not be able to make full proof of the material facts, except by the discovery, is insufficient. *Chancery*, 1820, *Seymour v. Seymour*, 4 *Johns. Ch.*, 409.

360. The case must be so far stated as to enable the court to see how the facts sought to be discovered are material. *Ct. of Errors*, 1819, *McIntyre v. Mancius*, 16 *Johns.*, 592; and *S. C.* below, 3 *Johns. Ch.*, 45. *Chancery*, 1842, *Lane v. Stebbins*, 9 *Paige*, 622.

361. Where the complainant seeks to give jurisdiction, or to stay proceedings at law, on the ground that a discovery is necessary, he must not only show that the facts as to which a discovery is sought are material, but he must also show affirmatively, in his bill, that his right or defence cannot be established at law by the testimony of witnesses, or without the aid of the discovery which he seeks. [1 *Johns. Ch.*, 547; 4 *Id.*, 409; 2 *Marsh. Kent*, 823; 4 *Hen. & Munf.*, 478; 1 *McCord's Ch.*, 60; 7 *Cranch*, 89.] *Chancery*, 1881, *Leggett v. Postley*, 2 *Paige*, 599.

362. A bill of mere discovery, in aid of an action or defence at law, must show a good cause of action or defence, and that the discovery is material thereto, but need not aver that the right at law cannot be established without it; but, this fact also must be shown, by the bill, where it seeks relief in equity. *Chancery*, 1842, *Marsh v. Davison*, 9 *Paige*, 580; and see *Leggett v. Postley*, 2 *Id.*, 599.

363. Form of charge. The matters of which discovery in aid of a suit at law is sought, must be charged to be true in fact, either positively, or upon information and belief. *Chancery*, 1842, *Marsh v. Davison*, 9 *Paige*, 580.

364. Interrogatories. The principle that a defendant cannot be called upon to answer any interrogatory which is not founded upon some allegation or charge in the bill, does not refer solely to those material averments in the bill upon which the complainant's right to relief essentially depends. It is sufficient, to

entitle him to an answer to the interrogatory, if it is founded upon a statement in the bill which is set up merely as evidence in support of the main charges therein. *Chancery*, 1832, *Mechanics' Bank v. Levy*, 3 *Paige*, 606.

365. Usury. The provision of 1 Rev. Stat., 772, § 8,—dispensing with the payment or offer to pay interest, on the filing of a bill in chancery for a discovery of usury received,—does not abrogate the established principle of equity, that a bill of discovery on an allegation of usury, must offer to pay the principal. *Ct. of Errors*, 1833, *Livingston v. Harris*, 11 *Wend.*, 329; affirming *S. C.*, 3 *Paige*, 528. *S. P.*, *Chancery*, 1832 [citing 1 *Paige*, 429; 8 *Wend.*, 573], *Osgood v. Joslin, Id.*, 195.

366. And this offer must be made, although the bill contains an allegation that the whole debt has been paid, for this may prove untrue. *Chancery*, 1832, *Brockway v. Copp*, 3 *Paige*, 539.

367. In a bill against a corporation, and officers thereof, who are joined for the purpose of discovery, it is not necessary to aver that a knowledge of the facts of which discovery is sought, is confined to them; it is enough if it appear that such facts are known to them, and material to the relief sought against the corporation. *Chancery*, 1841, *Many v. Beekman Iron Co.*, 9 *Paige*, 188.

368. The defendant cannot plead any matters in bar of the discovery merely, which would be equally valid as a defence to the relief. [2 *Bro. C. C.*, 124; *For. Ex. R.*, 124; *Stor. Pl.*, 254, n. 1; *Welf. Eq. Pl.*, 133.] *Chancery*, 1843, *Brownell v. Curtis*, 10 *Paige*, 210.

369. Issue. A bill to enjoin a suit at law, should state whether issue has been joined or not. [2 *Paige*, 394.] *Chancery*, 1881, *Teller v. Van Deusen*, 3 *Paige*, 33.

370. Payment. To a bill of discovery in aid of an action at law for the recovery of a debt, the defendant cannot plead payment of the debt before the commencement of the action at law. [2 *Bro. C. C.*, 7; 2 *Dick.*, 651; *Welf. Eq. Pl.*, 135.] The existence of the indebtedness is the very matter to be tried, as a matter of fact, in the action at law. *Chancery*, 1848, *Sperry v. Miller*, 2 *Barb. Ch.*, 632.

7. Divorce.

371. A charge of adultery, whether by way of crimination or recrimination, should

Rules Applicable to—Foreclosure.

be so stated that the adverse party may be prepared to meet it on the trial. It must be charged with reasonable certainty of time and place, and the name of the person with whom it was committed stated, unless averred to be unknown. If the charge is not sufficiently explicit, the objection may be made when a feigned issue is applied for. *Chancery*, 1830, Wood v. Wood, 2 *Paige*, 108.

372. A charge in a bill for divorce that defendant has "in numerous instances, both before and since their separation, committed adultery both within this State and elsewhere," is too vague to authorize awarding a feigned issue. *Chancery*, 1816, Codd v. Codd, 2 *Johns. Ch.*, 224. *Supreme Ct.*, 1848, Whispell v. Whispell, 4 *Barb.*, 217.

373. A general allegation of adultery, "with divers persons unknown," is too vague, and will not let in evidence. Time, place, and circumstances must be stated, though the name of the person is unknown. *V. Chan. Ct.*, 1840, Kane v. Kane, 8 *Edw.*, 889.

374. A recriminatory charge of adultery set up in an answer to a bill for divorce, must be set up in the same manner as in a bill, and with the allegations, which the rules of court require in a bill, that it was committed without the defendant's procurement, connivance, privity, or consent. These allegations are issuable. *Supreme Ct.*, 1848, Morrell v. Morrell, 8 *Barb.*, 286.

375. In a bill for a divorce for adultery, though it is sufficient to charge that the offence was committed with one or more persons unknown to the plaintiff, if the feigned issue specified a particular individual only, the plaintiff should be confined to that specific charge. *Chancery*, 1822, Germond v. Germond, 6 *Johns. Ch.*, 347.

376. Charges of adultery and cruel usage, being distinct and independent, and requiring separate answer, leading to distinct issues and decrees, cannot be joined together in the same bill. *Chancery*, 1822, Johnson v. Johnson, 6 *Johns. Ch.*, 168; 1833, Smith v. Smith, 4 *Paige*, 92; 1844, Rose v. Rose, 11 *Id.*, 166. Compare Beach v. Beach, 11 *Id.*, 161; S. C., 8 *N. Y. Leg. Obs.*, 202; and see Pomeroy v. Pomeroy, 1 *Johns. Ch.*, 606.

377. Defences. The defendant may deny the adultery charged, and also insist that, if it was committed, it was condoned, and also charge the complainant with adultery as a bar.

Chancery, 1834, Smith v. Smith, 4 *Paige*, 432; S. P., 1830, Wood v. Wood, 2 *Id.*, 108; 1844, Hopper v. Hopper, 11 *Id.*, 46.

378. Condonation must be urged by way of special plea, or insisted upon in the answer. *Chancery*, 1834, Smith v. Smith, 4 *Paige*, 432.

379. In a suit for a divorce on the ground of adultery, only the facts contested by the pleadings are to be tried. Hence, where the answer recriminates, if the complainant has not set up condonation of his adulteries in the bill by way of anticipation, he must do so by way of amendment, or an issue cannot be directed to try such condonation. *Supreme Ct.*, 1848, Morrell v. Morrell, 8 *Barb.*, 286; questioning a previous decision in S. C., 1 *Id.*, 318.

380. That the adultery of a complainant, committed after his suit commenced, may be set up before decree in a supplemental answer, or by a cross-bill, in the nature of a plea *puis darrein continuance*, on leave obtained. *Chancery*, 1834, Smith v. Smith, 4 *Paige*, 432.

8. Foreclosure.

381. Mortgage to trustee. Where an executor takes a mortgage in his individual name, adding merely a description of him as executor of, &c., and dies, a bill filed by his successor to foreclose the mortgage must expressly allege, aside from the language of the mortgage, that it was a part of the assets. *Ct. of Appeals*, 1858, Peck v. Mallams, 10 *N. Y. (6 Seld.)*, 509.

382. Consideration of mortgage. A bill to foreclose a mortgage need not allege the indebtedness, in consideration of which the bond and mortgage were given. The execution of the bond and mortgage is enough. *A. V. Chan. Ct.*, 1845, Day v. Perkins, 2 *Sandf. Ch.*, 859. Compare Russell v. Kinney, 1 *Id.*, 84; S. C., 2 *N. Y. Leg. Obs.*, 233; affirmed, *Ct. of Errors*, 1845. See 2 *Sandf. Ch.*, 81, *note*.

383. Complainant's other claims. Notwithstanding Rules 132 and 136 of 1830,—which dispense with the practice of allowing junior incumbrancers, who are made defendants in foreclosure, to litigate their claims not only with the complainant but also with their co-defendants,—the complainant should set out in his bill all his claims upon the mortgaged premises; and the defendants should set up in their answers any claims that they might have to the equity of redemption, as

Rules Applicable to—Fraud. Undue Influence;—Particular Facts and Allegations.

incumbrancers or otherwise, as against the complainant. *Chancery*, 1843, *Tower v. White*, 10 *Paige*, 895.

384. Where a person holding a mortgage on the defendant's property has also a judgment against him subsequent in date to the mortgage, which judgment is a lien upon the mortgaged premises, a claim for payment of the judgment is proper to be made in a bill filed by him to foreclose the mortgage. *Chancery*, 1846, *Wheeler v. Van Kuren*, 1 *Barb. Ch.*, 490.

385. Rents and profits. In order to entitle a complainant in foreclosure to a recovery of the rents and profits before decree, his bill must allege that the premises are an inadequate security for his demand. An allegation that they are not sufficient "for all just incumbrances," is not enough. *Supreme Ct., Sp. T.*, 1847, *Warner v. Gouverneur*, 1 *Barb.*, 86.

386. Precluding defence of usury. If a mortgagee foreclosing would avail himself of the fact that the grantee of the equity of redemption took it subject to the mortgage, in order to preclude the latter from setting up usury he must set forth the pretence of usury, and charge the execution of the grant subject to the mortgage. *A. V. Chan. Ct.*, 1846, *Hetfield v. Newton*, 3 *Sandf. Ch.*, 564.

387. —of purchase. Where a person executes a mortgage upon premises which he has previously contracted to sell to another, and the mortgagees file a bill to foreclose such mortgage, making the purchaser a party thereto, if they mean to insist that they are entitled to a preference over such purchaser, as *bona-fide* mortgagees without notice, the bill should state that such purchaser claims an interest under a contract, or a pretended contract, to purchase, prior to the mortgage; and it should also allege that if he had any such interest the complainants had no notice thereof at the time they took their mortgage, and should show the other facts which are necessary to entitle the complainants to protection as *bona-fide* purchasers. *Chancery*, 1848, *Bank of Orleans v. Flag*, 3 *Barb. Ch.*, 316.

388. Proceedings at law. A bill for the foreclosure or satisfaction of a mortgage, must state whether proceedings have been had at law for the recovery of any part of the debt, and whether it has been collected. 2 *Rev. Stat.*, 191, § 155.

389. If it shows a judgment, and does not show that the remedy has been exhausted, it is defective, and the objection may be taken either by demurrer or answer. [8 *Paige*, 648.] *Chancery*, 1841, *Shufelt v. Shufelt*, 9 *Paige*, 187.

390. Plea of recovery at law. To a bill for a foreclosure, averring that no proceedings at law have been had for the recovery of the mortgage-debt, a plea in bar, that the complainant, before bill filed, had recovered a judgment for the debt, is good. It is not necessary to go further and show that the complainant had not exhausted his remedy at law. The burden of showing that he had, is thrown upon the complainant. *Chancery*, 1841, *North River Bank v. Rogers*, 8 *Paige*, 648.

9. Fraud. Undue Influence.

391. A bill to set aside a will, on the ground of fraud and undue influence, must state the impediment to the relief at law which gives the Court of Chancery jurisdiction. *Ct. of Appeals*, 1848, *Brady v. McCosker*, 1 *N. Y. (1 Comst.)*, 214; affirming *S. C.*, 1 *Barb. Ch.*, 329.

392. Where the bill showed that when filed the complainant was not in actual possession of the estate, and that a trust-term in such estate, which vested the legal title in trustees, was yet unexpired, so that no recovery could be had in ejectment, but also contained a general averment that the complainant was in possession,—*Held*, that the latter averment might be construed to mean merely that he was entitled to actual possession, and a demurrer to the bill for want of jurisdiction, on the alleged ground that there was a perfect remedy at law, was properly overruled. *Id.*

393. Evidence. A bill charging a particular fraud upon the complainant, may charge, as evidence, other similar contemporaneous frauds upon others. [1 *Hill*, 811, 817.] *V. Chan. Ct.*, 1845, *Bruen v. Bruen*, 4 *Edw.*, 640.

10. Particular Facts and Allegations.

394. Assignment in trust. A plea setting up an assignment in trust, to show the necessity of making the assignees parties, must not only aver an execution, but also a delivery and acceptance of it. *V. Chan. Ct.*, 1837, *Whitlock v. Fiske*, 3 *Edw.*, 181.

395. Insolvency. An averment of insolvency is not equivalent to a denial of having

Rules Applicable to—Partition. Contribution to Assessment.

any property. *Chancery*, 1848, *Brownell v. Curtis*, 10 *Paige*, 210.

396. The proper allegation in a bill, where it is sought to excuse the complainant for not making the representatives of a deceased person parties to the suit, is that the decedent died insolvent and without leaving any assets for the payment of his debts. [10 *Sim.*, 58.] *Chancery*, 1845, *Dart v. Palmer*, 1 *Barb. Ch.*, 92.

397. Fraud. Where fraud is charged upon the defendant in a bill of discovery, and a series of transactions is specified in relation to which the fraud is alleged to exist, the defendant cannot shield himself from fully disclosing these transactions by a general denial of fraud. Fraud results from the law and the facts, and the court must be made acquainted with all the facts to be enabled to determine whether fraud does or does not really exist. The defendant may, in many cases, very honestly deny fraud in a transaction which is actually tainted by it; for what constitutes fraud, particularly fraud in law, is often a matter of much diversity of opinion; he therefore must answer to every material allegation. [5 *Johns. Ch.*, 280; 20 *Johns.*, 554.] *Ct. of Errors*, 1829, *Pettit v. Candler*, 8 *Wend.*, 618; affirming *S. C.*, 1 *Paige*, 427.

398. Tense. An allegation in the present tense relates to the time of filing the bill. *A. V. Chan. Ct.*, 1846, *Wheeler v. Heermans*, 8 *Sandf. Ch.*, 597.

399. Act of agent. The answer conceded that the defendant's agent had repeatedly exercised authority and his acts had always been ratified, but insisted that in the case in suit his act was without express authority and without the knowledge or direction of the defendants. *Held*, that this was not sufficient to avoid the agent's act. *Ct. of Appeals*, 1853, *Wood v. Auburn & Rochester R. R. Co.*, 8 *N. Y.* (4 *Seld.*), 160.

400. Corporate power. The power of a foreign corporation to make the contract which is sought to be enforced, must be set forth in the bill. An allegation that it was incorporated with various powers and duties, will not let in proof of a power to loan money and take security on land; and setting forth a statute enacted after the transaction in question, is not enough. *A. V. Chan. Ct.*, 1845, *Bard v. Chamberlain*, 8 *Sandf. Ch.*, 81.

401. When a foreign corporation sues, it

must establish its right to bring the suit, and to make the contract it seeks to enforce; but it is sufficient if it does so on the hearing, and it need not set forth its authority in pleading. [5 *Wend.*, 478.] *Supreme Ct., Sp. T.*, 1847, *Marine & Fire Ins. Bank v. Jauncey*, 1 *Barb.*, 486. Followed, 1848 [citing, also, *Hob.*, 211; 1 *Ohitt. Pl.*, 321; 1 *Saund.*, 840, n. 2; *Ang. & A. on Corp.*, 568; but questioning the reason of the rule], *Camden & Amboy R. R. & Transportation Co. v. Remer*, 4 *Id.*, 127.

402. Will. A bill by next of kin, claiming from executors part of the property as not effectually disposed of by the will, must set forth the will. *Chancery*, 1848, *Muir v. Leake & Watts Orphan House*, 3 *Barb. Ch.*, 477.

403. A bill alleging that there was an instrument in writing purporting to be the last will and testament of M., deceased, and to be duly executed and attested; that it was admitted to probate as a will of real and personal estate, and that letters-testamentary were issued, and the executors took upon themselves the execution of the instrument, sufficiently shows that the instrument was a will, and had been so adjudged by the Surrogate's Court. *Supreme Ct.*, 1852, *Mason v. Jones*, 18 *Barb.*, 461. To somewhat similar effect, *Chancery*, 1837, *Van Cortlandt v. Beekman*, 6 *Paige*, 492.

11. Partition. Contribution to Assessment.

404. Rights of parties. In a partition suit, under the statute and Rule 174, the bill must state the rights and interests of all the parties in the premises, so far as known to the complainant, or as he has information and belief. If the share or interest of any party, or if the ownership of the inheritance, is contingent, so that the parties who may be ultimately entitled cannot be named, the complainant should set forth the nature of such contingent interest. And whatever the complainant is bound to state in his bill, the defendants may be required to admit or deny by their answers. *Chancery*, 1837, *Van Cortlandt v. Beekman*, 6 *Paige*, 492.

405. Possession. In a bill for partition, the fact that the complainant is in possession of the premises, may be presumed from the allegation that the parties are seized in common, and need not be averred. *Chancery*, 1832, *Jenkins v. Van Schaack*, 3 *Paige*, 242.

Rules Applicable to—Specific Performance;—Statute of Frauds;—Statutes;—Statute Actions.

406. Sale for assessment. Under the Laws of 1841, 325,—which authorizes the sale of real estate in certain cases to pay assessments, &c.,—a bill filed by a part-owner to compel the other parties interested in the premises to contribute, must distinctly allege that an assessment has been imposed upon the premises which is legal and valid, under which the premises have been sold or are liable to be. *Chancery*, 1845, *Dikeman v. Dikeman*, 11 *Paige*, 484.

407. To entitle the complainant to an order to extend the time to redeem, the bill should not only show a valid assessment and sale, but it should also be verified by oath. The bill should also offer, that if the suit should be discontinued or dismissed, the complainant would either redeem, &c.; or, if the premises were not redeemed, that he would pay interest. And if the complainant is irresponsible, the court will require security. *Id.*

12. Specific Performance.

408. Mistake. Where an agreement, of which specific performance is sought, is of such a nature as to authorize the court to correct any mistake which has been made therein, if the written agreement does not in fact contain the true agreement between the parties, the complainant, when he wishes to introduce parol proof to correct it, should not merely state the agreement as it ought to have been reduced to writing, but he must also state the substance of the written agreement, and must show wherein it differs from the one actually made. *Chancery*, 1844, *Coles v. Bowne*, 10 *Paige*, 526.

409. Statute of Frauds. If a bill for specific performance sets up a parol contract, with circumstances taking it out of the Statute of Frauds, the defendant cannot plead or insist upon the statute. *Ct. of Errors*, 1880, *Harris v. Knickerbacker*, 5 *Wend.*, 638.

18. Statute of Frauds.

410. Demurrer. Pleading. The Statute of Frauds does not alter the rules of pleading. If the complainant, in his bill, states the making of a contract, without alleging that it was by parol, the court will presume that it was in writing, &c., if necessary; and defendant cannot demur. Where the agreement stated in the bill is denied by the answer of the defendant, the complainant must prove

such an agreement as will be valid within the Statute of Frauds; although nothing is said in the answer on that subject. But if the making of the agreement is admitted by the answer, the defendant, in such answer, must insist that it was not in writing, and therefore not binding upon him. *Chancery*, 1880, *Cozine v. Graham*, 2 *Paige*, 177; 1832, *Ontario Bank v. Root*, 3 *Id.*, 478; 1844, *Coles v. Bowne*, 10 *Id.*, 526; 1845, *Champlin v. Parish*, 11 *Id.*, 405. To the same effect, *Ct. of Errors*, 1880, *Harris v. Knickerbacker*, 5 *Wend.*, 638. *Supreme Ct.*, 1848, *Gibbs v. Nash*, 4 *Barb.*, 449. *S. P.*, *Chancery*, 1845, *Dart v. Palmer*, 1 *Barb. Ch.*, 92. *A. V. Chan. Ct.*, 1844, *Vaupell v. Woodward*, 2 *Sandf. Ch.*, 143. See, also, *Lewin v. Stewart*,* 10 *How. Pr.*, 509.

411. Definiteness. The defence that an agreement, admitted to have been made, is not in writing, must be pleaded or set up in the answer as a fact, and distinctly put in issue. Averring that "the contract is void in law, and that the defendant is not bound to perform the same," is not definite enough to put the complainant upon proof of a contract in writing. *A. V. Chan. Ct.*, 1844, *Vaupell v. Woodward*, 2 *Sandf. Ch.*, 143.

14. Statutes. Statute Actions.

412. Defence. It is not necessary in setting up a defence under a general statute to set forth the statute. It is sufficient to set forth in the plea or answer the facts bringing the case within the operation of the statute, and to insist that upon those facts the plaintiff's right or remedy is at an end, or never existed. *Chancery*, 1883, *Bogardus v. Trinity Church*,† 4 *Paige*, 178; 1839, *Van Hook v. Whitlock*,‡ 7 *Id.*, 373.

413. Foreign usury laws. To set up the defence that a foreign contract is void by foreign usury laws, defendant should first state what those laws were at the time of the transaction, and then set out the facts which rendered the securities void according to those laws. *Chancery*, 1844, *Curtis v. Masten*, 11 *Paige*, 15.

414. In an action given by statute, the

* Reversed on another ground, 17 *How. Pr.*, 5.

† Affirmed, *Ct. of Errors*, 1835, 15 *Wend.*, 111, the only opinion stated being that there was no error in the decree, either in matter of form or upon the merits.

‡ Affirmed on other grounds, 26 *Wend.*, 43.

Rules Applicable to—Statute of Limitations;—New Promise;—Usury.

objection that it appears by the bill that the complainant has not complied with the directions of the statute, may be raised at any stage of the cause. *V. Chan. Ct.*, 1889, Manning v. Merritt, *Clarke*, 98.

15. Statute of Limitations. New Promise.

415. Anticipating defence. A complainant, seeking relief upon the ground of fraud (2 *Rev. Stat.*, 801, § 51), need not allege in the bill that he discovered the fraud complained of within six years. And a demurrer will not lie to a bill showing that the fraud occurred more than six years before the commencement of the suit, unless it also appears, positively, or by necessary intendment, that the fraud was discovered by the party aggrieved more than six years before the bill was filed. *Chancery*, 1846, Radcliff v. Rowley, 2 *Barb. Ch.*, 28.

416. A bill filed for relief on the ground of fraud, which shows on its face that the fraud was committed more than six years before the filing of the bill, should not merely state, in anticipation of the defence of the Statute of Limitations, that the fraud was discovered within six years, but show that it could not with reasonable diligence have been discovered sooner. *N. Y. Superior Ct.*, 1850, Mayne v. Griswold, 8 *Sandf.*, 468; *S. C.*, 9 *N. Y. Leg. Obs.*, 28.

417. Where the plaintiff, who resided in England, alleged in his bill, that he was induced to purchase bonds of a corporation by the false statements of the defendant, who was a director of the company, and was therefore under the most sacred obligation to make correct and truthful representations in the premises, which statements were calculated and intended to mislead, and were artfully contrived for that purpose; and there was nothing to excite the suspicions of the plaintiff, and the interest on the bonds was regularly paid until a period short of six years before the filing of the bill;—*Held*, upon demurrer, that the plaintiff had satisfactorily accounted for the non-discovery of the fraud according to this rule. *Id.*

418. A pure plea of the statute is no bar, where there are circumstances stated in the bill which take the case out of it, unless the plea is accompanied with an answer destroying the force of those circumstances, by issuable averments. [*Beames' Pl.*, 169; 2 *Ves.*,

485; 15 *Id.*, 485; *Prec. in Ch.*, 885; 3 *Atk.*, 70; 1 *Ball & B.*, 178.] *Chancery*, 1828, Kane v. Bloodgood,* 7 *Johns. Ch.*, 90; 1818, Goodrich v. Pendleton, 8 *Id.*, 884.

419. Defence to part. The Statute of Limitations is not well pleaded as a bar to the whole of the complainant's demand, if it is a good defence to a part only. *Chancery*, 1829, Wood v. Riker, 1 *Paige*, 616.

420. Presumptions of payment, founded on the lapse of time, are matter of evidence resulting from facts in the case, and are not, in many cases, *proprio jure*, a matter of plea in bar. A defendant who is a stranger to the transaction, need not, in his answer, insist directly upon presumption of payment. If he insists his ignorance of the debt and its staleness, and that he has a complete title, it is sufficient to enable him to raise the objection, at the hearing, of presumption of payment. *Chancery*, 1831, Giles v. Baremore, 5 *Johns. Ch.*, 545.

421. In pleading a subsequent promise, in order to avoid the Statute of Limitations, it is necessary to aver definitely the time of such promise; a general averment of repeated acknowledgments amounts to nothing. [2 *Ves.*, 84; 19 *Id.*, 185.] *Ct. of Appeals*, 1858, Bloodgood v. Bruen, 8 *N. Y.* (4 *Seid.*), 862; reversing *S. C.*, 4 *Sandf.*, 427.

16. Usury.

422. Relief against suit at law. Where it is apparent on the face of the bill that the borrower can establish his defence of usury at law, under the act of 1837, his bill for relief in equity, against the suit at law, is bad on demurrer. In such case the court will not take jurisdiction. *V. Chan. Ct.*, 1840, Skinner v. Christmas, *Clarke*, 268.

But where the bill is filed to set aside a usurious mortgage, with power of sale, given by the complainant to the defendant, and no action at law has been brought on the usurious security, the court is bound by the statute to take jurisdiction. *Trowbridge v. Christmas, Id.*, 271.

423. Under Rule 17 as amended, whatever is stated in a bill to avoid a contract for usury as the act of the defendant, or as a fact within his personal knowledge, if not denied by the

* Affirmed, *Ct. of Errors*, 1828, 8 *Cow.*, 860, but no opinion reported.

Analysis.

answer, is admitted. *Chancery*, 1842, Anderson v. Rapelye,* 9 Paige, 483.

17. Waste.

424. In a bill to restrain the lessee from cutting down trees, it is admissible to set forth the extent of the complainant's title, and facts to meet defendant's pretence that the trees were necessary for fencing, &c., and that the trees alleged to be ornamental, were so considered by former owners. *Chancery*, 1836, Hawley v. Wolverton, 5 Paige, 522.

PLEADING, UNDER THE CODE OF PROCEDURE

[Under this title are presented the cases upon the mode of pleading in actions, in courts of record, under the Code of Procedure. Further discussions of the substance which is necessary to be presented in making out each cause of action or defence, will be found under their appropriate titles elsewhere.]

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I. GENERAL PRINCIPLES.

1. Of the Changes introduced by the Code.

1. The distinction between actions at law and suits in equity, and the forms of all such actions and suits abolished. *Code of Pro.*, § 69.

2. All the forms of pleading heretofore existing are abolished; and, hereafter, the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act. *Code of Pro.*, § 140.

3. The rules for "determining the sufficiency of pleadings," to which the Code refers, are manifestly rules of pleading and not of law. [*Code*, § 140; 8 *How. Pr.*, 497; 4 *Id.*, 819; 5

Id., 216, 472; 7 *Barb.*, 80.] *N. Y. Superior Ct.*, 1851, *Fry v. Bennett*, 5 *Sandf.*, 54; *S. C.*, 9 *N. Y. Leg. Obs.*, 330; less fully, 1 *Code R.*, *N. S.*, 238.

4. Upon a given state of facts, the law pronounces the same judgment since, that it did prior to the Code. An answer stating only such facts, as under the former system, if set out in a special plea, would have made the latter bad on general demurrer, according to decisions determining the precise question, is frivolous. *N. Y. Superior Ct.*, 1855, *Strong v. Stevens*, 4 *Duer*, 668.

5. The fundamental principles of pleading are not abolished. Facts must still be set forth, according to their legal effect and operation, and not the mere evidence of those facts, nor arguments, nor inferences, nor matter of law only. Nor should pleadings be hypothetical, nor in the alternative. *Supreme Ct.*, 1849, *Boyce v. Brown*, 7 *Barb.*, 80; affirming *S. C.*, 3 *How. Pr.*, 391.

6. Equitable causes. The Code has not changed the substance of the old rules of equity pleading, and a complaint seeking equitable relief, should set forth the facts as much at large as was required in a well-drawn bill in equity. Thus facts important only with reference to an injunction sought for, or bearing only on the question of costs, may be alleged. *N. Y. Superior Ct.*, 1851, *Howard v. Tiffany*, 8 *Sandf.*, 695.

7. A complaint in an equitable action under the Code, must not contain the system of pretence and charge which prevailed in the former chancery pleading. *Supreme Ct., Sp. T.*, 1853, *Clark v. Harwood*, 8 *How. Pr.*, 470.

8. Allegations merely formal—i. e., such as require no proof at the trial—are unnecessary under the Code. *Supreme Ct.*, 1857, *Ensign v. Sherman*, 14 *How. Pr.*, 439; reversing *S. C.*, 18 *Id.*, 85; 1858, *Dias v. Short*, 16 *Id.*, 322.

9. Two prominent elements intended in the new system are, that falsehoods should not be put upon the record, and that the pleadings should disclose the facts relied on in support or defence of an action. *Ct. of Appeals*, 1854, *Bush v. Prosser*, 11 *N. Y.* (1 *Kern.*), 347; reversing *S. C.*, 13 *Barb.*, 221.

10. Misconception of the cause of action. Under the Code of Procedure, the judgment may be sustained, if facts were stated in the complaint which warrant it, al-

General Principles;—What is to be stated in Pleading.

though, the grounds upon which it was rendered were other than those evidently contemplated by the pleader. *Ct. of Appeals*, 1854, *Wright v. Hooker*, 10 *N. Y.* (6 *Seld.*), 51.

11. Corporations. The provision of 2 Rev. Stat., 458, § 3,—which declares that in suits brought by a corporation, it shall not be necessary to prove on the trial the existence of such corporation, unless the defendant shall have pleaded in abatement, or in bar, that the plaintiff is not a corporation,—was enacted to relieve plaintiffs from preparing, in every case of an action by a corporation where the general issue was pleaded, to prove their charter. If defendant desired to litigate that question, he was required to plead the fact expressly. The Code has not abolished that provision. Taking §§ 140 and 421 together, it will be seen that the prior practice and forms of pleadings are abolished only in a qualified manner; and there is no inconsistency or repugnancy in applying the provision referred to from the Revised Statutes to actions under the Code. There are the same reasons of convenience for it now as under the former system, and it does not conflict with the Code. *Ct. of Appeals*, 1855, *Bank of Genesee v. Patchin Bank*, 13 *N. Y.* (3 *Kern.*), 809. Compare PLEADING, AT COMMON LAW, 825–827, 815–817.

12. The former rules relative to proferet and oyer, have no application to actions under the Code. *N. Y. Com. Pl., Sp. T.*, 1856, *Mayor, &c., of N. Y., v. Doody*, 4 *Abbotts' Pr.*, 127. *N. Y. Superior Ct.*, 1852, *Bright v. Currie*, 5 *Sandf.*, 433; *S. C.*, 10 *N. Y. Leg. Obs.*, 104.

13. Even if they had, the omission of an executor to make proferet of letters-testamentary, is not ground of demurrer. *Supreme Ct., Sp. T.*, 1858, *Welles v. Webster*, 9 *How. Pr.*, 251.

2. What is to be stated in Pleading.

14. In general. Neither the evidence by which the facts alleged are to be established, nor the legal conclusions to be derived from such facts, can properly be stated. A complaint is sufficient, if it contains a simple statement of facts which, if proved, will entitle the plaintiff to judgment. The answer, in like manner, is sufficient if it deny generally, all the facts stated in the complaint, or specifically, any particular fact stated, so as to form

an issue of fact upon the matters of the complaint; or, if, admitting the facts stated in the complaint to be true, it states other facts which, if proved, will countervail the legal effect of the facts alleged in the complaint, and admitted to be true, and shows that notwithstanding the truth of such facts, the defendant, and not the plaintiff, is entitled to judgment. *Supreme Ct., Sp. T.*, 1849, *Russell v. Olapp*, 7 *Barb.*, 482. To similar effect, *Glenny v. Hitchins*, 4 *How. Pr.*, 98; *S. C.*, 2 *Code R.*, 56.

15. In pleading, the Code does not authorize the party to set out all the evidence in the case, nor to plead a mere presumption of a fact. *Supreme Ct., Sp. T.*, 1850, *Pattison v. Taylor*, 8 *Barb.*, 250.

16. In general, a pleading, to be good by the settled principles of pleading, as modified by the Code, must state the facts constituting a legal cause of action, or ground of defence; and these should be set forth in a plain, direct, definite, certain, and traversable manner, and according to their legal effect. Any number of facts constituting one cause of action or one defence, may be combined; but each cause of action, and each defence, should be separately stated. *Supreme Ct.*, 1849, *Boyce v. Brown*, 7 *Barb.*, 80; affirming *S. C.*, 3 *How. Pr.*, 391.

17. An answer justifying under a right of way must set up the grant actual or presumed on which it rests. Alleging that defendant claims a right of way by grant, without stating any thing more, or that he had the use of the way by a mere license, which is revocable, or that he claimed it by virtue of an agreement which is not shown to have been performed on his part, or was not mutual, is bad. *Ib.*

18. Facts and evidence. Under the Code, the pleader must aver only the facts on which his cause of action or his defence rests, and not the circumstances which tend to prove that fact.* *Supreme Ct., Chambers*, 1849, *Shaw v. Jayne*, 4 *How. Pr.*, 119; *Floyd v. Dearborn*, 2 *Code R.*, 17; *Sp. T.*, 1850, *Knowles v. Gee*, 8 *Barb.*, 350; *S. C.*, 4 *How. Pr.*, 317; 3 *Code R.*,

* The doctrine asserted in *Burget v. Bissell*, 5 *How. Pr.*, 192; *Rochester City Bank v. Suydam*, *Id.*, 216; and *Le Roy v. Marshall*, 8 *Id.*, 373, that this rule was limited to pleading actions and defences of a legal nature, is overruled in *Williams v. Hayes*, 5 *Id.*, 470, and many subsequent cases.

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81. To similar effect, 1851, *Williams v. Hayes*, 5 *How. Pr.*, 470.

19. Distinction between pleading facts, and the evidence of facts, stated. *Talman v. Rochester City Bank*, 18 *Barb.*, 123.

20. Instances of the application of the rule, that facts, not evidence, must be pleaded. *Smith v. Brown*, 17 *Barb.*, 481; *Walter v. Lockwood*, 23 *Id.*, 228; S. C., 4 *Abbotts' Pr.*, 307; *Hyatt v. McMahon*, 25 *Barb.*, 457; *Allen v. Patterson*, 7 *N. Y. (8 Seld.)*, 476; *People v. Ryder*, 12 *N. Y. (2 Kern.)*, 433; affirming S. C., 16 *Barb.*, 870; *Stone v. De Puga*, 4 *Sandf.*, 681; *Radde v. Ruckgaber*, 8 *Duer*, 684; *Wooden v. Strew*, 10 *How. Pr.*, 48; *Eddy v. Beach*, 7 *Abbotts' Pr.*, 17; *Dows v. Hotchkiss*, 10 *N. Y. Leg. Obs.*, 281; *Shaw v. Jayne*, 4 *How. Pr.*, 119; *Clark v. Harwood*, 8 *Id.*, 470; *Page v. Boyd*, 11 *Id.*, 415; *Buzzard v. Knapp*, 12 *Id.*, 504.

21. Accuracy. The plaintiff must state the facts constituting his cause of action. He is not at liberty to make it out by proving facts not alleged. If he would charge the defendants as common carriers, he must state that they were such; and if he does not allege a compensation for the carriage, their agreement must be regarded as made without a consideration. If a demand is necessary to show a right of action, it must be averred. *Supreme Ct.*, 1850, *Bristol v. Rensselaer & Saratoga R. R. Co.*, 9 *Barb.*, 158.

Consult, however, *VARIANCE*.

22. The averment of a fact necessary to be established, cannot be dispensed with because it may be presumed from the existence of other facts. [15 *Barb.*, 34.] *Supreme Ct.*, *Sp. T.*, 1856, *Van De Sande v. Hall*, 18 *How. Pr.*, 458.

23. General averment of indebtedness. A complaint stating in substance that on, &c., at, &c., the plaintiffs, at the request of the defendant, sold and delivered to him goods for which he then owed, or was then bound to pay, the plaintiffs, the sum of, &c.; and further averring that there was then due them from the defendant the said sum, for which sum the plaintiffs demanded judgment,—states facts enough to constitute a cause of action. These facts are implied in a statement that “defendant is indebted to plaintiffs in the sum of, &c., for goods sold,” describing the sale as above, in form as in an old count in assumpsit. The allegation that the price is “due,” may be

reasonably intended to mean that it is payable. *Op. of Appeals*, 1852, *Allen v. Patterson*,* 7 *N. Y. (8 Seld.)*, 476. (To similar effect, *N. Y. Com. Pl., Sp. T.*, 1849, *Tucker v. Rushton*, 7 *N. Y. Leg. Obs.*, 315; S. C., 2 *Code R.*, 59.) Followed in a case where the nature of the items of the account were not stated, *N. Y. Superior Ct.*, 1856, *Graham v. Camman*, 5 *Duer*, 697; S. C., 13 *How. Pr.*, 360. Compare *Chamberlin v. Kaylor*, 2 *E. D. Smith*, 184; and see *Farron v. Sherwood*, 17 *N. Y. (8 Smith)*, 227.

24. A complaint to recover for money lent to, and paid, laid out, and expended for, the defendant at his request, is sufficient under the Code; though as general in its allegations of the particulars of the cause of action as the old form of a declaration in *indebitatus assumpsit*. If the defendant wishes a more detailed statement, his remedy is to demand a copy of the account, or the particulars of the cause of action. [8 *Seld.*, 476.] *N. Y. Superior Ct., Chambers*, 1854, *Cudlipp v. Whipple*, 4 *Duer*, 610; S. C., 1 *Abbotts' Pr.*, 106.

25. A claim for services was stated as follows: That the plaintiffs, at the time herein-after mentioned, and before and afterwards, were partners and stockbrokers at, &c., and that they reasonably deserve to have from the defendant for their services as such stockbrokers, in making purchases and sales of stock, which they were employed by the said defendant to make, and which they did make as his brokers, during the year 1854, a large sum of money, to wit, the sum of \$115, or thereabouts, and that the defendant has not paid the said commissions, or any part thereof

* In *Chesbrough v. N. Y. & Erie R. R. Co.*, 26 *Barb.*, 9; S. C., 18 *How. Pr.*, 557, it was said that this case is not an authority as to the standard of definiteness and certainty required in pleading; and in *Blanchard v. Strait*, 8 *How. Pr.*, 33, such a complaint was held indefinite and uncertain. So in *Wiggin v. Gans* (*N. Y. Superior Ct.*, 1851, 4 *Sandf.*, 646), it was held, that stating that a set-off claimed was for work and labor, and for goods, wares, and merchandise, in the language of the common counts in assumpsit under the old practice, was indefinite and uncertain. But such a complaint was held sufficiently definite and certain in *Adams v. Holley* (*Supreme Ct., Sp. T.*, 1854), 12 *How. Pr.*, 326. So, also, in *Dows v. Hotchkiss* (*Supreme Ct., Sp. T.*, 1852), 10 *N. Y. Leg. Obs.*, 281, a complaint in this form alleging an indebtedness on an account was held sufficiently definite and certain.

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to the plaintiffs. *Held*, sufficient on demurrer, though it would be obnoxious to a motion to make more definite and certain. *N. Y. Superior Ct.*, 1856, *Merwin v. Hamilton*, 6 *Duer*, 244.

26. A complaint which merely states that the defendant is justly indebted to the plaintiff for moneys had and received by him to the use of the plaintiff, and that being so indebted, he became liable to pay the amount to the plaintiff, is bad upon demurrer, for the reason that it simply affirms a legal conclusion, without stating, as required by the Code, the facts which constitute the cause of action. *N. Y. Superior Ct.*, *Sp. T.*, 1858, *Lienan v. Lincoln*, 2 *Duer*, 670; *S. C.*, 12 *N. Y. Leg. Obs.*, 29. *S. P.*, *N. Y. Com. Pl.*, *Drake v. Cockroft*, 4 *E. D. Smith*, 34; *S. C.*, 1 *Abbotts' Pr.*, 208; 10 *How. Pr.*, 877; and see *Seeley v. Engell*, 17 *Barb.*, 580.

27. A complaint averring that the defendant is indebted to plaintiff for services rendered for the defendant, as his attorney and counsel, in divers suits, and for other professional services, and at his request, and for money paid out and expended for the defendant, at his request, previous to a day named, sufficiently states a cause of action, and the plaintiff is not confined to proof of one item. *Supreme Ct.*, 1858, *Beekman v. Platner*, 15 *Barb.*, 550.

28. In an action by a corporation to recover funds received by the defendant as their treasurer, if the complaint shows the relation of the parties, and alleges as a matter of fact that defendant is indebted, giving a statement of the items of moneys received by him, this is equivalent, on demurrer, to alleging that all that is essential to make him indebted has been done, and consequently that a demand has been made. In such a case the summons is a sufficient demand; and if none were made, the defendant should pay the debt, but not the costs. *Supreme Ct.*, 1857, *Second Avenue R. R. Co. v. Coleman*, 24 *Barb.*, 800.

29. **Conclusions of law.** Uncertain statements and conclusions of law,—*Held*, bad. *Levy v. Bend*, 1 *E. D. Smith*, 169.

30. **Payment.** A complaint must set forth all the material issuable facts which are relied on as establishing the plaintiff's right of action, and not the inferences from those facts, which, under the advice of his counsel, he may deem to be the conclusions of law. The facts to be stated must be real, traversable

facts, as distinguished from conclusions of law. Thus under a complaint alleging that the plaintiff settled an account by paying in money the whole amount claimed to be due, and claiming to recover a sum which he overpaid in consequence of an overcharge in the account, the plaintiff cannot recover on proving that he settled the account by an order for delivery of stock. *N. Y. Superior Ct.*, 1852, *Mann v. Moorewood*, 5 *Sandf.*, 557.

31. **Sale to third person on defendant's credit.** When goods sold are delivered to a third person for the exclusive use of such person, his authority to receive them, and their delivery to him, are material and issuable facts, which the plaintiff, in an action against the purchaser, is bound to prove upon the trial, and is therefore bound to aver in the complaint. It is true that the delivery of goods sold to a third person for the use of such person, under an authority from the purchaser, is, in judgment of law, a delivery to such purchaser; but it is so, not as a fact, but as a conclusion of law. *N. Y. Superior Ct.*, 1853, *Smith v. Leland*, 2 *Duer*, 497.

32. But under an allegation, in such case, of a sale and delivery to the defendant, proof of a delivery to the third person at the defendant's request, and followed by his ratification and promises to pay, is not a failure to prove the plaintiff's allegations in their entire scope and meaning, but a variance in some particulars only, and may be disregarded if the defendant does not appear to have been misled. *N. Y. Superior Ct.*, 1857, *Rogers v. Verona*, 1 *Bow.*, 417.

33. That a variance in this respect is no ground for reversal, when the whole merits have been investigated and full justice done. *N. Y. Com. Pl.*, 1851, *Briggs v. Evans*, 1 *E. D. Smith*, 192.

34. **Validity of instrument.** Whether a written instrument, under which plaintiffs claim possession as mortgagees, is or is not a valid mortgage, is a question of law, and to enable the court to determine it, when the action is founded upon the instrument, either the whole instrument, or those provisions which are relied on, as giving to it the character of a mortgage, must be set forth in the complaint, or a copy annexed. *N. Y. Superior Ct.*, 1858, *Fairbanks v. Bloomfield*, 2 *Duer*, 349.

35. Merely averring that the note in suit

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was obtained from the defendant by fraud, and is without consideration and void, is bad. It presents no issuable fact. [4 How. Pr., 98, 347.] *Supreme Ct., Chambers*, 1850, *McMurray v. Gifford*, 5 How. Pr., 14.

36. — of election. In an action to try the title to an office, an allegation in the complaint that "at an election duly and legally held . . . pursuant to the statute in such case made and provided," for the election of a county judge, to discharge the duties of that office, from a specified day, for four years, the relator was elected such judge, and that a majority of the legal votes was given for him, is an allegation of matters of fact, and not of a conclusion of law; and it sufficiently states the time of the election. There is a reference to the statute, and that fixes the precise time. There could be no election on any other day than that fixed by statute. If more definiteness is necessary, a motion and not a demurrer is the remedy. *Ct. of Appeals*, 1855, *People v. Ryder*, 12 N. Y. (2 Kern.), 433; affirming S. C., 16 Barb., 370.

37. Liability. An allegation that a defendant, as executrix, controls and manages the estate of the deceased, and is responsible therefor, is a conclusion of law and not a fact. *Supreme Ct., Sp. T.*, 1859, *Phinney v. Phinney*, 17 How. Pr., 197.

38. Liability of special partner. In an action against partners, seeking to charge as a general partner one who was a special partner under the statute, it is not proper that the complaint should set forth the special partnership, and the acts in violation of the statute, relied on as rendering the defendant liable as a general partner; but he should be charged as a general partner. Facts and not evidence are to be pleaded. *N. Y. Superior Ct.*, 1851, *Stone v. De Puga*, 4 Sandf., 681.

39. Ownership. In an action on a contract made by the defendant with a third person, the plaintiff showed title to the claim only by the allegation, "the said plaintiff is now the sole owner of the said demand." *Held*, on demurrer, that the allegation was insufficient. It was merely an allegation of a conclusion of law. The defendant had a right to be informed by the complaint how the plaintiff became the owner of the demand; whether by purchase, assignment, operation of law, or how otherwise. Some fact or facts should be stated by which it would appear how he became such

owner. [7 Barb., 432; 4 How. Pr., 202; 5 Id., 14; 10 Id., 233.] *Supreme Ct., Sp. T.*, 1855, *Thomas v. Desmond*, 12 How. Pr., 321. To the same effect, 1854, *Adams v. Holley, Id.*, 326.

40. Party in interest. An allegation in a pleading that a party to the action is not the real party in interest, or that a third party who is shown by the adverse pleading to be a necessary party, has not any interest, is bad upon demurrer, for the allegation does not involve a traversable fact, but merely a conclusion of law. *Supreme Ct., Circuit*, 1849, *Bentley v. Jones*, 4 How. Pr., 202; *Sp. T.*, 1849, *Russell v. Clapp*, 4 Id., 347; S. C., 3 Code R., 64.

41. Intent. The complaint in an action to restrain proceedings by advertisement to foreclose a mortgage, under the statute, alleged that the defendant, being an attorney, bought the mortgage and immediately commenced the proceedings to foreclose, and alleged that he bought it with intent to sue thereon contrary to the statute. *Held*, that the foreclosure not being a suit, the latter allegation was a mere conclusion of law, and not admitted by a demurrer. *Supreme Ct., Sp. T.*, 1850, *Hall v. Bartlett*, 9 Barb., 297.

42. Breach of obligation. Ground of judgment. In an action against a surety for the performance of a special agreement, to recover damages for the principal's failure to perform, an averment that the principal "failed to fulfil his obligations by virtue of said instrument," is not sufficient, nor is an averment that plaintiff had recovered judgment against the principal "on account of his failure to fulfil his obligations." The facts themselves, not the legal conclusions, ought to be pleaded. [7 Barb., 80; Id., 482; Whitt. Pr., 161.] *Supreme Ct.*, 1852, *Van Schaick v. Winne*, 16 Barb., 89; S. P., *Lawrence v. Wright*, 2 Duer, 678.

43. An implied promise is a conclusion of law. It is sufficient to state facts showing the duty from which the law implies a promise, without also alleging in terms a promise. *Ct. of Appeals*, 1858, *Farron v. Sherwood*, 17 N. Y. (8 Smith), 227. *Supreme Ct., Chambers* (1849?), *Glenny v. Hitchins*, 4 How. Pr., 98; S. C., 2 Code R., 56; *Sp. T.*, 1853, *Dows v. Hotchkiss*, 10 N. Y. Leg. Obs., 281; S. P., 1849, *Russell v. Clapp*, 7 Barb., 432. *Contra*, *Hall v. Southmayd*, 15 Id., 32; *Cropey v. Sweeney*, 27 Id., 310; S. C., 7 *Abbotts' Pr.*, 129.

The Complaint;—Title of the Cause, &c.

3. Pleadings not Evidence.

44. The pleading of a party is not, under the Code, evidence in his own behalf. *Supreme Ct., Sp. T.*, 1859, *Ames v. Hurlbut*, 17 *How. Pr.*, 185; *S. P.*, 1856, *Voris v. McCredy*, 16 *Id.*, 87.

45. No pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading. *Code of Pro.*, § 167, last clause.

II. THE COMPLAINT.

1. Title of the Cause, &c.

46. The complaint shall contain: the title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant. *Code of Pro.*, § 142, subd. 1.

47. Name of the court. Where summons and complaint are served together, if the name of the court appears in the summons its omission from the complaint should be disregarded as a technical irregularity, which cannot injure the defendant. [8 *How. Pr.*, 278.] *Supreme Ct., Sp. T.*, 1853, *Van Namee v. Peoble*, 9 *How. Pr.*, 198. Followed, 1856, *Van Benthuyzen v. Stevens*, 14 *Id.*, 70.

48. The place of trial must be clearly stated in the complaint, and the omission to state it is not like a mere irregularity. This defect in the complaint is not waived by the obtaining of time to answer, nor can it be cured by reference to the summons. The complaint in such case must be amended or stricken out as irregular. But upon motion for such amendment before issue joined, the court will not fix upon a particular county as the place of trial. *Supreme Ct., Sp. T.*, 1854, *Merrill v. Grinnell*, 10 *How. Pr.*, 81; *S. C.*, less fully, 12 *N. Y. Leg. Obs.*, 286. Followed, 1858, *Hotchkiss v. Crooker*, 15 *How. Pr.*, 336.

49. Names of parties. When plaintiff is ignorant of the name of a defendant, he may be designated by any name; and when his true name is discovered, the pleading or proceeding may be amended. *Code of Pro.*, § 175. See, also, *PARTIES*, 397, 398.

50. The complaint of an infant suing by guardian should be entitled with the name of the infant, adding, "by A. B., his guardian," against, &c.; but it is enough if the names of the parties appear correctly in the body of the complaint. *Supreme Ct., Sp. T.*, 1848, *Hill v. Thaxter*, 2 *Code R.*, 3; *S. C.*, 3 *How. Pr.*, 407.

51. One plaintiff representing many others. An action cannot be maintained for the benefit of an unincorporated society in the name of a member, merely upon an allegation that the members are extremely numerous; but the complaint must set forth the articles of association to enable the court to determine whether they have a right of action in the case, and whether the plaintiff named has authority to sue for them. A statement that he is especially authorized to do so, is not enough. *N. Y. Superior Ct.*, 1851, *Habicht v. Pemberton*, 4 *Sandf.*, 657.

52. In an action in which an injunction is sought, if all persons interested in the subject-matter are so numerous that it would be greatly inconvenient to make them all parties, one of them may sue on behalf of all, but he must distinctly state in his complaint that he sues as well on behalf of himself as on behalf of all others equally interested with him. *Supreme Ct., Sp. T.*, 1851, *Smith v. Lockwood*, 1 *Code R., N. S.*, 319; *S. C.*, 10 *N. Y. Leg. Obs.*, 12; 1857, *Wood v. Draper*, 24 *Barb.*, 187; *S. C.*, 4 *Abbotts' Pr.*, 322.

53. The complaint by one or more of a numerous class, may state that the plaintiffs sue for the benefit of those interested who may "come in and contribute to the expenses." Under the established practice, the words of the Code (§ 119, *q. v.*, *PARTIES*, 548),—"for the benefit of the whole,"—mean no more. *Supreme Ct.*, 1854, *Dennis v. Kennedy*, 19 *Barb.*, 517.

54. A taxpayer or corporator in a municipal corporation, who sues as such for an injunction against the corporation, must aver in his complaint that he sues in his own behalf, and also in behalf of all others similarly interested who may come in, &c. *Supreme Ct., Sp. T.*, 1857, *Wood v. Draper*, 24 *Barb.*, 187; *S. C.*, 4 *Abbotts' Pr.*, 322.

55. Description of the person. A complaint commencing "A. B., administrator of the goods, &c., of, &c., deceased, plaintiff in this action," and containing no other statement of the fact of plaintiff's appointment as administrator, does not allege that he is administrator, or show that he prosecutes in that capacity. The introductory statement is a *descriptio personæ* merely. [6 *N. Y.*, 163; 4 *Den.*, 80; 17 *Wend.*, 197; 9 *Id.*, 490; 8 *Cow.*, 235; 7 *Barb.*, 204.] *Supreme Ct.*, 1855, *Sheldon v. Hoy*, 11 *How. Pr.*, 11.

The Complaint;—Mode of stating the Cause of Action.

56. Reason of making defendant instead of plaintiff. When the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. *Code of Pro.*, § 119.

57. Four joint-owners of a vessel having leased her, two of them afterwards brought suit for her hire. *Held*, that though a legal action could only be sustained by all suing together, yet fewer than all might proceed upon equitable rights, and enforce them in equity; but to entitle themselves to do so, they must show in their complaint facts which excused them from joining the co-owners as plaintiffs, and must join them as defendants, unless it were shown that they had ceased to have any interest in the matters in controversy. *N. Y. Superior Ct.*, 1856, *Coster v. N. Y. & Erie R. R. Co.*, 3 *Abbotts' Pr.*, 382; *S. O.*, less fully, 6 *Duer*, 48.

58. Defendant not served, omitted. In an action corresponding to the non-bailable actions of the former practice, if several defendants are joined in the summons, but only one served, the complaint may be against the latter only, omitting the names of the others. *Supreme Ct.*, *Sp. T.*, 1851, *Travis v. Tobias*, 7 *How. Pr.*, 90.

2. Mode of stating the Cause of Action.

59. The complaint shall contain . . . 2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. *Code of Pro.*, § 142, subd. 2.

60. A complaint against two defendants, which does not set forth facts sufficient to constitute a simple joint liability of both, but shows a liability partly joint, and partly and principally several, is fatally defective, and defendants may object in any stage of the suit. *Supreme Ct.*, 1854, *Lewis v. Acker*, 11 *How. Pr.*, 163.

61. Anticipating defence. It is unnecessary for the plaintiff to set forth in his complaint facts which are matters of defence—*e. g.*, payments made to him on account of the indebtedness in suit; and if he does so, he cannot be compelled to make such allegations more definite and certain. *Supreme Ct.*, *Sp. T.*, 1856, *Van Demark v. Van Demark*, 18 *How. Pr.*, 872.

62. The plaintiff cannot properly allege, in his complaint, matters only important by way of anticipating and avoiding a defence which it is wholly optional with defendant to inter-

pose in his answer, or to waive—*e. g.*, the Statute of Limitations. *Supreme Ct.*, *Sp. T.*, 1857, *Butler v. Mason*, 5 *Abbotts' Pr.*, 40.

63. The plaintiff may, in his complaint, state facts connected with the cause of action, which avoid an anticipated defence—*e. g.*, that he had been induced, by false representations, to receive in payment a worthless check. *Supreme Ct.*, *Sp. T.*, 1856, *Bracket v. Wilkinson*, 18 *How. Pr.*, 102.

64. Former proceedings in Justice's Court. In an action commenced in a County Court, after discontinuance before a justice of the peace, on a plea of title, it is not necessary that the complaint should set forth the proceedings in the justice's court; but if it were, appearing at the trial is a waiver of the omission. The proceedings before the justice should be made a part of the judgment-roll, on a recovery in the County Court, and the record would then show jurisdiction. *Supreme Ct.*, 1856, *Clyde & Rose Plank-road Co. v. Parker*, 22 *Barb.*, 323. To the same effect, *Sp. T.*, 1854, *Clyde & Rose Plank-road Co. v. Baker*, 12 *How. Pr.*, 371.

65. Facts authorizing arrest of a defendant, need not be set forth in the complaint, except when they are facts constituting the cause of action. *Supreme Ct.*, *Sp. T.*, 1853, *Union Bank v. Mott*, 6 *Abbotts' Pr.*, 315; 1857, *Frost v. McCarger*, 14 *How. Pr.*, 181; 1849, *Secor v. Roome*, 2 *Code R.*, 1; *Chambers*, 1851, *Oheney v. Garbutt*, 5 *How. Pr.*, 467; *Gen. T.*, *Barker v. Russell*, 11 *Barb.*, 308. Approved and followed, *Sp. T.*, 1853, *Field v. Morse*, 8 *How. Pr.*, 47; 1856 [citing 2 *Code R.*, 117; 6 *N. Y.*, 560; 8 *How. Pr.*, 473], *Sellar v. Sage*, 18 *Id.*, 280. To the contrary was *Barber v. Hubbard*, *Sp. T.*, 1850, 8 *Code R.*, 156.

66. Where the summons and complaint are upon a contract for a specified sum of money, it is improper to insert in the complaint allegations that the defendant was guilty of a fraud in contracting the debt, or incurring the obligation, for which the action is brought. This might be a surprise on defendant, if the summons were served alone. If plaintiff would obtain an arrest, he must do so by order pending the suit. *N. Y. Superior Ct.*, 1851, *Lee v. Elias*, 8 *Sandf.*, 786.

67. Statement of a defendant's claim. Although § 118 of the Code allows any person who has, or claims, an interest in the con-

The Complaint;—Mode of stating the Cause of Action.

troversy, adverse to the plaintiff, to be made defendant, the *nature* of the claim must be stated, otherwise there would be no method of ascertaining whether it could be joined with the main subject of litigation under § 167; and, at all events, the defendants are entitled to know what the complaint is against them. *So held*, in an action for partition. *Supreme Ct.*, 1853, *Stryker v. Lynch*, 11 *N. Y. Leg. Obs.*, 116.

68. The complaint in a creditor's action alleged that certain defendants claimed an interest in the property which plaintiff sought to reach, and that their claims were unfounded and untrue. *Held*, that it was not an admission of their claim; and that the plaintiff, after having established his own claim, was not bound to go on and disprove theirs. *Supreme Ct., Sp. T.*, 1859, *Ames v. Hurlbut*, 17 *How. Pr.*, 185.

69. *Belief*. An allegation in a complaint that plaintiff believes such a fact, is, on demurrer, equivalent to a direct allegation. The remedy, if any, is by a motion to make it more definite and certain. *Supreme Ct., Sp. T.*, 1851, *Howell v. Fraser*, 6 *How. Pr.*, 221. To the same effect, *Bement v. Wisner*, 1 *Code R.*, *N. S.*, 148.

70. *Averment on information, &c.* It is unnecessary, in any case, for the plaintiff to distinguish in his complaint the allegations which are made on information and belief. *Supreme Ct., Sp. T.*, 1857, *Ricketts v. Green*, 6 *Abbotts' Pr.*, 82. *N. Y. Superior Ct.*, 1855, *N. Y. Marbled Iron Works v. Smith*, 4 *Duer*, 362. To the same effect, *Supreme Ct., VIII. Dist., Sp. T.*, 1851, *Truscott v. Dole*, 7 *How. Pr.*, 221; where the words, "as the plaintiff is informed and believes," were struck out as redundant.

The contrary view was taken in *Finnerty v. Barker*, 7 *N. Y. Leg. Obs.*, 316.

71. It is no objection to a complaint that facts within plaintiff's personal knowledge are stated upon information and belief. *N. Y. Superior Ct.*, 1855, *N. Y. Marbled Iron Works v. Smith*, 4 *Duer*, 362.

72. *Matters not within the knowledge* of the plaintiff may be stated upon belief, without averring information. *So held*, on demurrer. *N. Y. Superior Ct.*, 1852, *Radway v. Mather*, 5 *Sandf.*, 654.

73. A verification of a complaint in the ordinary form is sufficient to obtain an injunc-

tion upon, if the allegations relied upon, as sufficient grounds for granting the injunction, are stated positively in the complaint, and not on information and belief. *Supreme Ct., Sp. T.*, 1853, *Woodruff v. Fisher*, 17 *Barb.*, 224.

74. *Cross-complaint*. That where leave is given to file a cross-complaint, the complaint must, in some degree, correspond with the requisites of a cross-bill. *Supreme Ct.*, 1850, *Newcomb v. Keteltus*, 2 *Code R.*, 152.

75. *Several counts for same cause*. The practice of setting forth a single cause of action in different counts is abolished by the Code. There can be but one substantially true statement of a single cause of action. *Supreme Ct., I. Dist., Sp. T.*, 1856, *Whittier v. Bates*, 2 *Abbotts' Pr.*, 477; *II. Dist., Sp. T.*, 1854, *Lackey v. Vanderbilt*, 10 *How. Pr.*, 155; 1855, *Dunning v. Thomas*, 11 *Id.*, 281. To the same effect, *III. Dist., Sp. T.*, 1854, *Churchill v. Churchill*, 9 *Id.*, 552; *III. Dist., Sp. T.*, 1851, *Stockbridge Iron Co. v. Mellen*, 5 *Id.*, 489; but compare *Mead v. Mali*, 15 *Id.*, 847.

76. Where a complaint sets forth one cause of action in two statements or counts, as two causes of action, but without any substantial difference, so that it is apparent that there is in fact but one cause of action, the complaint should be set aside on motion, even though there be some reason for supposing that no defence to the action was contemplated. *Supreme Ct., III. Dist., Sp. T.*, 1856, *Ford v. Mattice*, 14 *How. Pr.*, 91.

77. Where a single cause of action is pleaded in several counts, the defendant's remedy is by a motion to strike out, founded on affidavits, not by demurrer.* *Supreme Ct., II. Dist., Sp. T.*, 1854, *Lackey v. Vanderbilt*, 10 *How. Pr.*, 155.

78. A plaintiff may be allowed to set up one cause of action in two different counts, where there is a fair and reasonable doubt of his ability to safely plead them in one mode only. *Supreme Ct., I. Dist.*, 1855, *Jones v. Palmer*, 1 *Abbotts' Pr.*, 442.

79. *Double aspect*. Defendants had become joint assignees of a lease in fee subject to

* In *Lackey v. Vanderbilt*, 10 *How. Pr.*, 155, the counts subsequent to the first were struck out, with leave to plaintiff to elect to retain any other one in lieu of the first, or plead anew. In *Dunning v. Thomas*, 11 *How. Pr.*, 281, and *Whittier v. Bates*, 2 *Abbotts' Pr.*, 577, the complaints were set aside with leave to amend.

The Complaint;—Several Causes of Action, and their Separate Statement.

an annual rent, and the plaintiff, who was the devisee of the lessor, brought an action against both for the whole rent due, and alleged in his complaint that he did not know in what proportion they held the lands, or whether jointly or severally, and prayed judgment against them jointly, if it should turn out they were jointly liable, or severally for their proper portions if their liability was several; and after issue joined it appeared that they were severally liable. *Held*, that the complaint was properly drawn, and that the plaintiff was entitled to recover from each defendant the proper proportion of rent due from him. [4 Johns. Ch., 287; 2 Brown C. C., 388, 518; 1 Atk., 598; 13 Price, 721; Com. Dig., Chan., 4; 1 Rent.; Adams' Eq., 288, n. 1; 1 Freem. Ch., 99; 1 Stor. Eq. Jur., §§ 470-485, 684, 686; Code, § 389; 2 Barb., 644.] *Supreme Ct., Circuit*, 1853, *Van Rensselaer v. Layman*, 10 *How. Pr.*, 505.

80. Where the matters which formed the ground of claim arose in the Pacific Ocean; the conduct there of the agents of the party was impeached, and the party could not be expected to know with certainty what the facts really were; and he stated his claim in two aspects, either of which showed his claim to be good, and gave adequate reasons why he could not be more certain or specific;—*Held*, sufficient; and that although they were inconsistent with each other, he could not be required to elect between them. *N. Y. Com. Pl., Sp. T.*, 1851, *Bucknam v. Astor Mutual Ins. Co.*, cited (1852) in *Ketcham v. Zerega*, 1 *E. D. Smith*, 553.

81. Where plaintiff has a good cause of action, but it is uncertain in which of two forms he should sue for it, he may adopt the narrative mode of stating the facts, as was frequently done in a bill in chancery, and sometimes in an action on the case. Thus he may allege a contract on which he seeks to hold the defendant liable, and also a judgment recovered by him thereon in another State, as one cause of action; or in an action on a note, in which it may be that defendant could show some usury, he may set forth also the original consideration of the note; thus stating the origin of the first indebtedness, and the securities or evidences of debt subsequently taken for it, claiming still only one payment for the whole—as one only is due. *Supreme Ct., Sp. T.*, 1855, *Thompson v. Minford*, 11 *How. Pr.*, 278.

82. In an action by commissioners of highways against a railroad company, the complaint stated as a first cause of action that the defendants had constructed their road across a highway, injuring it and neglecting to restore it, and claimed damages under the general railroad act. (*Laws of 1850*, 224, § 28.) As a second cause of action it stated the same acts, and claimed treble damages under the provisions of 1 Rev. Stat., 526, § 180, respecting highways. *Held*, on motion to set aside the complaint, or to strike out one of the counts, that the plaintiffs could not recover under both statutes for the same act, and as there was doubt as to which remedy was applicable, the plaintiffs should not be compelled to elect between them, but the complaint should be set aside altogether, so that they might state their case anew. *Supreme Ct., Sp. T.*, 1853, *Sipperly v. Troy & Boston R. R. Co.*, 9 *How. Pr.*, 83.

83. *Separate statement.* In all cases of more than one distinct cause of action, defence, counter-claim, or reply, the same shall not only be separately stated but plainly numbered. *Rule 19 of 1858.*

8. Several Causes of Action, and their Separate Statement.

84. *What is a single cause of action.* A complaint which sets forth the negligence of the defendant as a ground of action, and claims damages as resulting therefrom both to the person and the property of plaintiff, is to be regarded as alleging but one cause of action. [10 Bing., 112, 117; 14 Johns., 433; 10 Wend., 328; 1 Chitt. Pl., 127.] *Supreme Ct., Sp. T.*, 1851, *Howe v. Peckham*, 6 *How. Pr.*, 229.

85. In an action for damages for one injury, if the plaintiff would rely on several acts of negligence, he should allege all the acts of negligence in one count, and aver that they were the cause, &c., and if he prove upon the trial that any one of them was the cause, his complaint is sustained. The plaintiff is not permitted to put into his complaint different counts for the same cause of action, varying them as to form and manner of statement. [5 *How. Pr.*, 439; 9 *Id.*, 88, 85; 10 *Id.*, 155; 11 *Id.*, 281.] *Supreme Ct.*, 1856, *Dickens v. N. Y. Central R. R. Co.*, 13 *How. Pr.*, 228.

86. A complaint by a debtor to have his obligations delivered up and cancelled, and an account of the securities pledged for them, and payment of the overplus, states but a single

The Complaint:—Demand of Relief.

cause of action. *Ct. of Appeals*, 1852, *Oahoon v. Bank of Utica*, 7 *N. Y.* (3 *Seld.*), 486; *S. C.*, 7 *How. Pr.*, 401; reversing *S. C.*, *Id.*, 184.

87. A complaint seeking to have a written contract reformed, and for judgment thereon when reformed, states but a single cause of action. [*Stor. Eq. Jur.*, §§ 157–161; 2 *Johns. Ch.*, 585; 4 *Id.*, 144.] *Supreme Ct., Sp. T.*, 1853, *Gooding v. McAlister*, 9 *How. Pr.*, 128.

88. An account for various items may be alleged as a single cause of action, though the items accrued at different times; and an averment of a promise is not necessary in order to avoid the objection of duplicity, but is redundant. *Supreme Ct., Sp. T.*, 1852, *Dows v. Hotchkiss*, 10 *N. Y. Leg. Obs.*, 281.

89. Although several demands may be contained in one count, by stating that the defendant was indebted in a sum large enough to cover all the sums the plaintiff claims to recover, if it be further alleged, that in consideration of such indebtedness the defendant promised to pay such sum, yet where there are several claims but no promise to pay all in the aggregate, they should be separately stated and numbered as distinct causes of action. *Supreme Ct., Chambers*, 1855, *Acome v. American Mineral Co.*, 11 *How. Pr.*, 24.

90. A plaintiff may include any number of items in one count or statement of a cause of action. (*Code*, § 158.) Where the action is for a legal remedy in distinction from equitable relief, items which accrued to him in his own right should be stated as a separate cause of action from such as came to him by assignment under the Code, and for which, before the Code, he could not sustain an action in his own name; and in case he wishes to include causes of action assigned to him by different persons, there should be a count for each of such classes. But if the action be in fact for an accounting, it may be treated as one cause of action of an equitable nature, and stated accordingly. *Supreme Ct., Sp. T.*, 1854, *Adams v. Holley*, 12 *How. Pr.*, 326.

91. A complaint which alleges that the defendant assaulted the plaintiff, and at the same time slandered him, states but a single cause of action. The plaintiff may bring his action for the whole transaction, to recover damages for the compound injury he has sustained. *Supreme Ct., Sp. T.*, 1857, *Brewer v. Temple*, 15 *How. Pr.*, 286.

92. If several causes of action, set out

in a complaint, are not separately stated and numbered, the complaint may be set aside. [*Rule 87*; 4 *N. Y.*, 249.] *Supreme Ct., Sp. T.*, 1853, *Blanchard v. Strait*, 8 *How. Pr.*, 83.

93. That a statement of a separate cause of action, or defence, should begin with appropriate words to designate it as such. *Supreme Ct., Sp. T.*, 1852, *Benedict v. Seymour*, 6 *How. Pr.*, 298.

94. In an action to recover very numerous causes of action claimed by one and the same right,—*a. g.*, many penalties for repetition of the same offence,—the items may be, for the sake of brevity and convenience, thrown into one count, [*Steph. Pl.*, 268.] In such case, defendant may plead one defence to some of the items, and another defence to others.* *Supreme Ct., Sp. T.*, 1857, *Longworthy v. Knapp*, 4 *Abbotts' Pr.*, 115.

95. Each to be complete. The plaintiff cannot avail himself of an allegation in the statement of one cause of action, to sustain a defect in the statement of another cause of action. *N. Y. Com. Pl.*, 1857, *Sinclair v. Fitch*, 3 *E. D. Smith*, 677. To similar effect, *N. Y. Superior Ct., Sp. T.*, 1855, *Landau v. Levy*, 1 *Abbotts' Pr.*, 376.

96. Where an action is brought for several breaches of the same contract, if the pleader chooses to state them as separate causes of action, instead of assigning all as one cause of action, it is unnecessary to repeat the allegations of the contract and of plaintiff's performance under each statement. *N. Y. Superior Ct.*, 1857, *Rowland v. Phalen*, 1 *Bow.*, 43.

97. Objection to the misjoinder of several causes of action, can only be raised on demurrer, or motion to strike out. *Supreme Ct.*, 1855, *Youngs v. Seely*, 12 *How. Pr.*, 395.

4. Demand of Relief.

98. The complaint shall contain . . . 3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated. *Code of Pro.*, § 142, subd. 3.

99. General prayer. Under a complaint, asking that a deed of trust be declared void,

* But compare *Ogdensburgh Bank v. Paige*, 2 *Code R.*, 75, where it was held that separate demurrers, interposed to the several allegations, were not frivolous, unless each allegation stated in itself a sufficient cause of action.

The Complaint:—Damages.

and also for further or other relief, the court may allow the deed to be reformed, by inserting in it a power of revocation. *Supreme Ct., Sp. T.*, 1858, *Grafton v. Remsen*, 16 *How. Pr.*, 82.

100. Specific relief. Where a complaint asks for specific relief, and the defendant makes no defence, the plaintiff cannot take judgment for a greater amount than is asked for in the complaint. *N. Y. Com. Pl.*, 1851, *Hurd v. Leavenworth*, 1 *Code R., N. S.*, 278.

101. Where, in an action between partners, the defendant did not deny that the accounting was due,—*Held*, that after trial, he had waived the objection that plaintiff ought to have prayed a sale and a division of the proceeds. *N. Y. Com. Pl.*, 1852, *Van Dyke v. Jackson*, 1 *E. D. Smith*, 419.

102. Inconsistent relief. A complaint which alleges the taking, detention, and conversion of personal property, and claims not only a redelivery to the plaintiff, but also damages for the conversion, is bad on demurrer. A plaintiff cannot so frame his complaint, as that, if he fails to recover the possession of the property, he can recover damages for the conversion. *Supreme Ct., Sp. T.*, 1852, *Maxwell v. Farnam*, 7 *How. Pr.*, 286.

103. Though the Code has abolished the distinction between legal and equitable remedies, it does not sanction demands for inconsistent relief. Thus, a forfeiture of a lease, and granting an injunction as though the lease was subsisting, cannot both be sought in the same action. *N. Y. Superior Ct.*, 1850, *Linden v. Hepburn*, 8 *Sandf.*, 668; *S. C.*, 9 *N. Y. Leg. Obs.*, 80.

104. But alternative relief can be obtained; and a complaint in an equitable action may be framed with a double aspect, when the pleader doubts the particular relief to which plaintiff is entitled; so that, if the court should be against him, under one view of the case, it may nevertheless afford him assistance in another. Thus, in an action to recover property sold under a mortgage, the plaintiff may state both that the mortgage was usurious, and that the sale under the foreclosure was void for other reasons. *Supreme Ct., Sp. T.*, 1855, *Young v. Edwards*, 11 *How. Pr.*, 201.

105. As to sufficiency of a complaint asking, in the alternative, judgment for either one of two parties plaintiff. *Warwick v. Mayor,*

&c., of *N. Y.*, 28 *Barb.*, 210; *S. C.*, 7 *Abbotts' Pr.*, 265; *People v. Mayor, &c.*, of *N. Y.*, 28 *Barb.*, 240; *S. C.*, 8 *Abbotts' Pr.*, 7.

106. What relief may be granted. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. *Code of Pro.*, § 275.

107. If the defendant has answered the complaint, the demand of relief becomes immaterial. The case made by the complaint, and the limits of the issue, alone determine the extent of the power of the court. The statement of the right of the plaintiff, and its infringement by the defendant, constitute the case made by the complaint. The addition to these material facts of others, which neither show a right in the plaintiff nor a wrong thereto on the part of the defendant, do not add to or alter the legal case contained in the complaint. They may subject the party to an order, under § 160, to correct the pleading, but they do not limit his right to give evidence upon the trial, nor impose upon the court any restraint as to the nature or extent of the relief to be given. A good cause of action is not destroyed by adding immaterial allegations. [8 *Hill*, 551.] *Ct. of Appeals*, 1855, *Marquat v. Marquat*, 12 *N. Y. (2 Kern.)*, 836; reversing *S. C.*, 7 *How. Pr.*, 417.

5. Damages.

108. Rate. Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action. *Code of Pro.*, § 276.

109. Mesne profits. Under the Code (§ 167, subd. 5), a demand for the mesne profits may be made in an action for recovery of possession of lands, or a subsequent action may be brought for them; but, in order to their recovery in the action for the possession, they must be specially claimed in the complaint. A claim of damages for the ouster does not cover them. The Code has not disturbed the rule that a party must recover *secundum allegata*. *Supreme Ct.*, 1852, *Livingston v. Tanner*,* 12 *Barb.*, 481.

110. Special damages. Damages not the immediate and natural consequences of an

* Reversed on other points, 14 *N. Y. (4 Kern.)*, 64.

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lawful act, or which the law would not presume necessarily to flow from it, must be specially stated. [14 Wend., 159; 12 Id., 64; 1 Chitt. Pl., 371; Sedg. on Dam., 67; Say. on Dam., 315.] Such averments are not traversable, but they are necessary in the complaint, that the defendant may not be taken by surprise. They, therefore, are not to be struck out, on motion, as irrelevant. *N. Y. Com. Pl., Sp. T.*, 1858, *Molony v. Dows*, 15 *How. Pr.*, 261.

111. Matters merely in aggravation of damages are not pleadable [2 Stark., 457], and may be struck out. *Id.*

112. In an action for libel, on words not on their face libellous, the complaint must show special damage. [2 Den., 299; 4 Sandf., 60.] *Supreme Ct., Sp. T.*, 1855, *Caldwell v. Raymond*, 2 *Abbotts' Pr.*, 193.

113. In an action for slander of title, the complaint must show special damage; and to show it, the person who refused to purchase, or to loan, in consequence of the slander, must be named, or the complaint is bad on demurrer. [3 Bing. N. C., 371; Cro. Car., 140; Oro. Jac., 484; 8 Keb., 153; Style, 169; 5 N. Y., 14; 4 Wend., 587; Satnd. Pl. & Ev., 243; 1 Hall, 399.] *N. Y. Superior Ct.*, 1853, *Linden v. Graham*, 1 *Duer*, 670.

114. Damages arising from bodily pain or suffering need not be alleged specially in the complaint. *Supreme Ct.*, 1855, *Curtiss v. Rochester & Syracuse R. R. Co.*,* 20 *Barb.*, 282.

6. Service. Filing.

115. Demand. Where a summons is served without any copy of the complaint, the plaintiff is not bound to serve a copy of the complaint, unless the defendant demand the same within ten days after the service of the summons. *N. Y. Com. Pl.*, 1850, *Bennett v. Dellicker*, 8 *Code R.*, 117.

116. Twenty days is now given for demand. *Code of Pro.*, § 180.

117. Upon a demand for a copy of the complaint, under § 130 of the Code of 1849 (which did not fix the time in which the plaintiff must comply), twenty days from the demand is a reasonable time for plaintiff to make the service. *Supreme Ct., Sp. T.*, 1850, *Colvin v. Bragden*, 5 *How. Pr.*, 124; S. C.,

8 *Code R.*, 188; *Munson v. Willard*, 5 *How. Pr.*, 263; *Luce v. Trémper*, 9 *Id.*, 212; overruling *Littlefield v. Murin*, 4 *Id.*, 806; S. C., 2 *Code R.*, 128, where it was held that twenty-four hours would, in ordinary cases, be a reasonable time.

118. Jurisdiction is obtained by the service of the summons, and a judgment entered without a sufficient service of the complaint is merely irregular, and not void. *Supreme Ct., Sp. T.*, 1858, *Van Benthuyssen v. Lyle*, 8 *How. Pr.*, 312.

119. An order giving plaintiff further time to serve complaint cannot be granted after the time for serving it has expired, except on notice or an order to show cause. *N. Y. Superior Ct.*, 1851, *Stephens v. Moore*, 4 *Sandf.*, 674.

120. Filing. Where plaintiff does not serve a complaint with the summons, he is bound to file the complaint within twenty days after service of the summons, so that defendant, if he does not demand a copy, may find it on file before his time to answer expires. *Brooklyn City Ct.*, 1851, *Toomey v. Shields*, 9 *N. Y. Leg. Obs.*, 66.

121. Motion to file. Section 416 of the Code—which provides 'that an order may be obtained from a judge to compel the summons and pleadings in an action to be filed—applies only to such papers as shall have been served. *Brooklyn City Ct.*, 1851, *Toomey v. Shields*, 9 *N. Y. Leg. Obs.*, 66. *Supreme Ct., Sp. T.*, 1849, *Littlefield v. Murin*, 4 *How. Pr.*, 806; S. C., 2 *Code R.*, 128.

122. Notice. The party filing a pleading in obedience to an order under § 416, is not bound to notify the other that he has done so. *N. Y. Com. Pl., Sp. T.*, 1852, *Doucy v. Hoyt*, 1 *Code R.*, N. S., 286.

III. DEFENDANT'S PLEADINGS.

1. What and how Served.

123. Demurrer. Answer. The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint. *Code of Pro.*, § 143.

124. A demurrer admits relevant facts that are well pleaded, but not conclusions of law. [1 Ves., 78; Stor. Pl., 452.] *Supreme Ct., Sp. T.*, 1850, *Hall v. Bartlett*, 9 *Barb.*, 297.

125. A defendant cannot both demur to,

* Affirmed, 18 *N. Y.* (4 *Smith*), 534, without referring to the question of pleading.

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and answer at the same time, a single cause of action alleged in the complaint. *Supreme Ct.*, *Sp. T.*, 1850, *Slocum v. Wheeler*, 4 *How. Pr.*, 378; *S. O.*, 3 *Code R.*, 59; 1850, *Spellman v. Weider*, 5 *How. Pr.*, 5; *Sp. T.*, 1855, *Munn v. Barnum*, 1 *Abbotts' Pr.*, 281; *S. O.*, less fully, 12 *How. Pr.*, 563.

Otherwise under the Code of 1848. *Circuit* (1848?), *Manchester v. Storrs*, 3 *Id.*, 410.

126. Upon the same principle, the defendant cannot by answer object that a ground of demurrer appears on the face of the complaint, and also deny the allegations which such objection concedes to be true. *Supreme Ct.*, 1851, *Ingraham v. Baldwin*,* 12 *Barb.*, 9.

127. Where an answer denied some allegations and set up new matter, and also declared that the defendant reserved certain objections which are by the Code itself grounds of demurrer and not waived by answering,—*Held*, that this reservation should not be struck out on motion. *N. Y. Superior Ct.*, 1849, *People v. Meyer*, 2 *Code R.*, 49.

128. If defendant does both answer and demur, plaintiff cannot disregard one pleading and move for judgment on account of frivolousness of the other. The proper remedy is to move to strike one out. *Supreme Ct.*, *Sp. T.*, 1850, *Spellman v. Weider*, 5 *How. Pr.*, 5.

129. Where the defendants serve a pleading which assumes both to answer and to demur to the complaint, they should be compelled to elect between the two. *Supreme Ct.*, *Sp. T.*, 1858, *Struver v. Ocean Ins. Co.*, 16 *How. Pr.*, 422.

130. **Demurring and answering.** The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue. *Code of Pro.*, § 151.

131. Where a complaint contains in reality two causes of action, stated however in form as but one, the defendant may demur to one and answer another. *N. Y. Com. Pl.*, 1854, *Clarkson v. Mitchell*, 3 *E. D. Smith*, 269.

132. **The test** whether a defence is an answer or demurrer is, Does it require any facts to be proved to sustain it? *Supreme Ct.*, *Sp. T.*, 1858, *Struver v. Ocean Ins. Co.*, 16 *How. Pr.*, 422.

133. **That a woman cannot answer separately** from her husband without leave of the court, except under special circumstances, as if he be an alien enemy, &c. *Supreme Ct.*, 1850, *Newcomb v. Keteltus*, 2 *Code R.*, 153; but compare *PARTIES*, 482-507.

134. **The expiration of the twenty days** from the service of the summons and complaint, cuts off defendant's right to answer. *Supreme Ct.*, *Chambers*, 1849, *Dudley v. Hubbard*, 2 *Code R.*, 70. To the contrary, *N. Y. Com. Pl.*, 1849, *Foster v. Udell*, *Id.*, 30, where it was held that defendant might answer at any time before judgment entered.

135. A pleading cannot be served after the time prescribed by the Code, without leave. *Supreme Ct.*, *Sp. T.*, 1851, *O'Brien v. Catlin*, 1 *Code R.*, *N. S.*, 273; *Mandeville v. Winne*, 5 *How. Pr.*, 461; *S. O.*, 1 *Code R.*, *N. S.*, 161.

136. Service of a pleading after the time allowed by law, although before the adverse party has acted upon the default, is not good. *N. Y. Com. Pl.*, 1850, *McGown v. Leavenworth*, 2 *E. D. Smith*, 24.

137. **An extension of time to answer**, allows the defendant to demur as well as to answer. [2 *Barb. Cl.*, 99.] *Supreme Ct.*, *Sp. T.*, 1850, *Brodhead v. Brodhead*, 4 *How. Pr.*, 808; *S. O.*, 8 *Code R.*, 8.

138. **Service before the complaint.** Serving a verified answer denying the complaint without any knowledge of the complaint, is a fraud upon the rules and practice of the court. *Supreme Ct.*, *Sp. T.*, 1854, *Phillips v. Prescott*, 9 *How. Pr.*, 430.

139. **Service on co-defendant.** A defendant who sets up a claim adverse to that of a co-defendant, is not bound to serve a copy of his answer upon such co-defendant, if the title by which he claims is set forth in the complaint, so that, from the notice thus given, he was bound to know that such claim might and probably would be preferred upon the trial, and, if then established by proof, must be allowed by the court. *N. Y. Superior Ct.*, 1854, *Leavitt v. Fisher*, 4 *Duer*, 1.

140. **Pleading over.** After the decision of a demurrer interposed in good faith, leave to plead over may be granted upon such terms as may be just. If the demurrer be allowed for a misjoinder of actions, the court may divide the action. *Code of Pro.*, § 172.

141. On demurrer to complaint, the court being of opinion that the pleading was not insufficient, but was indefinite and uncertain, the

* Affirmed, on another point, *Ct. of Appeals*, 1858, 9 *N. Y.* (5 *Seld.*), 45.

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demurrer was overruled, with leave to answer without costs, unless the plaintiff elected to amend the complaint, to make it more definite; but with like leave, on payment of costs of the demurrer, on his making such amendment. *Supreme Ct.*, 1857, *Oazeaux v. Mali*, 25 *Barb.*, 578; *S. O.*, *sub nom.* *Mead v. Mali*, 15 *How. Pr.*, 347.

142. On overruling a demurrer to a complaint as frivolous, leave to answer was refused, there being no affidavit of merits. *Appleby v. Elkins*, 2 *Sandf.*, 678.

143. Time to answer after demurrer. Where a demurrant, to whom, on overruling his demurrer, the court gives leave to answer within a certain time, does not accept the leave but appeals to the general term, even if it be conceded that he has the same time to answer after affirmance of the order, as was given by the order, he must tender his answer within that time. [6 *Cow.*, 582; 10 *Wend.*, 598.] And if he fails to do so, the court may properly refuse leave to interpose it at the trial. *N. Y. Superior Ct.*, 1857, *Ford v. David*, 1 *Bow.*, 569.

144. If the demurrant avails himself of leave to answer, granted on overruling his demurrer, he thereby abandons the demurrer. *Ct. of Appeals*, 1859, *Brown v. Saratoga R. R. Co.*, 18 *N. Y.* (4 *Smith*), 495.

145. Severing. Where several executors, sued as such for a demand against the estate, sever in their answers, each has the benefit of all the answers, and the plaintiff must succeed against all or none. *Supreme Ct.*, 1850, *Fort v. Gooding*, 9 *Barb.*, 371.

146. Party summoned to show cause why he should not be bound by judgment in action in which he was not originally summoned, may answer, denying the judgment, or setting up any defence which may have arisen subsequently; and in addition thereto, if he be proceeded against according to section 375, he may make the same defence which he might have originally made to the action, except the Statute of Limitations. *Code of Pro.*, § 379.

147. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply. *Code of Pro.*, § 880.

2. Demurrer.

A. In what Cases it Lies.

a. In General.

148. The defendant may demur to the complaint when it shall appear upon the face thereof, either—1. That the court has no juris-

diction of the person of the defendant, or the subject of the action; or, 2. That the plaintiff has not legal capacity to sue; or, 3. That there is another action pending between the same parties for the same cause; or, 4. That there is a defect of parties, plaintiff or defendant; or, 5. That several causes of action have been improperly united; or, 6. That the complaint does not state facts sufficient to constitute a cause of action. *Code of Pro.*, § 144.

149. Demand of relief. It is not a ground of demurrer that the plaintiff claims more relief than he is entitled to. *N. Y. Superior Ct.* (1852?), *Beale v. Hayes*, 5 *Sandf.*, 640; *S. O.*, 10 *N. Y. Leg. Obs.*, 166. *Supreme Ct.*, *Sp. T.*, 1855, *Andrews v. Shaffer*, 12 *How. Pr.*, 441; *Moran v. Anderson*, 1 *Abbotts' Pr.*, 288; 1857, *Hecker v. Degroot*, 15 *How. Pr.*, 314. To the same effect, *Gen. T.*, 1859, *Witherhead v. Allen*, 28 *Barb.*, 661.

150. Uncertainty. The omission to state the time and place of slander, is not a ground of demurrer; the remedy, if any, is by motion that the pleading be made definite. *N. Y. Com. Pl.*, *Sp. T.*, 1849, *Finnerty v. Barker*, 7 *N. Y. Leg. Obs.*, 316.

151. An executor united, in his complaint, with notes payable to his testator, a note made payable simply to himself, but the complaint indicated that he claimed all as executor. *Held*, on demurrer sufficient. If there were any uncertainty as to whether he claimed on the latter note as executor, or in his own right, the defendant's remedy was by motion. *Supreme Ct.*, *Sp. T.*, 1853, *Welles v. Webster*, 9 *How. Pr.*, 251.

152. Premature action. Where the complaint shows that the debt sued for is due, but does not affirmatively show that it was due when the action was brought, the court will not intend, in support of a demurrer, that it was not then due. The complaint need not state the time when the action was commenced. *Supreme Ct.*, 1852, *Maynard v. Talcott*, 11 *Barb.*, 569.

153. In an action on a bond, dated May 10, 1853, conditioned for the payment of a sum "in two years from the first day of April last, with annual interest," a demurrer, on the ground that no cause of action was stated, was tried in June, 1854. *Held*, that as interest was due before the time of trial, the plaintiff was entitled to judgment upon the demurrer. A demurrer is not the mode of raising the objection that the cause of action had not accrued when the action was commenced. It

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should be taken by answer. *Ct. of Appeals*, 1859, *Smith v. Holmes*, 19 *N. Y.* (5 *Smith*), 271.

154. Stale demand. A complaint which shows that the cause of action is a stale demand, which under the practice before the Revised Statutes could not be enforced, but is barred by the Statute of Limitations, is demurrable. *Supreme Ct., Sp. T.* (1851?), *Genet v. Tallmadge*, 1 *Code R., N. S.*, 846; but see *infra*, subd. *Limitations*.

155. Latent objection. An objection—*e. g.*, to the jurisdiction—which does not appear on the face of the complaint, cannot be raised by demurrer. *N. Y. Com. Pl.*, 1857, *Wilson v. Mayor, &c.*, of *N. Y.*, 6 *Abbotts' Pr.*, 6; *S. C.*, 15 *How. Pr.*, 500. To the same effect, *Supreme Ct., Sp. T.*, 1852, *Getty v. Hudson River R. R. Co.*, 8 *Id.*, 177.

156. A mere clerical error in a complaint.—*e. g.*, the omission in a complaint against two defendants of the letter "s" in the word "defendants,"—will not sustain a demurrer. *N. Y. Com. Pl.*, 1853, *Chamberlin v. Kaylor*, 2 *E. D. Smith*, 184.

157. Interrogatories. The insertion, in a complaint, of interrogatories, after the manner of a bill of discovery, is not a ground of demurrer. The remedy is by motion. *Supreme Ct., Sp. T.*, 1852, *Bank of British North America v. Suydam*, 6 *How. Pr.*, 379; *S. C.*, 1 *Code R., N. S.*, 825.

b. Want of Jurisdiction.

158. The meaning of the clause "that the court has no jurisdiction of the person" (*Code*, § 144, subd. 2; *g. v., supra*, 148), is, that the person is not subject to the jurisdiction of the court, and not that the suit has not been regularly commenced. If the suit has not been regularly commenced, the defendant cannot plead the objection under section 147, but must move against the irregularity. *Supreme Ct.*, 1850, *Nones v. Hope Mutual Life Ins. Co.*, 8 *Barb.*, 541.

159. Where several causes of action are properly united, except for the objection that of one of them the court in which the action is brought has no jurisdiction, a demurrer to the whole complaint merely for a misjoinder of actions must be overruled. The demurrer should be limited to the cause of action of which the court has no jurisdiction. *N. Y. Superior Ct., Chambers*, 1854, *Cook v. Chase*, 3 *Duer*, 648.

c. Another Action pending.

160. Rule of law not changed. Section 144 of the Code (*g. v., supra*, 148),—which allows defendant to demur when it appears on the face of the complaint that there is another action pending between the same parties for the same cause of action,—and section 147,—which allows the objection to be taken by answer when it does not appear on the face of the complaint,—do not enlarge the defence of the pendency of another suit, but merely direct the mode in which such defence or objection, in so far as it is already available by law, may be taken advantage of. These provisions do not make the pendency of another suit in a court of the United States, or of a sister State, a defence. *Supreme Ct., Sp. T.*, 1850, *Burrows v. Miller*, 5 *How. Pr.*, 51. *N. Y. Superior Ct.*, 1851, *Cook v. Litchfield*, 5 *Sandf.*, 380; *S. P.*, 1855, *Strong v. Stevens*, 4 *Duer*, 668.

161. That an action between the same parties within the meaning of section 144 of the Code, is any proceeding in which the rights of the plaintiff in the last suit would be fully protected, whether it were strictly an action, an attachment, or citation before a surrogate, or a proceeding in court founded on a petition. *Supreme Ct.*, 1853, *Groshon v. Lyon*, 16 *Barb.*, 461.

162. The pendency of another action brought by defendant, for the same cause, is within § 144, subd. 3, and § 147. [*Code*, § 147.] *Supreme Ct., Sp. T.*, 1850, *Hornfager v. Hornfager*, 6 *How. Pr.*, 279.

163. Other relief. The pendency of another action between the same parties is not a ground of demurrer, where the other action is for relief which could not be granted in the action in which the demurrer is interposed. *Ct. of Appeals*, 1851, *Haire v. Baker*, 5 *N. Y.* (1 *Seld.*), 357.

d. Defect of Parties.

164. What is. The defect of parties for which a demurrer is allowed under section 144 of the Code, is only a deficiency, and not an excess of parties.* *So held*, in the case of a misjoinder of defendants. *Ct. of Appeals*, 1858, *N. Y. & N. H. R. R. Co. v. Schuyler*, 7 *Abbotts' Pr.*, 41; *S. C.*, less fully, 17 *N. Y.* (3 *Smith*), 592. *Supreme Ct.*, 1856, *Churchill v. Trapp*,

* The contrary is asserted in *Leavitt v. Fisher*, 4 *Duer*, 1.

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8 *Abbotts' Pr.*, 306. *N. Y. Com. Pl.*, 1854, *Pinckney v. Wallace*, 1 *Id.*, 82.

So held, also, in the case of misjoinder of plaintiffs. *Supreme Ct.*, 1855, *Peabody v. Washington County Mutual Ins. Co.*, 20 *Barb.*, 339. Followed, *N. Y. Superior Ct., Sp. T.*, 1856, *Gregory v. Oaksmith*, 12 *How. Pr.*, 134. *Supreme Ct., Sp. T.*, 1858, *People v. Mayor, &c.*, of *N. Y.*, 28 *Barb.*, 240; *S. C.*, 8 *Abbotts' Pr.*, 7.

165. The rule that a misjoinder of plaintiffs is not ground of demurrer, is not applicable to the case of an action by husband and wife, which should have been brought by the husband alone. [Distinguishing 8 *How. Pr.*, 395.] In such a case the defect cannot, as in other cases, be obviated at the trial by rendering a judgment in favor of the proper plaintiff, and against one improperly joined; and if such judgment could be given, it would not indemnify the defendant for costs. *Supreme Ct., Sp. T.*, 1858, *Dunderdale v. Grymes*, 16 *How. Pr.*, 195.

166. When two persons are made defendants, and the complaint states, as a cause of action, facts sufficient to constitute a cause of action against each, and to create, by reason of the same facts, a liability of each co-extensive with that of the other, so that the measure and rule of damages is precisely the same in the one case as in the other, if either defendant seeks a separate trial, he must raise the question by demurrer. *N. Y. Superior Ct.*, 1857, *Colegrove v. N. Y. & Harlem R. R. Co.*,* 6 *Duer*, 382.

167. Where one of the defendants is improperly joined, and the misjoinder is not apparent upon the face of the complaint, the remedy is a motion to strike out the name. *Wayne County Ct.*, 1852, *Bailey v. Easterly*, 7 *How. Pr.*, 495.

168. Parties living. It cannot be deemed to appear upon the face of the complaint that there is a defect of parties, unless the complaint shows that the party for whose non-joinder the demurrer is interposed was living when the suit was commenced. It is not enough that the complaint is silent on the subject. The fact must appear affirmatively. If it does not so appear, the objection must be taken by answer. *Supreme Ct.*, 1855, *Brainard v. Jones*, 11 *How. Pr.*, 569.

169. Necessary parties. A demurrer to a complaint, for defect of parties, cannot be sustained if the court can determine the controversy before it without prejudice to the rights of others, or by saving their rights. *Supreme Ct.*, 1850, *Wallace v. Eaton*, 5 *How. Pr.*, 99.

a. Misjoinder of Actions.

170. A demurrer does not lie to a complaint for the defect of not separately stating two or more causes of action; they being such as might be united in one complaint, if properly stated. The remedy is by motion. *Supreme Ct.*, 1856, *Dorman v. Kellam*,* 4 *Abbotts' Pr.*, 202; *S. C.*, 14 *How. Pr.*, 184; *Woodbury v. Sackrider*, 2 *Abbotts' Pr.*, 402. *N. Y. Com. Pl.*, 1857, *Badger v. Benedict*,* 1 *Hill*, 414; affirming *S. C.*, 4 *Abbotts' Pr.*, 176. *Supreme Ct., Sp. T.*, 1855, *Moore v. Smith*, 10 *How. Pr.*, 361. *N. Y. Superior Ct., Sp. T.*, 1856, *Harsen v. Bayand*, 5 *Duer*, 656. To similar effect, *Supreme Ct., Sp. T.*, 1858, *Gooding v. McAlister*, 9 *How. Pr.*, 123; *Welles v. Webster, Id.*, 251; 1854, *Robinson v. Judd, Id.*, 378; (*Sp. T.*, 1854?), *Peckham v. Smith, Id.*, 436; 1852, *Benedict v. Seymour*, 6 *Id.*, 298; 1855, *Waller v. Raskan*, 12 *Id.*, 28.

171. The proper practice in such case is, to strike out of the complaint on motion every allegation not essential to a single cause of action. *Supreme Ct.*, 1856, *Dorman v. Kellam*, 4 *Abbotts' Pr.*, 202; *S. C.*, 14 *How. Pr.*, 184.

172. Motion. For a misjoinder of causes of action, the remedy is demurrer and not motion to set aside the complaint. [Code, § 144, subd. 5.] *Supreme Ct., Sp. T.*, 1852, *Stannard v. Mattice*, 7 *How. Pr.*, 4.

173. Injuries to person and property. In a complaint for injury to property, the complaint may allege also injuries to the person consequent upon the injury to the property. This is not a misjoinder of causes of action. *N. Y. Com. Pl., Sp. T.*, 1852, *Grogan v. Lindeman*, 1 *Code R., N. S.*, 287.

174. Corporation. In an action for equitable relief against a corporation, a claim for damages against individual defendants cannot

* Affirmed, *Ct. of Appeals*, 1859, 20 *N. Y.* (6 *Smith*), 492.

* These cases overrule *Durkee v. Saratoga & Washington R. R. Co.*, 4 *How. Pr.*, 226; *S. C.*, 2 *Code R.*, 145; *Pike v. Van Wormer*, 5 *How. Pr.*, 171; *Getty v. Hudson River R. R. Co.*, 8 *Id.*, 177; *Van Namee v. Peoble*, 9 *Id.*, 198; *Strauss v. Parker, Id.*, 342; and see *Colwell v. N. Y. & Erie R. R. Co.*, *Id.*, 311. *Acme v. American Mineral Co.*, 11 *Id.*, 24.

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be joined. *Supreme Ct., Sp. T.*, 1858, *House v. Cooper*, 16 *How. Pr.*, 292.

175. As to whether charges that defendants, named as a corporation, have usurped corporate franchises, and that they have forfeited them, can be united in one complaint. *People v. Ravenswood, &c.*, *Turnpike & Bridge Co.*, 20 *Barb.*, 518.

f. Insufficiency.

176. In general. A complaint is not bad on demurrer, as not stating facts sufficient to constitute a cause of action, if it actually contain the elements of a cause of action, however inartificially they may be stated. On such demurrer, it is the duty of the court to analyze the facts disclosed, and if the whole or any part of them can be resolved into a cause of action, the demurrer should be overruled. *Supreme Ct., Sp. T.*, 1858, *People v. Mayor, &c.*, of N. Y., 28 *Barb.*, 240; S. C., 8 *Abbotts' Pr.*, 7.

177. On demurrer for the reason that the complaint does not state facts sufficient to constitute a cause of action, the only inquiry is, whether facts enough to support the action are stated in any form,—whether plainly and concisely without unnecessary repetition, or argumentatively and inferentially, and in connection with irrelevant and redundant matter, cannot affect the decision. *Supreme Ct., Sp. T.*, 1855, *Buzzard v. Knapp*, 12 *How. Pr.*, 504.

178. If a demurrer admits facts enough to constitute a cause of action, that is sufficient to sustain the complaint against it. *Supreme Ct., Sp. T.*, 1858, *Richards v. Edick*, 17 *Barb.*, 260.

179. The mistake of the pleader in setting forth the facts constituting a single cause of action in two separate statements, some facts in one and some in another, as constituting separate causes of action, does not render the pleading demurrable. *So held*, on separate demurrers to each count. *Supreme Ct.*, 1856, *Hillman v. Hillman*, 14 *How. Pr.*, 456.

180. Superfluous averment. A complaint, after stating a cause of action on a contract against partners, and demanding judgment therefor, contained also allegations that the defendants were insolvent, and had fraudulently confessed judgment to hinder their creditors, and demanded an injunction and a receiver. *Held*, that although the last matter might be obnoxious to a motion to strike out, its insertion did not render the complaint demurra-

ble. *Supreme Ct.*, 1858, *Meyer v. Van Collem*, 28 *Barb.*, 230; S. C., 7 *Abbotts' Pr.*, 222.

181. Formal defects. A demurrer to a complaint, based upon subd. 6 of § 144, can only be sustained where the complaint presents defects so substantial in their nature and so fatal in their character as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action whatever. Defects merely formal, and which under the former practice were the appropriate subjects of a special demurrer, cannot now be corrected by demurrer. *Supreme Ct., Sp. T.*, 1853, *Richards v. Edick*, 17 *Barb.*, 260. *N. Y. Superior Ct.*, 1856 [citing, also, 28 Eng. L. & Eq., R. 157], *Graham v. Camman*, 5 *Duer*, 697; S. C., 18 *How. Pr.*, 860. To the same effect, *Supreme Ct.*, 1848, *DeWitt ads. Swift*, 3 *Id.*, 280; S. C., 1 *Code R.*, 25; 6 *N. Y. Leg. Obs.*, 314; and see *Hatch v. Peet*, 28 *Barb.*, 575; *Woodbury v. Sackrider*, 2 *Abbotts' Pr.* 402.

182. Cause of action in third party. A complaint by an assignee, which—after setting out the note or other chose in action upon which suit is brought, and stating that on such a day, &c., it was assigned by the payee to the plaintiff—alleges that it is the property of the assignor, and that he is the lawful owner and holder thereof, or that the defendant is indebted thereon to the assignor, is bad on demurrer, on the ground that it does not state facts sufficient to constitute a cause of action, although the assignment stated was in trust, and the plaintiff alleges that he has possession of the note. *Supreme Ct.*, 1858, *Palmer v. Smedley*, 28 *Barb.*, 468; S. C., 6 *Abbotts' Pr.*, 205. Compare *Myers v. Machado, Id.*, 198; S. C., 14 *How. Pr.*, 149.

183. Value. In an action to compel delivery of an instrument in writing, the question whether value can be shown by extrinsic proof, is a question of law, which, when the document is set forth in the complaint, or is annexed, is proper to be raised by a demurrer. *N. Y. Superior Ct., Sp. T.*, 1852, *Knehue v. Williams*, 1 *Duer*, 597; S. C., 11 *N. Y. Leg. Obs.*, 187.

184. Demurrer to supplemental complaint. Where the object of a supplemental complaint is to revive a former action and to proceed in that action against the same defendants, a demurrer alleging that it does not state facts sufficient to constitute a cause of

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action will not lie, because it is not intended to state facts constituting a cause of action. *Supreme Ct., Sp. T.*, 1854, *Spier v. Robinson*, 9 *How. Pr.*, 325.

185. Capacity to sue. When a plaintiff describes himself in the complaint, as administrator, &c., but does not set forth his appointment, a demurrer upon the ground that it does not appear upon the face of the complaint, that he has a legal capacity to sue, is frivolous if the cause of action is one on which he may sue in his own right. *N. Y. Superior Ct.*, 1851, *Bright v. Currie*, 5 *Sandf.*, 488; *S. C.*, 10 *N. Y. Leg. Obs.*, 104.

186. In an action required to be brought by the administrator in his capacity as such, a complaint which does not allege his authority, but merely describes him as administrator, does not contain a statement of facts constituting a cause of action, and is bad on demurrer, on that ground. *Supreme Ct.*, 1855, *Sheldon v. Hoy*, 11 *How. Pr.*, 11.

187. The complaint against a committee of an habitual drunkard is bad on demurrer, for not stating a cause of action, if it omits to allege or show by what court of authority the debtor was declared an habitual drunkard, and the custody of his person and estate awarded to the defendant. *Supreme Ct., Sp. T.*, 1858, *Hall v. Taylor*, 8 *How. Pr.*, 428.

188. In an action by a receiver, an objection to the jurisdiction of the judge who is alleged to have appointed him, is not to be taken by a demurrer on the ground that the complaint does not constitute a cause of action. It should be, that plaintiff had not "legal capacity to sue." *N. Y. Superior Ct., Sp. T.*, 1856, *Hobart v. Frost*, 5 *Duer*, 672.

189. The want of an allegation showing the capacity of the plaintiffs to sue,—*e. g.*, their incorporation,—is not available under a demurrer stating merely that the complaint does not constitute a cause of action, but only on the ground that the plaintiff has not legal capacity to sue. *Supreme Ct., Sp. T.*, 1859, *Connecticut Bank v. Smith*, 17 *How. Pr.*, 487; *S. C.*, 9 *Abbotts' Pr.*, 168. To the same effect, 1855, *Bank of Lowville v. Edwards*, 11 *How. Pr.*, 216; *Gen. T.*, 1857, *Bank of Havanna v. Wickham*,* 7 *Abbotts' Pr.*, 184; *S. C.*, 16 *How. Pr.*, 97.

190. A complaint in an action for specific performance is not bad on demurrer because it fails to supply the details necessary to guide in drawing a judgment directing a conveyance. *Supreme Ct., Sp. T.*, 1853, *Richards v. Edick*, 17 *Barb.*, 260.

B. Form of Demurrer. Joint Demurrer.

191. Form. A pleading which denies an allegation of that to which it responds, is not available as a demurrer. *Supreme Ct., Sp. T.*, 1851, *Clark v. Van Deusen*, 3 *Code R.*, 219.

192. Assigning as a cause of demurrer that certain parts of the complaint are immaterial and redundant, does not vitiate the demurrer, and a motion to strike out such superfluous specifications should be denied. *Supreme Ct., Sp. T.*, 1852, *Smith v. Brown*, 6 *How. Pr.*, 388.

193. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. *Code of Pro.*, § 145.

194. Words of the statute. A demurrer specifying one of the grounds of demurrer authorized by the Code, in the words of the Code, is a compliance with the statute. *So held*, of a demurrer stating that the complaint does not state facts sufficient to constitute a cause of action. *Ct. of Appeals*, 1851, *Haire v. Baker*, 5 *N. Y. (1 Seld.)*, 357.

195. Insufficient facts. When the want of a statement of facts sufficient to constitute a cause of action, is the only cause of demurrer to a complaint, it is a sufficient assignment of the grounds of the demurrer to state simply that the complaint does not state facts sufficient to constitute a cause of action. Section 145 only requires that the demurrer shall specify distinctly one or more of the six causes of the demurrer enumerated in section 144. In the Superior Court this may be considered as settled. *N. Y. Superior Ct.*, 1858, *Paine v. Smith*, 2 *Duer*, 298. To the same effect, *Supreme Ct., V. Dist. (Sp. T.)*, 1848, *DeWitt ads. Swift*, 8 *How. Pr.*, 280; *S. C.*, 1 *Code R.*, 25; 6 *N. Y. Leg. Obs.*, 314; *IV. Dist., Sp. T.*, 1849, *Durkee v. Saratoga & Washington R. R. Co.*, 4 *How. Pr.*, 226; *S. C.*, 2 *Code R.*, 145; *VI. Dist.*, 1850, *Hyde v. Conrad*, 5 *How. Pr.*, 112; *S. C.*, 3 *Code R.*, 162; 1851, *Johnson v. Wetmore*, 12 *Barb.*, 433; *VIII. Dist.*, 1857 [citing, also, 7 *How. Pr.*, 278; 8 *Id.*, 343; 11 *Id.*, 216], *White v. Brown*, 14 *How. Pr.*, 262; but see *infra*, 200, to the contrary.

* See this case in table of *CASES CARRIED OVER*, Vol. I., *Ante*.

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196. A demurrer which states that, "the complaint does not state facts sufficient to constitute a cause of action," is sufficient, for that objection is not waived by omitting to demur. *Supreme Ct., II. Dist., Sp. T.*, 1853, Hoogland v. Hudson, 8 *How. Pr.*, 848.

197. The words, "the complaint does not state a sufficient cause of action against the defendant,"—*Held*, equivalent to "does not state facts sufficient to constitute a cause of action." *Supreme Ct., V. Dist. (Sp. T.?)*, 1848, De Witt *ads.* Swift, 8 *How. Pr.*, 280; S. C., 1 *Code R.*, 25; 6 *N. Y. Leg. Obs.*, 814.

198. **Exceptions.** All the grounds of demurrer may be properly stated in the words of the statute, except that where the objection is an alleged want of jurisdiction, it must be stated whether it is of the person or the subject-matter, and where it is a defect of parties, it must be stated whether plaintiff or defendant. *Supreme Ct., III. Dist., Sp. T.*, 1852, Getty v. Hudson River R. R. Co., 8 *How. Pr.*, 177. Followed in the case of a demurrer, under subd. 2, *VII. Dist.*, 1856, Hulbert v. Young, 18 *Id.*, 418.

199. **Enumeration of particulars.** A demurrer on the ground that the facts stated, are not sufficient to constitute a cause of action, in this, &c., specifying certain allegations deemed essential, excludes all other grounds of objection than those which are particularly set forth. *Supreme Ct.*, 1852, Nellis v. De Forest, 16 *Barb.*, 61.

200. **It is not enough to specify the ground of objection in the words of the statute.** Section 144 declares *when* the defendant may demur, and section 145 declares *how* he shall demur. *Supreme Ct., II. Dist., Sp. T.*, 1852, Purdy v. Carpenter, 6 *How. Pr.*, 361; (*VI. Dist.?*) [citing, also, Van Santv. Pl., 421], Hinds v. Tweddle, 7 *Id.*, 278. To the same effect, *N. Y. Com. Pl.*, 1849, Grant v. Lasher, 2 *Code R.*, 2; Hunter v. Frisbee, *Id.*, 59; S. C., 7 *N. Y. Leg. Obs.*, 819; and see Loomis v. Tift, 16 *Barb.*, 541.

201. **Extent.** Demurrer may be taken to the whole complaint, or to any of the alleged causes of action stated therein. *Code of Pro.*, § 145.

202. **Too broad.** Where a complaint, although defective as to the chief part of the cause of action, is good as to the rest, a demurrer, going to the whole, cannot be sustained. *N. Y. Com. Pl., Sp. T.*, 1855, Jaques v. Morris, 2 *E. D. Smith*, 689. S. R., *Supreme*

Ct., Sp. T. (1851?), Cooper v. Clason, 1 *Code R., N. S.*, 347.

203. A demurrer to a whole complaint containing several causes of action, on the ground that the several counts do not state facts sufficient to constitute a cause of action, must be overruled, unless all the statements are insufficient. *Supreme Ct., Sp. T.*, 1853, Martin v. Mattison,* 8 *Abbotts' Pr.*, 3; 1853, Butler v. Wood, 10 *How. Pr.*, 222.

204. A demurrer to the whole complaint is bad, if one of the plaintiffs may have judgment separately. It must be sustained or fail to the whole extent to which it is applied. [1 *Ohitt. Pl.*, 576.] *Supreme Ct.*, 1855, Peabody v. Washington County Mutual Ins. Co., 20 *Barb.*, 339.

205. In an action to oust the defendant from, and to induct the relator into, an office, if an usurpation of office is properly alleged, a demurrer to the whole complaint is bad, whether it sets forth a valid title in the relator or not. *Supreme Ct., Sp. T.*, 1853, People v. Ryder,† 16 *Barb.*, 370.

206. A joint demurrer cannot be sustained by two or more defendants, on the ground of defect of parties, because there are too many defendants. *Supreme Ct., Sp. T.*, 1855, Phillips v. Hagadon, 12 *How. Pr.*, 17.

207. That in an action against several defendants, the complaint cannot be held bad on a joint demurrer by both defendants, put upon the ground that it does not state facts sufficient to constitute a cause of action if it states a cause of action against either defendant. *Supreme Ct.*, 1856, Woodbury v. Sackrider, 2 *Abbotts' Pr.*, 402; 1855, Peabody v. Washington County Mutual Ins. Co., 20 *Barb.*, 339; *Sp. T.*, 1855, Phillips v. Hagadon, 12 *How. Pr.*, 17; *Cirouit*, 1856, Eldridge v. Bell, *Id.*, 547.

208. If in an action against husband and wife, the complaint seeks judgment solely against the separate estate of the wife, but fails to show a cause of action against the wife, the defendants may demur jointly, and on such demurrer judgment should be given for them. *N. Y. Superior Ct., Sp. T.*, 1857, Goodall v. McAdam, 14 *How. Pr.*, 385.

209. In an action for lands, brought against a municipal corporation and several individ-

* This decision was subsequently affirmed at *General Term*, 1859.

† Affirmed, *Ct. of Appeals*, 1855, 12 *N. Y. (2 Kern.)*, 483, without discussing this point.

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ual defendants, the complaint alleged that the Corporation took possession and leased the lands to the individual defendants, who wrongfully withheld possession; and that the individual defendants who were in possession, refused to pay rents to the plaintiffs, being directed so to refuse by the Corporation, and that they paid their rents to the agents of the Corporation. The judgment demanded was for possession, and for rents and profits. The Corporation and certain individual defendants demurred jointly. *Held*, that as the Corporation were not shown to be in actual possession, there was no cause of action as against them, but they could not take the objection upon the joint demurrer; and there being a cause of action against the other defendants, the demurrer must be overruled. *Supreme Ct., Sp. T.*, 1858, *People v. Mayor, &c., of N. Y.*, 28 *Barb.*, 240; *S. C.*, 8 *Abbotts' Pr.*, 7.

C. Objections to Defects in Demurrant's Pleadings.

210. Judgment against the party who committed first fault. Upon the argument of a demurrer to the answer, the defendant may attack the complaint, but it must be upon some ground on which he might have successfully demurred. *N. Y. Superior Ct.*, 1851, *Fry v. Bennett*, 5 *Sandf.*, 54; *S. C.*, 9 *N. Y. Leg. Obs.*, 380; less fully, 1 *Code R., N. S.*, 238; 1852, *Schwab v. Furniss*, 4 *Sandf.*, 704.* *S. P.*, *Supreme Ct.*, 1851, *Stoddard v. Onondaga Annual Conference*, 12 *Barb.*, 573. Compare *Graham v. Dunnigan*, 6 *Duer*, 629; *S. C.*, 4 *Abbotts' Pr.*, 426.

211. Contra. Since by section 148 defendant waives all objections to the complaint, not taken by answer or demurrer, except the question of jurisdiction and the existence of a cause of action, he cannot, on demurrer to his answer, attack the complaint, except for those two grounds. *Supreme Ct., Sp. T.*, 1852, *People v. Banker*, 8 *How. Pr.*, 258.

212. That the fact that the complaint is demurrable, does not aid a defective answer. *N. Y. Com. Pl., Sp. T.*, 1849, *Hoxie v. Cushman*, 7 *N. Y. Leg. Obs.*, 149.

213. Several defences. Where, on plaintiff's demurrer to one of several defences, the defendant objects that the plaintiff's complaint

does not state facts sufficient to constitute a cause of action, an admission or averment in a defence, not demurred to, which supplies the defect in the complaint, will not avail the plaintiff in his complaint; for the defence containing the admission is not before the court on the demurrer. *Supreme Ct.*, 1854, *Ayres v. Covill*, 18 *Barb.*, 260.

8. Mode of taking or waiving Objections not appearing on the face of the Complaint.

214. When any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer. *Code of Pro.*, § 147.

215. Objection to a defect of parties, which does not appear upon the face of the complaint, may be taken by answer. *Supreme Ct., Sp. T.*, 1853, *Ripple v. Gilborn*, 8 *How. Pr.*, 456.

216. Want of jurisdiction. The meaning of the language of the Code (§ 147), allowing it to be set up as a defence that "the court has no jurisdiction of the person," is, that the person is not subject to the jurisdiction of the court, not that original process has been improperly served. *Supreme Ct.*, 1850, *Nones v. Hope Mutual Life Ins. Co.*, 5 *How. Pr.*, 96.

217. Under section 38 of the Code of 1850,—which required that all of several defendants sued as joint-debtors in the *N. Y. Superior Court* should be personally served with the summons, in the city of New York,—it is not a sufficient answer for one defendant served to allege that the other is a non-resident of the State, and had not been served. *N. Y. Superior Ct., Sp. T.*, 1852, *Bridge v. Payson*, 1 *Duer*, 614.

218. Waiver by not answering. If no such objection (as those enumerated in § 144) be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. *Code of Pro.*, § 148.

219. Insufficiency. The objection mentioned in the 6th subd. of section 144, not waived by omitting to take it in the answer, or by demurrer. [§ 148; 8 *How. Pr.*, 280.] *So held*, where it was taken on the trial. *Supreme Ct.*, 1851, *Ludington v. Taft*, 10 *Barb.*, 447.

* There is a different report of the same case, 1 *Code R., N. S.*, 342.

220. Where defendant failed to demur or to object to the evidence, or to except to the de-

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cision of the referee, and a good cause of action was proved;—*Held*, that he had waived his right to object to the sufficiency of the complaint. [Code of 1848.] *Supreme Ct.*, 1849, *Oarley v. Wilkins*, 6 *Barb.*, 557. Compare *Rayner v. Clark*, 7 *Id.*, 581.

221. If a complaint contain no cause of action against the defendant, it is fatal in every stage of the proceeding, and the defendant is entitled to judgment on a demurrer merely specifying that, in general terms, as the ground of objection. *Supreme Ct.*, *Sp. T.*, 1852, *Noxon v. Bentley*, 7 *Hov. Pr.*, 316; 1853, *Burnham v. De Bevoise*, 8 *Id.*, 189.

222. Though it is improper to set up, in an answer, that the complaint does not contain facts sufficient to constitute a cause of action, the objection may be taken, irrespective of its being set up. *N. Y. Com. Pl.*, 1855, *Slack v. Heath*, 4 *E. D. Smith*, 95; *S. C.*, 1 *Abbotts' Pr.*, 881.

223. *Misjoinder of parties.* The objection that there is an improper joinder of parties, when it means in effect that several causes of action are improperly united, can only be taken by demurrer. [Code, §§ 144, 147, 148.] *N. Y. Superior Ct.*, 1853, *Baggott v. Boulger*, 2 *Duer*, 160.

224. The objection that there is a misjoinder of defendants must be raised by demurrer or answer; and if it is not so raised, the plaintiff will be entitled to recover against all the defendants. *Ct. of Appeals*, 1855, *Fosgate v. Herkimer Manufacturing & Hydraulic Co.*, 12 *N. Y. (2 Kern.)*, 580; affirming *S. C.*, 12 *Barb.*, 352. Compare *Bates v. James*, 3 *Duer*, 45.

225. Section 148 of the Code (*q. v. supra*, 218) means, that if the objection is not taken by demurrer, where that mode of raising it is proper, or by answer in cases where that is the appropriate method, it is waived. Therefore, in actions sounding in tort, where a defect of parties plaintiff appears by the complaint, the defendant should take advantage of the same by demurrer; and if he omits to do so, he waives the defect, even though he insists in the answer that the complaint should be dismissed for that defect. *Ct. of Appeals*, 1855, *Zabriskie v. Smith*, 18 *N. Y. (3 Kern.)*, 322.

226. Where the representatives of a deceased member of a firm are sued with the survivors, for a debt due from the partnership, but insolvency of the surviving members, or

some other ground of relief is not shown, the misjoinder cannot be set up in the answer of the representatives; but they must point out the defect, either by demurrer, or by objecting at the trial that the complaint shows no cause of action as against them. *N. Y. Superior Ct.*, *Sp. T.*, 1853, *Higgins v. Freeman*, 2 *Duer*, 650.

227. *Defect of parties.* If the demurrer does not specify, as grounds of demurrer, a want of parties, or object that the action is not in behalf of others than the plaintiff, all such objections are waived. *Supreme Ct.*, 1853, *Loomis v. Tift*, 16 *Barb.*, 541.

228. An objection to a complaint for defect of parties is waived, if not taken by demurrer or answer. *N. Y. Com. Pl.*, *Sp. T.*, 1857, *Lewis v. Graham*, 4 *Abbotts' Pr.*, 106.

229. When the sufficiency of a complaint, as not stating facts constituting a cause of action, is denied, the only question is, whether, if the facts stated are admitted to be true, the plaintiff is entitled to the relief which he claims; and in determining this question, it is quite immaterial whether the relief sought is, in its nature, legal or equitable. Hence, if an action involving the distribution of a fund by a trustee is to be deemed equitable in its nature, and the presence of other parties is deemed by the trustee to be necessary, before the relief sought, although proper in itself, could with propriety be granted, the absence of those parties must be made a ground of objection, at the time and in the form prescribed by the Code,—*i. e.*, by demurrer or answer (§ 148),—in order that the plaintiff might bring them in, if their presence was held necessary. Such objection cannot be taken by motion to dismiss the complaint at the trial on the ground that the complaint does not state facts sufficient. *N. Y. Superior Ct.*, 1856, *General Mutual Ins. Co. v. Benson*, 5 *Duer*, 168.

230. The objection that the plaintiff in a suit is not the real party in interest, must be set up in the answer, to enable defendant to rely upon it as a defence; and although the fact should appear upon the trial from the examination of witnesses, it is then too late for the defendant to avail himself of it. *N. Y. Com. Pl.*, 1850, *Jackson v. Whedon*, 1 *E. D. Smith*, 141; *S. C.*, 3 *Code R.*, 186.

231. The objection of a defect of parties, which appears upon the face of the complaint, must be taken by demurrer [Code, § 144, subd.

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4]; and allegations in an answer raising such objection, may be struck out, on motion. *Supreme Ct.*, 1854, *Dennison v. Dennison*, 9 *How. Pr.*, 246.

232. Where a partner is sued alone for a firm debt, the non-joinder of his copartner is a defence to the action. *N. Y. Superior Ct.*, 1851, *Bridge v. Payson*, 5 *Sandf.*, 210.

233. In an answer setting up as a defence the non-joinder of others jointly liable, the omission to allege that they are still living, is cured by proof that they were still living, given on the trial. Objection to such proof should be disregarded, or the answer amended to conform to the proof. *Supreme Ct.*, 1858, *Wooster v. Chamberlin*, 28 *Barb.*, 602.

4. The Answer.

A. Taking Issue.

a. In General.

234. The answer of the defendant must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. *Code of Pro.*, § 149, subd. 1.

235. What are material and traversable allegations. To a complaint alleging that the plaintiffs sold, &c., "to defendants, who are partners in business," goods, &c., an answer of one of the defendants that "he never was a copartner in business with the defendants F. and S., jointly," is not frivolous, but raises an issue upon his liability as a partner with the others. *Supreme Ct., Chambers*, 1848, *Corning v. Haight*, 1 *Code R.*, 71.

236. Where indebtedness is stated in a complaint, as a matter of fact, an answer of not indebted is sufficient, and should not be struck out. *Supreme Ct., Sp. T.*, 1849, *Anonymous*, 2 *Code R.*, 67.

237. An answer which, without denying any fact stated in the complaint, merely denies that the plaintiff is entitled to the money demanded, will be struck out, on motion. *N. Y. Com. Pl.*, 1855, *Drake v. Cockcroft*, 4 *E. D. Smith*, 34; *S. C.*, less fully, 1 *Abbotts' Pr.*, 208; 10 *How. Pr.*, 377. Compare *Higgins v. Freeman*, 2 *Duer*, 650.

238. Allegations in a complaint, relative to the intent and motives of a libellous publication, are not to be deemed material, so as to render it necessary for the defendant to admit or controvert them in his answer. Only those allegations in a complaint are material, in the

sense of the Code, which the plaintiff must prove upon the trial in order to maintain his action. *N. Y. Superior Ct.*, 1851, *Fry v. Bennett*, 5 *Sandf.*, 54; *S. C.*, 9 *N. Y. Leg. Obs.*, 380; less fully, 1 *Code R.*, *N. S.*, 238.

239. An answer or reply should only deny material allegations; but if immaterial allegations, made in traversable form, are denied, the court will not strike out the denial. *Supreme Ct., Sp. T.*, 1852, *King v. Utica Ins. Co.*, 6 *How. Pr.*, 485.

240. In an action upon a promissory note, payable to plaintiff's order at a bank, an allegation in the complaint that the plaintiff "is the lawful owner and holder of the note," is a material allegation, and a denial of knowledge or information sufficient to form a belief, is proper. [2 *Code R.*, 66.] *Supreme Ct., Chambers*, 1852, *Temple v. Murray*, 6 *How. Pr.*, 329.

241. In an action on a note against maker and indorser, the allegation that the latter indorsed the note and transferred it to the plaintiff, is a material allegation which the former may controvert. *Supreme Ct., Chambers*, 1856, *Flood v. Reynolds*, 13 *How. Pr.*, 112.

242. To a complaint against an indorser of a promissory note, alleging presentment and non-payment, an answer "that as to the presentment and non-payment, the defendant had not information in respect thereof sufficient to form a belief,"—is sufficient to raise an issue. *Supreme Ct., Sp. T.*, 1848, *Dickerson v. Kimbal*, 1 *Code R.*, 49.

243. In an action for conversion, an allegation of the complaint, that plaintiff lent to defendant the thing converted, if this is the only allegation showing that defendant had possession, is issuable. *Supreme Ct.*, 1855, *Elton v. Markham*, 20 *Barb.*, 343.

244. Where plaintiff sues in a representative capacity, and in his complaint only alleges in general terms that defendant is indebted to him for, &c., an answer denying knowledge or information sufficient to form a belief whether defendant is indebted to plaintiff, is not frivolous. When the plaintiff merely avers that the defendant is indebted to the plaintiff, instead of setting forth the contract upon which the indebtedness arises, he should not complain if the defendant takes issue upon such indebtedness. *N. Y. Com. Pl., Sp. T.*, 1856, *Morrow v. Ougan*, 8 *Abbotts' Pr.*, 323.

245. Denial of aggravation. In an action

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for assault and battery, an answer admitting the assault, &c., but denying certain aggravating circumstances which the complaint stated, and setting forth circumstances considered as a provocation, is frivolous. Circumstances of aggravation in such an action are not traversable. [5 Wend., 184; Grab. Pr., 798.] Such new matter does not constitute a defence or a counter-claim. [Code, § 150; 12 How. Pr., 810; 10 Id., 67, 882; 7 Id., 123, 294, 808.] *Supreme Ct., VI. Dist.*, 1857, Gilbert v. Rounds, 14 How. Pr., 46. To similar effect in respect to denials, *III. Dist., Sp. T.*, 1854, Lane v. Gilbert, 9 Id., 150.

246. In an action for an assault, the defendant's answer admitted an assault, but denied that it was of the nature or extent stated in the complaint. *Held*, that there was no issue to be tried, and that the plaintiff was entitled to an assessment of damages. *Supreme Ct., Sp. T.*, 1858, Schnaderbeck v. Worth, 8 *Abbotts' Pr.*, 87.

247. Denial of plaintiff's title. In an action upon a promissory note, an allegation in the answer that the plaintiff is not the owner and holder of the note, and that A. B. is the owner and real party in interest, creates no issue. *N. Y. Com. Pl., Sp. T.*, 1856, Brown v. Ryckman, 12 How. Pr., §18.

248. Disregarding. A plaintiff cannot, without leave of the court, disregard an answer because it does not present a material issue. *Supreme Ct., Chambers*, 1848, Corning v. Haight, 1 *Code R.*, 71.

249. An answer addressed to the bill of particulars instead of the complaint, is insufficient, and may be demurred to, but cannot be stricken out as frivolous. *Supreme Ct., Sp. T.*, 1849, Scovell v. Howell, 2 *Code R.*, 88.

250. Issues defined. *Code of Pro.*, §§ 248, 251.

b. Form of Denial.

251. Conjunctive denials. Negative pregnant. Where time or place are immaterial,—as in the case of a complaint for assault and battery,—a denial of having made an assault on the day or at the place mentioned in the complaint, admits by implication that defendant committed the act on some other day, &c., and he cannot be permitted to prove that the assault was committed by any one else. *Supreme Ct.*, 1852, Baker v. Bailey, 16 *Barb.*, 54.

252. An answer to a complaint in an action for slander, which simply states that the de-

fendant did not utter the precise words at the precise time and in the particular place and manner stated in the complaint, is clearly bad. *Supreme Ct., Sp. T.*, 1858, Salinger v. Lusk, 7 *How. Pr.*, 430.

253. In an action for services, a denial that the plaintiff rendered the services "on the days, and at the times, and to the extent or quantity, or in the manner mentioned in the complaint," is no denial of any thing certain. *Supreme Ct.*, 1858, Davison v. Powell, 16 *How. Pr.*, 467.

254. In an action to recover possession of demised premises on the ground of a forfeiture by violation of a covenant not to underlet without consent of the lessor, the answer denied that the defendant had "in violation of the covenant, and without consent of the lessor, underlet." *Held*, that although the answer contained a negative pregnant, yet it put in issue the subletting; and a judgment founded on the ground that the answer did not deny the fact of underletting was reversed. *Ct. of Appeals*, 1855, Lawrence v. Williams, cited in *Wall v. Buffalo Water Works Co.*, 18 *N. Y.* (4 *Smith*), 119, 122; and reversing *S. C.*, 1 *Duer*, 585. Compare *Young v. Oatlett*, 6 *Duer*, 437.

255. An answer denying that defendants did at the time, and for the purpose stated in the complaint, by their authorized agent, make their promissory note by the name and for the amount, and as is in this respect set forth in said complaint, is frivolous for denying the allegations of the complaint conjunctively. *Supreme Ct.*, 1855, Shearman v. *N. Y. Central Mills*, 1 *Abbotts' Pr.*, 187; affirming *S. C.*, *sub nom.* *Thorn v. N. Y. Central Mills*, 10 *How. Pr.*, 19.

256. The objection that a denial is a negative pregnant is a formal one, and unless objection is made before the trial, it will be waived, and each allegation will be regarded as controverted. *Supreme Ct.*, 1855, Elton v. Markham, 20 *Barb.*, 343.

257. In a foreclosure action, the complaint set forth the condition of the bond, and alleged that the mortgage was executed "with the same conditions as the said bond." The answer denied that the mortgage contained the condition, repeating it as stated in the complaint. *Held*, insufficient on demurrer. It was not a denial that the mortgage contained, by reference to the bond or otherwise, substantially the same condition. To raise that

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issue, the defendant should have denied the deeds, or set forth the condition of the mortgage in *hæc verba*, that the court might see what it was. *Ct. of Appeals*, 1857, *Dimon v. Dunn*, 15 *N. Y.* (1 *Smith*), 498; reversing *S. C.*, *sub nom.* *Dimon v. Bridges*, 8 *How. Pr.*, 16.

258. To an allegation that a mortgage, under which the pleader claims, was "a valid and subsisting lien," a denial that it was ever a lien,—*Held*, sufficient to enable the other party to prove that it was fraudulent. *Supreme Ct.*, 1852, *Wager v. Ide*, 14 *Barb.*, 468.

259. To a complaint alleging that defendant assaulted the plaintiff and seized him and shook him, a denial that the defendant did assault and seize him and shake him, &c., is bad. Each charge should have been denied separately. *Supreme Ct., Sp. T.*, 1850, *Hopkins v. Everett*, 6 *How. Pr.*, 159.

260. *Hypothetical denials*.—*e. g.*, that if any ditch was dug it was done without the knowledge of the defendant,—are bad. [*Van Santv. Pl.*, 201.] *Supreme Ct., Sp. T.*, 1854, *Wies v. Fanning*, 9 *How. Pr.*, 548.

261. *General denial*. In an action for the conversion of personal property, a general denial of each and every allegation of the complaint traverses the plaintiff's title, as well as the conversion, and the defendant may show title out of the plaintiff. *Supreme Ct.*, 1858, *Robinson v. Frost*, 14 *Barb.*, 586.

262. Where the complaint of a corporation does not allege that plaintiff is incorporated, a general denial is not sufficient to put the plaintiff to proof of his corporate capacity, but the answer must deny the existence of such a corporation. *Supreme Ct.*, 1857, *Bank of Havana v. Wickham*,* 7 *Abbotts' Pr.*, 124; *S. C.*, less fully, 16 *How. Pr.*, 97.

263. The complaint expressly averred that the plaintiff fell into the ditch, and that he fell into it in consequence of defendants' negligence in omitting to place any guard against accident. The answer denied that the ditch was left unguarded, "so that persons using reasonable care" would fall into it. It then proceeded with a further denial "that the plaintiff, without any fault or want of care on his part, did fall therein." *Held*, this denial not having been moved against as indefinite or uncertain, was to be deemed a "general denial" of the

plaintiff's allegation of his having fallen into the ditch in the manner described, so that that allegation in all its parts must be deemed to have been controverted, and the plaintiff must prove that he fell into the ditch. Evidence that he was found near it, with his leg broken, was not sufficient. *Ct. of Appeals*, 1858, *Wall v. Buffalo Water Works Co.*, 18 *N. Y.* (4 *Smith*), 119.

264. Of the analogy between a general denial under the Code and the general issue. *McKyring v. Bull*, 16 *N. Y.* (2 *Smith*), 297.

265. *Exceptions*. The form of an answer which consisted of a general denial of each and every allegation in the complaint, except certain parts therein admitted, approved as making the pleading brief and simple. *Supreme Ct., Sp. T.*, 1856, *Parshall v. Tillou*, 18 *How. Pr.*, 7.

266. In an action by a mutual insurance company upon a premium note, an answer, admitting the execution of the note, and the delivery of the policy of insurance, and denying each and every other allegation in the complaint, is sufficient, there being other material allegations in the complaint. [*Mon. Pr.*, 146.] *Supreme Ct., Sp. T.*, 1850, *Genesee Mutual Ins. Co. v. Moynihan*, 5 *How. Pr.*, 321.

267. A general denial of fraud is not enough, where facts are admitted from which the court may infer fraud. *Supreme Ct.*, 1849, *Litchfield v. Pelton*, 6 *Barb.*, 187.

268. *Specific denial*. Under the Code of 1849,—which required "in respect to each allegation," &c., a specific denial thereof,—saying that defendant denies specifically each and every matter, is not a sufficient denial. *Supreme Ct., Sp. T.*, 1852, *Seward v. Miller*, 6 *How. Pr.*, 312.

269. "Defendant denies each and every allegation," &c., is a sufficient denial of the entire complaint. *Supreme Ct., Sp. T.*, 1850, *Kellogg v. Church*, 4 *How. Pr.*, 349.

Not so under the Code of 1851,—which only authorized a specific denial. *N. Y. Com. Pl., Sp. T.*, 1851, *Rosenthal v. Brush*, 1 *Code R., N. S.*, 228.

270. After a denial "of each and every allegation in the complaint," subsequent denials of particular allegations are but repetitions of what was fully denied before, and may be struck out as redundant. *Supreme Ct.*, 1854, *Dennison v. Dennison*, 9 *How. Pr.*, 246; *Sp. T.*, 1858, *Lippencott v. Goodwin*, 8 *Id.*, 242; and see *Wies v. Fanning*, 9 *Id.*, 548.

* See this case in table of CASES CRITICIZED, Vol. I., *Ante*.

Defendant's Pleadings;—The Answer;—Taking Issue;—Denials of Information, &c.

271. A denial must be direct. Averring that the defendants say that they deny, &c., is not enough. *Supreme Ct.*, 1858, Arthur v. Brooks, 14 *Barb.*, 588. Compare *supra*, 69; *infra*, 278.

272. Denial of the conclusion of law. An answer which controverts no allegation of the complaint, and sets up no new matter in bar, but merely denies a conclusion of law, is bad, and judgment may be given for plaintiff upon it. *Supreme Ct.*, *Chambers*, 1850, McMurray v. Gifford, 5 *How. Pr.*, 14. *N. Y. Com. Pl.*, *Sp. T.*, 1848, Pierson v. Cooley, 1 *Code R.*, 91.

Such an answer may be struck out as frivolous. *Supreme Ct.*, *Sp. T.*, 1848, Beers v. Squire, 1 *Code R.*, 84; 1849, Mullen v. Kearney, 2 *Id.*, 18.

a. Denials of Information, &c.

273. Under the Code of 1849,—which allowed the defendant's denial to be a denial "according to his information and belief, or of any knowledge thereof sufficient to form a belief,"—an answer stating "that the defendant verily believes, and therefore answers and says," is sufficient. *Supreme Ct.*, *Sp. T.*, 1849, Davis v. Potter, 4 *How. Pr.*, 155; *S. C.*, 2 *Code R.*, 99.

274. So an allegation that defendant "is ignorant of whether," &c., is insufficient. *N. Y. Com. Pl.*, 1851, Wood v. Staniels, 3 *Code R.*, 152.

275. Stating that as to certain allegations, defendant has not any knowledge (or that he has not any knowledge or information) thereof sufficient to form a belief, is a sufficient denial. [§ 149.] *Supreme Ct.*, *Sp. T.*, 1850, Genesee Mutual Ins. Co. v. Moynihan, 5 *How. Pr.*, 321; 1851, Snyder v. White, 6 *Id.*, 321; *Chambers*, 1852, Temple v. Murray, *Id.*, 329.

276. Denial of knowledge or information. Under § 149, as amended in 1852 (*q. v.*, *supra*, 234), a denial of any knowledge or information sufficient to form a belief of the subject of an allegation not necessarily within a party's own knowledge, is a complete denial without further words. *Supreme Ct.*, *Sp. T.*, 1856, Flood v. Reynolds, 18 *How. Pr.*, 112.

277. Where a party has no knowledge, or not sufficient knowledge to admit or deny, the Code permits him to state the fact of such want of knowledge, and that is equivalent to a denial; but where he has information on

which he has formed a belief, he cannot use that form of answer, but in such a case, he may admit or deny upon information and belief. *Supreme Ct.*, *Sp. T.*, 1858, Sackett v. Havens, 7 *Abbotts' Pr.*, 371, *note*.

278. A denial of knowledge sufficient to form a belief, is not good, as a denial of knowledge or information sufficient, &c. *N. Y. Com. Pl.*, 1852, Ketcham v. Zerega, 1 *E. D. Smith*, 558.

279. A denial of knowledge merely is not sufficient. If not positive, the denial must be of knowledge or information sufficient. *Supreme Ct.*, *Sp. T.*, 1852, Edwards v. Lent, 8 *How. Pr.*, 28.

280. An allegation in an answer, that the defendant "does not know, of his information or otherwise, that the plaintiff had commenced the action in the complaint mentioned," is not a denial. *N. Y. Com. Pl.*, *Sp. T.*, 1858, Sayre v. Cushing, 7 *Abbotts' Pr.*, 371.

281. Not informed. An allegation that the defendant "is not informed, and cannot state" whether, &c., is not good. *Supreme Ct.*, 1855, Elton v. Markham, 20 *Barb.*, 343.

282. No recollection. An allegation that the defendant "has no recollection as to the specific sum," &c., is not a denial. *Supreme Ct.*, *Sp. T.*, 1852, Nichols v. Jones, 6 *How. Pr.*, 355.

283. Denials of information, &c., not to be favored in a pleading which the party must have leave of court to put in. *Supreme Ct.*, *Sp. T.*, 1851, O'Brien v. Catlin, 1 *Code R.*, *N. S.*, 278.

284. Party cannot deny knowledge, &c., as to his own acts. That a party cannot deny the allegations of a pleading, as to his own acts, from want of sufficient knowledge or information to form a belief. *Supreme Ct.*, 1854, Lewis v. Acker, 11 *How. Pr.*, 163.

285. Acts done by the agent of the defendant are within the rule that the defendant must be presumed to know what he himself has done. As a general rule the principal should be deemed possessed of all the knowledge of the agent in the transaction of his business, sufficiently to form a belief, and he therefore cannot be permitted to deny information or belief as to such acts. This rule applies to the case of a corporation defendant, for a corporation can as well know the acts of his agent as any thing else. *Supreme Ct.*, 1855, Shearman v. N. Y. Central Mills, 1 *Abbotts'*

Defendant's Pleadings;—The Answer;—New Matter.

Pr., 187; affirming *S. C.*, *sub. nom.* *Thorn v. N. Y. Central Mills*, 10 *How. Pr.*, 19.

286. An answer of a person charged as indorser to the plaintiff, denying knowledge or information sufficient to form a belief "that he had ever indorsed the note mentioned in the complaint, or that the same had ever been transferred to the plaintiff," is frivolous. If for any reason he could not answer positively, that reason should have been stated. He ought either to admit or deny the transfer, or show how it happened that he had no knowledge or information on the subject. [8 *How. Pr.*, 28; 10 *Id.*, 19; 4 *Sandf.*, 708; 1 *Abbotts' Pr.*, 187, 254; 1 *Code R.*, *N. S.*, 255, 204.] *Supreme Ct.*, *Chambers*, 1855, *Fales v. Hicks*, 12 *How. Pr.*, 158.

287. — *nor contents of his contract.* If defendant admits that he executed an instrument upon which he is sued, he cannot deny information sufficient to form a belief as to facts stated in the instrument. If he admits having executed an instrument similar to that upon which he is sued, he cannot deny, merely upon a want of information sufficient to form a belief, that the instrument is correctly set forth in the complaint; but he is entitled to an inspection of the original to enable him to answer. *N. Y. Com. Pl.*, *Sp. T.*, 1855, *Wesson v. Judd*, 1 *Abbotts' Pr.*, 254.

288. — *nor matters within his means of knowledge.* An answer is insufficient, if it denies, merely upon information, an allegation, the truth or falsity of which is within the defendant's own knowledge. *Supreme Ct.*, *Sp. T.*, 1852, *Edwards v. Lent*, 8 *How. Pr.*, 28.

289. An answer denying knowledge, &c., sufficient to form a belief respecting an allegation, as to which defendant has presumptively means of information within his reach, may be stricken out as sham. Thus where defendant entered into an undertaking in a suit between A. & B. that he would pay any judgment that might be recovered against B., and after judgment and execution he was sued upon the undertaking, and employed the same attorney that B. had employed;—*Held*, that he could not be permitted to deny knowledge or information sufficient to form a belief as to whether plaintiff had recovered judgment against B., for he had but to ask his attorney. *N. Y. Com. Pl.*, 1851, *Hance v. Rumming*, 2 *E. D. Smith*, 48; *S. C.*, 1 *Code R.*, *N. S.*, 204; *S. P.*, *Mott v. Burnett*, 2 *E. D. Smith*, 50, and

S. C. below, 1 *Code R.*, *N. S.*, 225; but compare *Ketcham v. Zerega*, 1 *E. D. Smith*, 553.

290. But where defendant gave an undertaking that a judgment-debtor should appear in supplementary proceedings;—*Held*, that in an action upon the undertaking he might deny knowledge or information, &c., as to whether any judgment had been recovered against the debtor. *N. Y. Com. Pl.*, *Sp. T.*, 1855, *Wesson v. Judd*, 1 *Abbotts' Pr.*, 254.

291. An allegation of a fact which is presumptively within the defendant's personal knowledge, he cannot, in general, be permitted to answer by denying knowledge or information sufficient to form a belief. If from lapse of time, or other circumstances, he cannot admit or deny the charge positively, he must set up such circumstances, either in his answer or verification. *N. Y. Superior Ct.*, 1852, *Richardson v. Wilton*, 4 *Sandf.*, 708.

292. In an action against the maker and the indorser of a note, a denial by the maker of any knowledge or information sufficient to form a belief as to the plaintiff's allegation that the payee indorsed and delivered the note to the plaintiff, is material, and cannot be struck out on affidavits showing that both the defendants were partners, and as such gave the note to the plaintiff in settlement of a partnership debt. *Supreme Ct.*, 1852, *Caswell v. Bushnell*, 14 *Barb.*, 898; *S. C.*, 7 *How. Pr.*, 171. To the contrary, *N. Y. Com. Pl.*, 1855, *De Santes v. Searle*, 11 *How. Pr.*, 477.

293. A partner cannot be permitted to deny having any knowledge or information sufficient to form a belief as to a transaction alleged to have been had with his firm. If there is any thing to prevent his informing himself as to the fact, he should state what it was, by way of excusing himself from this mode of answering. [8 *How. Pr.*, 28; 10 *Id.*, 19; 4 *Sandf.*, 708; 1 *Abbotts' Pr.*, 254, 187.] *Supreme Ct.*, *Sp. T.*, 1855, *Chapman v. Palmer*, 12 *How. Pr.*, 87.

B. New Matter.

294. *The answer must contain . . . 2.* A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition. *Code of Pro.*, § 149, subd. 2.

295. *A partial defence.*—*s. g.*, a recoupment,—may be set up by answer, if the answer does not claim that the matter pleaded is a bar, but merely proposes to recoup, and

to give the matter in evidence in mitigation of damages; but the plaintiff will be entitled, when there is no other answer, to take judgment for the part of the count which is left unanswered. [Co. Lit., 308-9; 1 Chitt. Pl., 509; 1 Story, 308; 1 Saund., 28, n. 8.] *Supreme Ct., Sp. T.*, 1851, *Willis v. Taggard*, 6 *How. Pr.*, 438.

296. It is not necessary that new matter should constitute a defence to the whole cause of action in order to be pleaded as a defence under § 149 of the Code. Any partial defence which could not be proved unless pleaded,—*e. g.*, part-payment,—may be pleaded as a separate defence. *Supreme Ct.*, 1858, *Houghton v. Townsend*, 8 *How. Pr.*, 441.

297. That partial defences may be pleaded. *Hynds v. Griswold*, 4 *How. Pr.*, 69; *Williams v. Hayes*, 5 *Id.*, 470; *Bush v. Prosser*, 11 *N. Y. (1 Kern.)*, 347. To the contrary, *Kneedler v. Sternbergh*, 10 *How. Pr.*, 87; *Graham v. Stone*, 6 *Id.*, 15; *Heaton v. Wright*, 10 *Id.*, 79.

298. **Damages.** Facts that do not constitute a full defence, but only go in mitigation of damages, cannot be pleaded; if admissible at all, they may be proved without being pleaded. [2 *Hill*, 194; 6 *How. Pr.*, 15.] *Supreme Ct., Sp. T.*, 1852, *Smith v. Waite*, 7 *How. Pr.*, 227; *Gen. T.*, 1857, *Gilbert v. Rounds*, 14 *Id.*, 46.

299. That matters which affect, not the cause of action itself, but the measure of damages, do not constitute a defence, and cannot be pleaded except in cases of libel and slander. *Supreme Ct., Sp. T.*, 1855, *Van Benschoten v. Yaple*, 18 *How. Pr.*, 97.

300. **Contingent averment.** An allegation that if the plaintiff should prove certain facts, defendant will prove in justification certain matters, stating them, is bad, as being contingent instead of positive, and as not alleging the truth of the matters he intends to prove, nor any thing upon which the plaintiff can take issue. *Supreme Ct., Sp. T.*, 1850, *Lewis v. Kendall*, 6 *How. Pr.*, 59.

301. **A defence may be hypothetically predicated** upon a fact alleged in the complaint, not presumptively within the knowledge of the defendant, when he denies any knowledge or information of such fact sufficient to form a belief. *N. Y. Com. Pl., Sp. T.*, 1856, *Brown v. Ryckman*, 12 *How. Pr.*, 818.

302. In an action brought to recover for services rendered, the defendant, under an answer which denies the allegations in the complaint, and denies that he is indebted to the plaintiff, may prove any circumstances tending to show that he was never indebted at all, or that he owed less than was claimed. He may, for example, under such denials, prove that he never incurred the debt,—or that the services, either in whole or in part, were rendered as a gratuity,—or that the plaintiff had himself fixed a less price for them than he claimed to recover,—or that they were rendered upon the credit of some other person than the defendant, &c. So doing is not an attempt to show an extinguishment of the alleged indebtedness, but that it never existed. *Supreme Ct.*, 1853, *Schermerhorn v. Van Allen*, 18 *Barb.*, 29.

303. The complaint in an action for services, was upon a *quantum meruit*, not on special contract, and the answer was a general denial. *Held*, that the answer put in issue not only the performance of the services, but their value; and although the evidence tended to prove a special contract, the defendant was entitled to show, under the pleadings, that the work was unskillfully done, or that he had discharged the plaintiff, or given him notice to stop. *N. Y. Com. Pl.*, 1855, *Raymond v. Richardson*, 4 *E. D. Smith*, 171.

304. **New matter, in all cases, must be pleaded, whether it constitute an entire, or only a partial defence.** [§ 149.] Evidence of payment in whole or in part, if not put in issue by the pleadings, is not admissible in mitigation of damages. *Ct. of Appeals*, 1887, *McKyring v. Bull*, 16 *N. Y. (2 Smith)*, 297. To similar effect, *Supreme Ct.*, 1850, *Fort v. Gooding*, 9 *Barb.*, 371.

305. **A defence which merely confesses and avoids** the cause of action,—*e. g.*, payment, whether in full or partial,—cannot be given in evidence under an answer which contains simply a general denial of the allegations of the complaint. *So held*, where the complaint did not allege non-payment except in the form of a mere legal conclusion.* *Ct. of*

* But compare *Van Giesen v. Van Giesen*, 10 *N. Y. (6 Seld.)*, 816; affirming *S. C.*, 12 *Barb.*, 520, where it was held that where the complaint contained an averment of non-payment, a specific denial of payment formed a complete issue.

Appeals, 1857, *McKyring v. Bull*, 16 *N. Y. (2 Smith)*, 297.

306. The facts which are relied upon as constituting a defence must be set forth in the answer, with at least so much certainty as to enable the court to say that, admitting them to be true as alleged, they constitute a bar to the plaintiff's recovery. And where the defendant relies upon an award of arbitrators upon the matter in controversy, as his defence, although it may not be necessary to set forth its terms, its substance must be set forth so fully as to enable the court to say that if such an award was made the action is barred. *N. Y. Superior Ct.*, 1858, *Gihon v. Levy*, 2 *Duer*, 176.

307. Award. An answer which merely denies the allegations in the complaint, does not allow the defendant to rely upon an award of arbitrators upon the matters in controversy as a bar to the action, although the award appears from the plaintiff's evidence. An award or former recovery for the same cause is new matter, which must be set up as a defence in the answer.* *Ct. of Appeals*, 1854, *Brazill v. Isham*, 12 *N. Y. (2 Kern.)*, 9; affirming *S. C.*, 1 *E. D. Smith*, 437.

308. Payment must be specially set up as a defence. It cannot be proved unless it is alleged in the answer. [Code, § 149.] *N. Y. Superior Ct.*, 1856, *Texier v. Gouin*, 5 *Duer*, 389. See, also, *Calkins v. Packer*, 21 *Barb.*, 275.

309. To a complaint on a note, alleging that the defendants had not paid the same, or any part thereof, but that they were justly indebted to the plaintiff therefor, defendant's answer admitted the making of the note, and merely denied the allegation of non-payment, and that they were indebted, &c., and that the note, or any part thereof was justly due or owing by them. *Held*, that the denials were frivolous. The plaintiff would have nothing to prove upon the trial, and defendants could give nothing in evidence under

* But compare *N. Y. Central Ins. Co. v. National Protection Ins. Co.*, 14 *N. Y. (4 Kern.)*, 85, where the decision below (20 *Barb.*, 468), turning on this principle, was reversed on the ground, that as plaintiff did not appear to have been misled or surprised, and not having objected that the evidence of a defence not pleaded was not admissible, he could not have the judgment reversed because it had been admitted.

their answer. They could not, because they had no answer. *Supreme Ct.*, *Sp. Dillaye*, 8 *How. Pr.*, 273.

310. In an action on a mortgage, issued to the mortgagee as a mortgage-debt, the fact that the mortgage has been paid is not available as a defence, as stated in the answer. *N. Y. Superior Ct.*, 1857, *Grosvenor v. Atlantic*, 2 *Barb.*, 469.

311. Unexpired credit. In an action on goods sold, an answer admitting the sale of the goods, but averring that the goods were not sold, is not a defence, but a statement of new matter. *Supreme Ct.*, 1857, *Grosvenor v. Atlantic*, 2 *Barb.*, 469.

312. In an action upon a note, an answer denying the allegations in the complaint that the plaintiff is the owner, and setting up usury, is not a defence, but a statement of new matter. *Supreme Ct.*, 1857, *Grosvenor v. Atlantic*, 2 *Barb.*, 469.

313. In an action for a general denial, the plaintiff's case cannot be proved. *Supreme Ct.*, 1851, *Anonymous*, 6 *How. Pr.*, 287.

314. Denial of incorporation. In an action on a note, constituting a defence, under the Code, means some fact which the plaintiff is not bound to prove in order to maintain the cause of action, and which, if proved, would discharge of that cause of action. If defendants are sued by a corporation, although the complaint does not allege that the defendants are incorporated, they must establish the fact; and a denial that the defendants are a corporation, is not new matter. *Supreme Ct.*, 1851, *Stoddard v. Onondaga*, 12 *Barb.*, 578.

315. Defence arising after the answer. In an action on a note, the defendant may, after the answer, set up such settlement

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fence. Any defence existing at the time of answering, may be inserted in the answer. *Supreme Ct., Sp. T., 1854, Willis v. Chipp, 9 How. Pr., 568.*

316. Denial of assignment. In an action by the assignee of an obligation, an answer denying that the assignor for value, &c., to be paid by plaintiff, duly assigned, &c., whereby plaintiff became sole owner; but that if it was ever sold by the assignor, it was sold to a defendant specified, who furnished the money, and that he is the real plaintiff in interest,—is bad on demurrer. *Supreme Ct., 1853, Arthur v. Brooks, 14 Barb., 538.*

317. A fraud or breach of warranty, if not alleged in the answer, is not admissible in proof. *So held,* of pleadings in a justice's court. *Supreme Ct., 1849, Deifendorff v. Gage, 7 Barb., 18.*

318. Failure of consideration. In an action for the price of goods sold, an averment in the answer that they were of little value, being no defence, proof that they were of no value is inadmissible under it. *Id.*

319. Counter-claim. An answer setting up a counter-claim is not insufficient, because it does not present a defence to the whole demand of the plaintiff. It is not required that a counter-claim equal the amount of the plaintiff's claim. It is enough if the answer states a cause of action against the plaintiff, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action. *N. Y. Superior Ct., 1856, Allen v. Haskins, 5 Duer, 332.*

320. To a complaint on a note, the answer of an indorser alleged usury, and demanded judgment that his name be cancelled and discharged from the note. *Held,* that the answer was not to be deemed as setting up a counter-claim, so that failure to reply admitted its allegations. When the facts alleged may possibly constitute a counter-claim, but are such as always constitute a flat bar, at law, to the action, they should be deemed to be set up as a defence merely, unless the answer expressly states that they are set up by way of counter-claim. *N. Y. Superior Ct., 1856, Burrall v. De Groot, 5 Duer, 379.* Consult, also, COUNTER-CLAIM.

C. Pleading several Defences.

321. What may be set up and how. The defendant may set forth by answer, as many de-

fences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished. *Code of Pro., § 150.*

As to the Counter-claims also authorized by this section, see COUNTER-CLAIM.

322. Where defendant interposes several answers (defences?), an admission implied in one answer, by a neglect to deny an allegation of the complaint, only admits such allegation for the purposes of that answer, and is not available to the plaintiff under another answer. Each must stand by itself, and the plaintiff must recover upon the whole record. One material issue found for the defendant, is as complete a defence for him as if all the issues were found in his favor. *Supreme Ct., 1857, Swift v. Kingsley, 24 Barb., 541.*

323. Pleas in abatement and in bar may be united under the Code in the same answer. [Code, § 150.] Thus the non-joinder of a party defendant may be pleaded together with a defence on the merits. *Ct. of Appeals, 1856, Sweet v. Tuttle, 14 N. Y. (4 Kern.), 465; affirming S. C., 10 How. Pr., 40. N. Y. Superior Ct., 1851, Bridge v. Payson, 5 Sandf., 210. Supreme Ct., 1854, Mayhew v. Robinson, 10 How. Pr., 162.* To the contrary were *Gossling v. Broach, 1 Hill., 49; Van Buskirk v. Roberts, 14 How. Pr., 61.*

324. Consistency. It is no objection to an answer that it sets up several defences inconsistent with each other. *Supreme Ct., IV. Dist., Sp. T., 1848, Anonymous, 1 Code R., 184.*

325. A defendant has a right to set up as many defences as he may have, stating each separately (§ 150); and the mere fact that the materiality of one of them can only appear by assuming that the other is false, is not enough to deprive the defendant of the opportunity to set up both. *N. Y. Com. Pl., 1851, Mott v. Burnett, 2 E. D. Smith, 50; S. C. below, 1 Code R., N. S., 225. Supreme Ct., VI. Dist., 1853, Otis v. Ross, 8 How. Pr., 193; S. C., 11 N. Y. Leg. Obs., 343.*

326. Where facts are alleged in an answer, which from their nature must be within the personal knowledge of the defendant, and which, if true, are a complete answer to the claim, he cannot set up in addition facts not consistent therewith. Thus a carrier by water

will not be permitted to answer, 1. That he was not the owner of the vessel; and 2. That the property shipped was delivered to the plaintiff. *N. Y. Superior Ct.*, 1851, *Arnold v. Dimon*, 4 *Sandf.*, 680.

327. Although hypothetical pleading is objectionable, the defendant cannot be required, as a condition of averring new matter, to make an admission of the facts alleged which shall preclude him from denying them on the trial. Such was not the rule before the Code, and such is not the rule now. It is only for the purposes of the issue formed upon the new matter, that the defendant must admit, or rather that he is, by setting up the new matter, deemed to admit, the truth of the allegations avoided thereby. *N. Y. Com. Pl.*, 1852, *Ketcham v. Zerega*, 1 *E. D. Smith*, 558. Approved and followed, *Sp. T.*, 1856, *Brown v. Ryckman*, 12 *How. Pr.*, 318.

328. It is no ground of striking out a defence that it is inconsistent with another defence in the same answer. The Code allows a defendant to put in as many defences as he has, whether consistent or not. *So held*, in an action for slander, on a motion to strike out a defence in mitigation from an answer containing a denial of speaking the words. *Supreme Ct.*, *VI. Dist.*, *Sp. T.*, 1858, *Stiles v. Comstock*, 9 *How. Pr.*, 48.

329. It is only when the inconsistency is such as to mark one or the other defence as necessarily false, on the face of the answer, that it can be struck out on that ground. *Supreme Ct.* (*V. Dist.*, *Sp. T.*, 1858?), *Ostrom v. Bixby*, 9 *How. Pr.*, 57; 1854, *Hollenbeck v. Clow*, *Id.*, 289.

330. An answer seeking to avoid the complaint by new matter, should confess, directly, or by implication, that but for the matter of avoidance contained in it, the action could be maintained. Alleging that if plaintiffs are holders of the note in suit they obtained it by fraud, is bad. *Supreme Ct.* (*IV. Dist.*), *Chambers*, 1850, *McMurray v. Gifford*, 5 *How. Pr.*, 14.

331. In an action for slander, an answer which justifies the speaking of the words, is bad on demurrer, unless it expressly confesses the speaking of them. [1 *Chitt. Pl.*, 511; 1 *Stark. on Slander*, 421; 7 *East*, 498; 11 *Johns.*, 38.] *Supreme Ct.*, *IV. Dist.*, *Sp. T.*, 1851, *Anibal v. Hunter*, 6 *How. Pr.*, 255.

332. In slander, defendant cannot deny speaking the words, and then suggest hypo-

thetically, that if he did reference to, &c. He may set up as many defences as he may be separately stated and b. *N. Y. Com. Pl.*, *Sp. T.*, 1851, *Creedy*, 1 *Code R.*, *N. S.* effect, *Supreme Ct.*, *IV. Dist.*, *Sayles v. Wooden*, 6 *How. Pr.*, 318.

So held, in libel. *III. Dist.*, *ton v. Davis*, 6 *How. Pr.*, 318.

333. In an action for slander, the defendant may deny the uttering of the words set up by way of justification, although alleged to have been spoken in truth. Under the Code, the defendant is not required to be consistent. *Supreme Ct.*, *I. Dist.*, 1851, *worth*,* 17 *Barb.*, 649; *S. Ct.*, *v. Wentworth*, 9 *How. Pr.*, 318.

334. A denial and a confession in an action for slander are not inconsistent; both may be true. The court, on motion, decide the matter when they may be, and the defendant may take an affidavit that they are. The defendant has an absolute right to set up a defence, if he has, and if he fails, by reason of imperfect memory of his own words, it is no reason why he should be permitted to have the benefit of the denial. *Superior Ct.*, *Sp. T.*, 1856, *las*, 5 *Duer*, 665. To the contrary, see the previous decision in *S. Ct.*, 1851, *las*, 5 *Duer*, 665.

335. Where the answer seeks to avoid the issue, it cannot add a justification. *Superior Ct.*, 1851, *Schneider v. Rogers*, 8 *How. Pr.*, 356.

So held, in the case of slander. [citing, also, 4 *Sandf.*, 680; 88, *Ormsby v. Douglass*, 2 *How. Pr.*, 318; but, to the contrary, see a *S. Ct.*, 5 *Duer*, 665.]

336. Pleas which were formerly good under the former practice, but which are inconsistent as answers under the Code, are bad in an action for assault and battery. The answer may set up, 1. A plea that the plaintiff committed the assault. 2. That he was in defence of his person, great noise, &c., and refusing

* Not an authority for hypothesis. *Wies v. Fanning*, 9 *How. Pr.*, 51.

Defendant's Pleadings;—The Answer;—Pleading several Defences.

ants gently laid their hands on him, &c. *Supreme Ct., VI. Dist., Sp. T., 1854, Lansingh v. Parker, 9 How. Pr., 288.*

337. Denial of the making of the contract, and an allegation of non-performance of it on the part of the adverse party,—*Held*, inconsistent. *Supreme Ct., II. Dist., 1854, Lewis v. Acker, 11 How. Pr., 168.*

338. A defence setting up the Statute of Limitations may be joined in an answer denying the facts constituting the cause of action. *Supreme Ct., Sp. T. (V. Dist., 1854?), Ostrom v. Bixby, 9 How. Pr., 57.*

339. When an answer set up defences, some of which tendered issues with the complaint, and some of which hypothetically admitting the averments of the complaint, averred matter in avoidance;—*Held*, that the hypothetical defences must be stricken out, and that as there was enough left in the answer to put the plaintiff to proof of his case, it was unnecessary to allow an amendment. *Supreme Ct., III. Dist., Sp. T., 1856, Hamilton v. Hough, 18 How. Pr., 14.*

340. In an action to recover securities pledged with defendants, the defendants, in their answer, denied knowledge, &c., sufficient to form a belief whether the securities belonged to plaintiff; and then averred that the securities were delivered to them, by plaintiff, as collateral security for debts yet unpaid. *Held*, that the first clause of the answer would, by itself, have formed a good issue; and that it was not rendered irrelevant by the addition of the second. *N. Y. Com. Pl., Sp. T., 1856, Townsend v. Platt, 3 Abbotts' Pr., 325.*

341. The answer of the maker, to a complaint on a promissory note, set up as a first defence that no consideration was ever given for it; and, as a second defence, set forth the circumstances under which it was executed and came into the plaintiff's hands. *Held*, that the first branch of the answer must be interpreted by the second, and that so interpreted it was no defence in law; and the second branch, if it were a sufficient defence, not having been sustained by the evidence at the trial, that the whole defence failed, and there was no alternative but a verdict for the plaintiff. *Supreme Ct., I. Dist., Sp. T., 1857, Ryle v. Harrington, 4 Abbotts' Pr., 421; S. C., less fully, 14 How. Pr., 59.*

342. Matter in mitigation cannot be set

up in an answer, except in actions of libel or slander. *N. Y. Com. Pl., Sp. T., 1851, Rosenthal v. Brush, 1 Code R., N. S., 228.*

343. The rule as to giving color in pleading, not abolished. *Supreme Ct., Sp. T., 1850, Tobias v. Rogers, 8 Code R., 156.*

As to Inconsistent pleading, see, also, *supra*, 80, 102–104.

344. Several denials one defence. All or any of the material facts constituting one cause of action, may be denied generally or specifically as forming one defence, but not in the alternative form. Section 150 of the Code—requiring several defences to be separately stated—does not relate to defences consisting of mere denials. *Supreme Ct., 1853, Otis v. Ross, 8 How. Pr., 193; S. C., 11 N. Y. Leg. Obs., 343.*

345. Several demands one defence. Several demands against the plaintiff, which are available to the defendant as a set-off, may be pleaded in one defence, each being separately described. *Supreme Ct., Sp. T., 1851, Ranney v. Smith, 6 How. Pr., 420.*

346. Separate statement. Whenever an answer contains a traverse or denial of any one or more of the material allegations in the complaint, every thing else which it contains, whatever it may be, is redundant and must be stricken out, on motion, unless it belongs to a separate and distinct defence, and is so stated. Thus, allegations of matter going to support a denial of want of probable cause, &c., in an action for malicious prosecution, may be struck out from the defence in which they are commingled with such denial. [Code, § 150.] *Supreme Ct., Sp. T., 1852, Benedict v. Seymour, 6 How. Pr., 298.*

347. Separate statement. New matter, which might be sufficient if separately stated, may be struck out as redundant if it is merely added to denials with the connecting words "and the defendant further says." Each separate cause of action or defence should indicate distinctly, by fit and appropriate words, where it commences and where it concludes. *Supreme Ct., Sp. T., 1853, Lippencott v. Goodwin, 8 How. Pr., 242.* To similar effect, 1852, *Benedict v. Seymour, 6 Id., 298.*

348. Several defences need not have any formal commencement or conclusion; nor need each state the reason why it is a defence. *N. Y. Superior Ct., 1851, Bridge v. Payson, 5 Sandf., 210.*

Demurrer to Answer.

349. Each defence separately stated as a separate defence must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or to answer that part thereof which it purports to answer. The former rule in this respect is not relaxed by the Code. A defence which is only to be made complete and sufficient by resorting to portions of other defences contained in the same answer, but to which it does not refer for the purpose, is insufficient, and bad on demurrer. *N. Y. Superior Ct.*, 1858, *Xenia Branch Bank v. Lee*, 2 *Borw.*, 694; *S. C.*, 7 *Abbotts' Pr.*, 372.

350. The defect of a counter-claim or defence in such a respect, is a substantial defect; such, that the court should not sustain it on demurrer as sufficient, although the objection to its sufficiency in such respect was not discussed or raised upon the argument. *Id.*

351. Completeness. Each defence or counter-claim should be a complete single defence of itself, without reference to others. A defence cannot be made out in pleadings by connecting two or more separate defences together, any more than it could formerly by connecting together two or more special pleas, each insufficient of itself. *Supreme Ct.*, 1856, *Spencer v. Babcock*, 22 *Barb.*, 326.

352. Reference to complaint. If the substance of the defence clearly shows to which cause of action it is addressed, it is sufficient on demurrer. *Supreme Ct.*, *Sp. T.*, 1851, *Willis v. Taggard*, 6 *How. Pr.*, 433.

353. Where the complaint contained two counts, each upon a promissory note, an answer referring simply to "the note mentioned in the complaint,"—*Held*, bad for uncertainty. *Supreme Ct.*, *Sp. T.*, 1854, *Kneedler v. Sternbergh*, 10 *How. Pr.*, 67.

354. That equitable defences may, under the Code, be set up in an answer to a complaint in an action of a legal nature. *Ct. of Appeals*, 1854, *Dobson v. Pearce*, 12 *N. Y.* (2 *Kern.*), 156; *S. C.*, 1 *Abbotts' Pr.*, 97; affirming *S. C.*, 1 *Duer*, 142, and 10 *N. Y. Leg. Obs.*, 170; 1855, *Crary v. Goodman*, 12 *N. Y.* (2 *Kern.*), 266; reversing *S. C.*, 9 *Barb.*, 657. *Supreme Ct.*, *Sp. T.*, 1851, *Burget v. Bissell*, 5 *How. Pr.*, 192; and see *Miller v. Platt*, 5 *Duer*, 272, 284.

355. Affirmative relief. In an action for land, an equitable defence seeking affirmative relief is inadmissible in connection with a de-

nial in ejectment. The n
ferent. *N. Y. Superior C*
Webb, 4 *Sandf.*, 653.

356. If, in an action f
ant would set up an equit
for a conveyance of the l
become an actor and dema
Supreme Ct., *Sp. T.*, 1853,
Barb., 865.

D. Defendant's Den

357. Affirmative relie
not necessary for the defe
for the possession of pe
claim in his answer his
the taking and detention
him by the plaintiff. The
him to special damages do
the time of answering.
Woodruff v. Cook, 25 *Barb.*

358. Relief against co
section 274 of the Code,—
the judgment may determi
rights between the plaint
but also the ultimate right
tiffs or the defendants as a
such determination shoul
mere motion without an
the questions before the co
Sp. T., 1849, *Norbury v. Ser*

359. That a defendant
against a co-defendant wh
for the latter by not answer
by admit the contents of
former. *Supreme Ct.*, *Sp*
worth v. Bellows, 4 *How.*

360. Where the answer
defendants stated facts wh
tute a defence, and was im
him and the plaintiff, but
ground of relief against a
such co-defendant did not
that the answer must be s
tiff's motion. *Id.*

IV. DEMURRER TO

361. Privilege. That wh
libellous on its face, may be
leged, is a question of law th
ly raised by a demurrer.
Sandf., 54; *S. C.*, 9 *N. Y. L*
fully, 1 *Code R.*, *N. S.*, 238.

362. Mitigation. Matter
ed only in mitigation of dar

Demurrer to Answer.

for libel or slander, as they constitute no defence to the action, are not proper subjects of demurrer. The question whether the facts set up in mitigation are or are not such as should be admitted to be given in evidence in mitigation, must be determined by the judge on the trial. *N. Y. Superior Ct., Sp. T.*, 1851, *Newman v. Harrison*, 1 *Code R.*, *N. S.*, 184, note.

363. Part of defence. A demurrer will not lie to a part of an entire defence in an answer. *Supreme Ct., Sp. T.*, 1850, *Cobb v. Frazee*, 4 *How. Pr.*, 413; *S. C.*, 3 *Code R.*, 43.

364. Insufficiency. An answer is insufficient in the sense of the Code, and therefore bad upon demurrer, not only when it sets up a defence groundless in law, but when in the mode of stating a defence, otherwise valid, it violates the essential rules of pleading. Thus in an action for libel, an answer that the facts stated "were and are true," without specifying the facts on which the defendant relies to show its truth, is bad on demurrer.* *N. Y. Superior Ct.*, 1851, *Fry v. Bennett*, 5 *Sandf.*, 54; *S. C.*, 9 *N. Y. Leg. Obs.*, 330; less fully, 1 *Code R.*, *N. S.*, 238. To the contrary, see *Van Wyck v. Guthrie*, 4 *Duer*, 268.

365. Matter pleaded in mitigation in an action of tort is not demurrable, for it is not a defence.† No allegation in a complaint or answer can be deemed *material* within the meaning of section 168 of the Code (which provides that material allegations not controverted, &c., must be taken as true), unless an issue taken upon it, whether of law or fact, will decide the cause, so far as relates to the particular cause of action to which it refers. *N. Y. Superior Ct.*, 1851, *Newman v. Otto*, 4 *Sandf.*, 668.

366. The defendant's answer denied generally all the allegations of the complaint, and set up a counter-claim. The plaintiff's reply contained, among other things, a counter-claim to the defendant's counter-claim, and the defendants moved to strike out this portion of the reply. *Held*, that the defendants had mistaken their remedy; they should have demurred. *Supreme Ct., Sp. T.*, 1854, *Stewart v. Travis*, 10 *How. Pr.*, 148.

367. A defence which commences as an

answer to the whole complaint, is bad on demurrer, if it only shows a defence as to a part of the cause of action. *So held*, of a defence in ejectment, showing that defendant was rightfully in the possession of a portion of the premises to recover which the action was brought. [1 *Chitt. Pl.*, 510; 1 *Saund.*, 28, n. 3; 1 *Wend.*, 347; 6 *Hill*, 421.] *Supreme Ct., Sp. T.*, 1851, *Thumb v. Walrath*, 6 *How. Pr.*, 196.

368. A defence which professes to be an answer to the whole complaint must, in order to be sustained, amount to a defence as to all the causes of action. *Supreme Ct., Sp. T.*, 1853, *Loveland v. Hosmer*, 8 *How. Pr.*, 215.

369. When. Whether, before the amendment of 1855, the plaintiff could demur to an answer for insufficiency, except where the answer set up a counter-claim, the cases are conflicting.

That he could. *Supreme Ct., II. Dist., Sp. T.*, 1850, *Hopkins v. Everett*, 6 *How. Pr.*, 159; *II. Dist., Sp. T.*, 1852, *Seward v. Miller*, 6 *Id.*, 312; *II. Dist., Sp. T.*, 1853, *Salinger v. Lusk*, 7 *Id.*, 430; *VII. Dist., Sp. T.*, 1853, *Wisner v. Teed*, 9 *Id.*, 143; *IV. Dist., Sp. T.*, 1854, *Kneeder v. Sternbergh*, 10 *Id.*, 67; *Stewart v. Travis, Id.*, 148.

That he could not. *VI. Dist., Sp. T.*, 1852, *Thomas v. Harrop*, 7 *How. Pr.*, 57; *VIII. Dist., Sp. T.*, 1853, *Loomis v. Dorshimer*, 8 *Id.*, 9; *III. Dist., Sp. T.*, 1853, *Simpson v. Loft*, 8 *Id.*, 234; *Roosa v. Saugerties & Woodstock Plank-road Co., Id.*, 237; *Quin v. Chambers*, 1 *Duer*, 673; *S. C.*, 11 *N. Y. Leg. Obs.*, 155; *VI. Dist.*, 1852, *People v. Banker*, 8 *How. Pr.*, 258; 1854, *Dennison v. Dennison*, 9 *Id.*, 246; *III. Dist.*, 1854, *Richtmyer v. Haskins, Id.*, 481; *IV. Dist., Sp. T.*, 1854, *Myatt v. Saratoga County Mutnal Ins. Co., Id.*, 488; *I. Dist.*, 1854, *Mead v. Florence, Id.*, 396; *VIII. Dist.*, 1854, *Perkins v. Farnham*, 10 *Id.*, 120; *III. Dist., Sp. T.*, 1854, *Herr v. Bamberg, Id.*, 128; *IV. Dist., Sp. T.*, 1854, *Heaton v. Wright, Id.*, 79; *I. Dist., Sp. T.*, 1854, *Reilay v. Parker*, 11 *Id.*, 266; *IV. Dist., Sp. T.*, 1853, *Putnam v. De Forest*, 8 *Id.*, 146. *Westchester County Ct.*, 1853, *Williams v. Upton, Id.*, 205.

370. The plaintiff can demur to an answer, only for defects in respect of the new matters set up therein, by way of avoidance; and irrelevant matter, or an omission to deny any allegation of the complaint, are not grounds of demurrer. *N. Y. Superior Ct.*, 1850, *Smith v. Greenin*, 2 *Sandf.*, 702. Compare *Fry v.*

* A demurrer for such insufficiency was also sustained in *Sayles v. Wooden*, 6 *How. Pr.*, 84, without discussing the question.

† But compare *Bush v. Prosser*, 11 *N. Y. (1 Kern.)*, 347, 352; where it is said that partial defences may be pleaded under the Code.

Reply.

Bennett, 5 *Id.*, 54; S. C., 9 *N. Y. Leg. Obs.*, 330; less fully, 1 *Code R.*, *N. S.*, 238.

371. Neither irrelevancy nor surplusage is ground of demurrer. [2 *Sandf.*, 700.] *N. Y. Superior Ct.*, 1851, *Fry v. Bennett*, 5 *Sandf.*, 54; S. C., 9 *N. Y. Leg. Obs.*, 330; less fully, 1 *Code R.*, *N. S.*, 238; and see *Smith v. Brown*, 6 *How. Pr.*, 888.

372. The *N. Y.* Common Pleas will not allow a demurrer to an answer which merely denies the allegations in the complaint. The only remedy for defects in such an answer is, by motion to strike out, or to amend, or by application for judgment. *N. Y. Com. Pl.*, 1850, *Hart v. Chapin*; cited and followed (1852) in *Ketcham v. Zerega*, 1 *E. D. Smith*, 553. *Supreme Ct.*, *VI. Dist.*, *Sp. T.*, 1852, *Thomas v. Harrop*, 7 *How. Pr.*, 57; *VIII. Dist.*, *Sp. T.*, 1853, *Loomis v. Dorshimer*, 8 *Id.*, 9. These cases overrule *Hopkins v. Everett* (*Supreme Ct.*, *II. Dist.*, *Sp. T.*, 1850), 6 *How. Pr.*, 159; *Salinger v. Lusk* (1853), 7 *Id.*, 430.

373. Since the amendment of section 163, in 1852, declaring that new matter in an answer not relating to a counter-claim, shall be deemed controverted without a reply,—a demurrer to new matter other than a counter-claim, is not now permitted. If the new matter, not relating to a counter-claim, is not sufficient to constitute a defence, the plaintiff must move for judgment on account of its frivolousness, under section 247, or to strike it out, under section 160. *N. Y. Superior Ct.*, 1853, *Quin v. Chambers*, 1 *Duer*, 673; S. C., 11 *N. Y. Leg. Obs.*, 155.

374. An answer, though setting up no new matter, is, by section 153 of the Code, as amended in 1855, demurrable as insufficient. *Supreme Ct.*, *VII. Dist.*, 1857, *Gilbert v. Covell*, 16 *How. Pr.*, 84.

Otherwise by this section, as now amended, *q. v.*, *infra*, 375.

375. **Present statute.** The plaintiff may, in all cases, demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defence; and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims. *Code of Pro.*, § 153, middle clause.

376. An answer of new matter which does not state facts sufficient to constitute a defence, is always insufficient, and may be demurred to. *Supreme Ct.*, *VIII. Dist.*, *Sp. T.*, 1857, *Welch v. Hazelton*, 14 *How. Pr.*, 97.

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377. **Specifying groun** the Code, by requiring the answer to specify the grounds that defendant is to objections specifically tal *Sp. T.*, 1850, *Kreiss v.* 439; S. C., 5 *How. Pr.*, 4

378. The objection, that is to the bill of particulars complaint, cannot be taken to the answer, which does objection as a cause of defence.

379. A demurrer to an sufficient, if it states that stated are not sufficient to defence. [4 *How. Pr.*, 226 *prems Ct.*, *Sp. T.*, 1850, 1 *How. Pr.*, 112; S. C., 3 *O* *Anibal v. Hunter*, 6 *How.* 1853, *Arthur v. Brooks*, 14

380. It is not necessary that the answer should cover is material. *N. Y. Superior Bennett*, 5 *Sandf.*, 54; S. C. 380; less fully, 1 *Code R.*,

381. **How determined.** to an answer must be disposed issue of fact can be tried. *T.*, 1851, *Wilson v. Robinson*

382. — **separate defence** upon a demurrer, whether pleaded constitute a defence take into consideration all answer which precede that by the demurrer. The sufficient may, in many cases, fact, whether the allegations have been admitted or de *perior Ct.*, 1853, *Beach v.* 327.

383. — **counter-claim.** counter-claim upon demurre insufficiency, the facts alleged which are not inconsistent with in the counter-claim, are to mitted. *N. Y. Superior Ct. v. Dunnigan*, 6 *Duer*, 629; *Pr.*, 426.

V. REPLY.

384. **Code of 1848.** In a by two or more, for an unl

* This requirement is omitted now amended.

property, an averment in the answer that the plaintiffs are not joint-owners of the property, is material, and is new matter, which, under section 144 of the Code of 1848, required a reply. *Supreme Ct.*, 1849, Walrod v. Bennett, 6 *Barb.*, 144.

385. Where title is set up in a justice's court by answer, and a new suit is thereon brought in the Supreme Court, the Code requires the cause of action and the answer to be the same as in the justice's court; but in other respects the pleadings are to be governed by the practice of the Supreme Court. The form of the pleadings, too, should be according to that practice. *Supreme Ct.*, 1850, Jewett v. Jewett, 6 *How. Pr.*, 185; *Sp. T.*, 1851, Kiddle v. De Groot, 1 *Code R., N. S.*, 202. (To the contrary, *Sp. T.*, 1849, McNamara v. Bileley, 4 *How. Pr.*, 44. *S. C.*, 2 *Code R.*, 42.)

386. So, also, under the Code of 1848. *Supreme Ct.*, *Sp. T.*, 1848, Royce v. Brown, 3 *How. Pr.*, 391.

387. When the answer contains new matter constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer. . . . When an answer contains new matter, constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and in that case, the reply shall be subject to the same rules as a reply to a counter-claim. *Code of Pro.*, § 158.

388. Denial. Where an answer denies the facts set up in the complaint, and contains no statement of new matter sufficient to constitute a defence, plaintiff need not reply. *Supreme Ct.*, *Sp. T.*, 1850, Brown v. Spear, 5 *How. Pr.*, 146; 9 *N. Y. Leg. Obs.*, 97.

389. New matter, set up in the answer, which merely tends to show that the plaintiff has no cause of action, or tends to defeat his recovery in whole or in part by way of recoupment, does not constitute a counter-claim, and need not be replied to. A reply is only called for where the new matter constitutes a cause of action in the defendant against the plaintiff to the record, independent of the plaintiff's

cause of action, and which would entitle the defendant to maintain an action against the plaintiff, if the plaintiff had brought no suit against the defendant. *Supreme Ct.*, *Sp. T.*, 1858, Nichols v. Boerum, 6 *Abbotts' Pr.*, 290; but compare, to the contrary, Lemon v. Trull, 18 *How. Pr.*, 248; affirmed, *Ct. of Appeals*, 1858, 16 *Id.*, 576, note.

390. A specific denial in a reply, of knowledge, as to new matter in the answer, sufficient to form a belief, presents a case of new matter in an answer controverted by the reply, and creates an issue of fact as to such new matter. [*Code of 1848*, § 205.] *Supreme Ct.*, 1849, Doremus v. Lewis, 8 *Barb.*, 124.

391. Counter-claim. Under section 153 of the Code,—providing that where the answer contains a counter-claim, the plaintiff may reply, denying, &c., and may allege new matter not inconsistent with the complaint constituting a defence to such counter-claim,—the plaintiff may set up by reply a counter-claim to the defendant's counter-claim. *Supreme Ct.*, *Sp. T.*, 1854, Miller v. Losee, 9 *How. Pr.*, 856. Compare Stewart v. Travis, 10 *Id.*, 148; *q. v.*, *supra*, 866.

392. Plaintiff allowed to file a reply, after the time limited in an order to file it had expired. Short v. May, 2 *Sandf.*, 639.

393. Terms on which plaintiff should have leave to serve reply after neglecting to avail himself of opportunity to do so, and noticing for trial instead. Montecarbola v. Mundel, 16 *How. Pr.*, 141.*

394. Unnecessary reply. A reply put in when there was no necessity for one, cannot be set aside for want of sufficient verification. *Supreme Ct.*, *Sp. T.*, 1853, Silliman v. Eddy, 8 *How. Pr.*, 122; overruling Roscoe v. Maison, 7 *Id.*, 121.

395. A reply which plaintiffs were not entitled to put in, struck out upon the defendant's motion. Gilbert v. Cram, 12 *How. Pr.*, 455.

396. Denial. The answer,—in an action before the amendment of the Code, dispensing with a reply except in certain cases,—averred the truth of the libel sued on; and the reply controverted specific allegations in the answer, and then concluded with a general denial of all matters in the answer not particularly replied to. *Held*, that the denial was sufficiently specific, and that the issue was the truth of the publication, and the burden was on the

* Affirmed, *Supreme Ct.*, 1849, *sub nom.* Boyce v. Brown, 7 *Barb.*, 80.

Demurrer to Reply

Amended Pleadings.

Leave to Plead.

defendant. *N. Y. Com. Pl.*, 1855, *Hunt v. Bennett*,* 4 *E. D. Smith*, 647.

VI. DEMURRER TO REPLY.

397. When. If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof. *Code of Pro.*, § 155.

398. Departure. This provision affords to the defendant the broad right to demur to the reply, whenever it is insufficient; and does not point out the particular grounds on which a reply shall be deemed insufficient. And a defendant may demur to a reply on the ground that it is a departure from the complaint and from the grounds and cause of action set forth therein. *Supreme Ct.*, 1855, *White v. Joy*,† 11 *How. Pr.*, 86.

VII. AMENDED PLEADINGS. LEAVE TO PLEAD.

399. Amendments of course, authorized. *Code of Pro.*, § 172. See AMENDMENT.

400. How to proceed if complaint be amended. *Code of Pro.*, 146.

401. After a pleading has been struck out, there is no longer any such pleading in the cause capable of amendment of course. [1 *Code R.*, N. S., 20.] *Supreme Ct.* (1851†), *Aymar v. Chase*, 1 *Code R.*, N. S., 141.

402. Amendment not a new action. A defendant cannot treat an amended complaint as commencing a new action. The remedy, if any, for a departure, is by a motion to set it aside. *N. Y. Superior Ct.*, 1849, *Megrath v. Van Wyck*, 2 *Sandf.*, 651.

403. Service on defendant in default. Two of the defendants demurred to the complaint,—the other defendant suffered judgment for want of an answer. Plaintiff afterwards amended his complaint in substance. *Held*, that the defendant against whom judgment had been entered, should have been served with the amended complaint. *N. Y. Superior Ct.*, 1849, *People v. Woods*, 2 *Sandf.*, 652.

404. Disregarding. Though in general a party cannot judge for himself of the sufficiency of a pleading, or of the materiality of an

amendment, but must fore the court [8 *How.* amended pleading, in w are clearly frivolous or immediately before the for the mere purpose of regarded. *Supreme Ct.* *Bleeker*, 4 *Abbotts' Pr.*,

405. Where an amen for delay, and at so late the cause over the circu as a nullity, though if it interposed in good faith set aside. *Supreme Ct.*, *v. Compton*, 8 *How. Pr.*, AMENDMENT.

406. Retaining 16 day an amended complaint, w set up new causes of acti of the objection. *Suprem* *Hollister v. Livingston*, 9

407. On moving for le the time has expired, defe with the motion-papers a answer, sworn. *Supreme* *Lynde v. Verity*, 8 *How. Code R.*, 97.

408. Where a defendant been stricken out as frivo put in a new one, he sho offer it to the plaintiff's att decline to receive it, he m motion at a special term f or for leave to answer; and in his moving-papers the *Supreme Ct.*, *Chambers*, 1 *Brigham*, 12 *How. Pr.*, 399.

VIII. SUPPLEMENTAL

409. The plaintiff and tively, may be allowed, on i supplemental complaint, answ ing facts material to the case of former complaint, answer, or the party was ignorant when it was made. *Code of Pro.*, § 17†, *Radley v. Houghtalling*, 4

410. Complete satisfact facts sought to be so pleaded tire satisfaction of the cause c duty of the court to allow th will make no difference whet tion be made at the earliest *Supreme Ct.*, *Sp. T.*, 1858, *Drot* *How. Pr.*, 56.

* Affirmed, on other points, 19 *N. Y.* (5 *Smith*), 178.

† Reversed, on the ground that the reply in this case was not a departure, 18 *N. Y.* (8 *Kern.*), 88.

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411. If by a transfer of the cause of action pending the suit, maintenance becomes a defence, the defendant should set it up by supplemental answer, under section 177. *N. Y. Com. Pl.*, 1851, *Hastings v. McKinley*, 1 *E. D. Smith*, 278.

412. Attorney's lien. That the proper mode of opening a judgment entered by the attorney after the parties have settled the cause of action in disregard of his lien, is to allow a supplemental answer to be filed on payment of all the costs. *Wood v. North West Presbyterian Church*, 7 *Abbotts' Pr.*, 210, *note*.

413. When leave will be granted. Matters of defence which existed when the answer was put in, but of which the defendant was then ignorant, as well as matters of defence which have arisen after issue joined, are to be set up by supplemental answer. [Code, § 177.] And by the settled rules and practice of the courts of law and of chancery, still in force (§ 469), such applications should be granted, as a general rule, unless they have been too long delayed, or are clearly frivolous, or the defence they present is so inequitable in its nature that the permission sought should be refused for that cause. *N. Y. Superior Ct.*, 1856, *Hoyt v. Sheldon*,* 4 *Abbotts' Pr.*, 59.

414. When a motion for leave to put in a supplemental answer will be denied on the ground of laches. *Id.*

415. The court will not, as a general rule, after the time to answer has expired, allow a supplemental answer to be put in, to set up a technical defence, which may operate as a forfeiture of a just claim. But when the cause of action is one of equitable cognizance, although it may be one of strict legal right, and can be enforced only by depriving a defendant of property bought in good faith from an assignee of a common debtor of the plaintiff and the defendant, and which property, on principles of general equity, may as properly be applied to satisfy the claim of the defendant as that of the plaintiff, the court will not attempt, on such a motion, to determine the equities of the parties, and refuse leave to set up the defence. *Id.*

416. The court will not do so, when, upon

the settled principles of equity proceedings, the particular defence may properly be overruled, if giving effect to it, according to its legal operation, would defeat a cause of action, contrary to the intent of the parties to the transaction which constitutes the supposed defence. *Id.*

417. When it cannot well be decided, except upon a hearing of the whole case, whether, as between the parties to the action, it would be inequitable to give effect to the defence, if proved, and the court is competent to dispose of that question at the hearing, as may be just, a supplemental answer will be allowed. *Id.*

418. Leave will not be granted to file a supplemental complaint which alleges any fact known to the plaintiff at the time of commencing the action. *N. Y. Com. Pl.*, 1856, *McMahon v. Allen*, 8 *Abbotts' Pr.*, 89; *S. C.*, less fully, 1 *Hill.*, 108; affirming *S. C.*, 12 *How. Pr.*, 89. *S. P.*, *Supreme Ct.*, *Sp. T.*, 1850, *Houghton v. Skinner*, 5 *Id.*, 420.

419. Leave to file a supplemental complaint will not be granted where the object can be accomplished by amendment. [1 *Hoffm. Ch. Pr.*, 398; 1 *Smith's Ch. Pr.*, 526; *Mitt. Pl.*, 60.] *N. Y. Com. Pl.*, 1856, *McMahon v. Allen*, 8 *Abbotts' Pr.*, 89; *S. C.*, less fully, 1 *Hill.*, 108; affirming *S. C.*, 12 *How. Pr.*, 89.

420. A supplemental complaint should not be allowed where it is unnecessary;—*s. g.*, where another suit is already pending of such a nature that, if the supplemental complaint is filed, the defendant will be entitled to have either one discontinued. *Supreme Ct.*, *Sp. T.*, 1859, *Sage v. Mosher*, 17 *How. Pr.*, 367.

421. Death or disability. Supplemental complaint authorized, to allow an action to be continued by or against the representative or successor in interest of a party who dies or is disabled to sue or be sued. *Code of Pro.*, § 121.

422. Original pleadings. A supplemental complaint is not, like an amended complaint, a substitute for the original, but it is a further complaint; and hence, where a supplemental complaint is made after answer, the original complaint and answer remain in full force, and defendant cannot in such a case, as a general rule, without special permission, in addition to answering the supplemental complaint, answer anew, or further, the original complaint. *Supreme Ct.*, 1855, *Dann v. Baker*, 12 *How. Pr.*, 521.

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

IX. SUBSCRIPTION OF PLEADINGS.

423. Every pleading in a court of record must be subscribed by the party, or his attorney; . . . *Code of Pro.*, § 156.

424. The defendant's subscription of the verification of the pleading is a sufficient subscription of the pleading. *Supreme Ct., Sp. T.*, 1848, *Hubbell v. Livingston*, 1 *Code R.*, 68.

425. A verified answer is defective if neither the answer nor the verification are subscribed. *N. Y. Superior Ct.*, 1849, *Laimbeer v. Allen*, 2 *Sandf.*, 648; *S. C.*, 2 *Code R.*, 15.

426. In an action by an infant who appears by guardian, his summons and complaint are regular if signed by the attorney instead of the guardian. [11 *Wend.*, 164.] *Supreme Ct., Sp. T.*, 1849, *Hill v. Thacker*, 2 *Code R.*, 8; *S. C.*, 8 *How. Pr.*, 407.

As to **Verifying**, see **VERIFICATION**.

X. DISREGARDING AND RETURNING PLEADINGS.

427. Disregarding. A regular pleading, duly and seasonably served, cannot be treated as a nullity, because frivolous or insufficient. *N. Y. Com. Pt., Sp. T.*, 1856, *Bergman v. Howell*, 3 *Abbotts' Pr.*, 329. *Supreme Ct., Sp. T.*, 1848, *Hartness v. Bennett*, 3 *How. Pr.*, 289; *S. C.*, 1 *Code R.*, 67; *Sp. T.*, 1851, *Strout v. Curran*, 7 *How. Pr.*, 36; but compare, as to **Amendments**, *supra*, 405.

428. Returning. A pleading treated as a nullity, must be immediately returned. *Supreme Ct., Sp. T.* (1849?), *Levi v. Jakeways*, 4 *How. Pr.*, 126.

429. Objection. A party returning a pleading as defective or irregular, must point out the irregularity. *N. Y. Superior Ct.*, 1851, *White v. Cummings*, 3 *Sandf.*, 716. *Supreme Ct., Sp. T.*, 1852, *Broadway Bank v. Danforth*, 7 *How. Pr.*, 264.

430. Where a joint answer is properly verified by one defendant but not by another, plaintiff may retain it, but must give immediate notice of his objection as against the defendant whose verification is defective. *Supreme Ct., Sp. T.*, 1856, *Hull v. Ball*, 14 *How. Pr.*, 805.

XI. CONSTRUCTION OF PLEADINGS.

1. In General.

431. Liberality. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with

a view of substantial justice between the parties. *Code of Pro.*, § 159.

Applications of this rule. *Allen v. Patterson*, 7 *N. Y.* (3 *Seld.*), 476; *Lyon v. City of Brooklyn*, 28 *Barb.*, 609; *Richards v. Edick*, 17 *Id.*, 260; *St. John v. Griffith*, 1 *Abbotts' Pr.*, 39; *Yertore v. Wiswall*, 16 *How. Pr.*, 8.

432. A verified pleading must be construed, so as to make all its parts, if possible, harmonize with each other. *Supreme Ct., Sp. T.*, 1857, *Ryle v. Harrington*, 4 *Abbotts' Pr.*, 421; *S. C.*, less fully, 14 *How. Pr.*, 59.

433. Allegations in the present tense, in a verified complaint, must be deemed as relating to the date of the verification. *Ct. of Appeals*, 1857, *Prindle v. Caruthers*, 15 *N. Y.* (1 *Smith*), 425; reversing *S. C.*, 10 *How. Pr.*, 38.

434. Ambiguous date. An answer referring to the 30th day of July without naming the year,—*Held*, to relate to the year mentioned in the complaint. *Supreme Ct., Sp. T.*, 1859, *Heebner v. Townsend*, 8 *Abbotts' Pr.*, 234.

435. Demurrer to whole answer intended for only one defence. Where a demurrer to an answer containing two defences, one of which was good and the other bad, purported to be to the whole answer, but it was evident, from the assignment of the grounds of demurrer, that it had reference to the second defence only,—*Held*, that it was not error, under the liberal mode of construing pleadings enjoined by the Code, to construe it as being substantially limited to the badly pleaded defence, and to render judgment allowing it accordingly; and that the other defence remained unaffected by the judgment. *Ct. of Appeals*, 1853, *Matthews v. Beach*, 8 *N. Y.* (4 *Seld.*), 173; *S. C.* below, 5 *Sandf.*, 256.

436. Form of averment. An averment that certain facts are true, "as the plaintiff (or defendant) has been informed and believes," may be construed as an averment "upon information and belief" of the existence of the facts. *N. Y. Superior Ct.*, 1851, *Fry v. Bennett*, 5 *Sandf.*, 54; *S. C.*, 9 *N. Y. Leg. Obs.*, 380; less fully, 1 *Code R.*, *N. S.*, 238.

So of an averment that he believes that, &c., stating the facts relied on. 1852, *Radway v. Mather*, 5 *Sandf.*, 654.

437. Information. To state, in a pleading the nature and source of the information by which the party relies in making an averment of facts on information and belief, do

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vitiate an independent averment of such facts. Nor does it detract from the force of such averment, that the clause of the pleading in which it occurs, refers—*e. g.*, by the use of the word “therefore”—to the antecedent clauses, in which the grounds of the information and belief are stated. *N. Y. Superior Ct.*, 1857, *Borrowe v. Milbank*, 5 *Abbotts' Pr.*, 28.

438. Nature of the action. When the statement of facts constituting a cause, or causes of action, will support either of two actions, and it is doubtful which the pleader intended, the demand for judgment may be consulted with a view of ascertaining the action intended. *Supreme Ct.*, 1852, *Rodgers v. Rodgers*, 11 *Barb.*, 595; *Sp. T.*, 1848, *Spalding v. Spalding*, 8 *How. Pr.*, 297; *S. O.*, 1 *Code R.*, 64; 1849, *Dows v. Green*, 8 *How. Pr.*, 377.

439. Thus in an action for detention of personal property, if the complaint demands judgment for the value thereof only, proceedings of claim and delivery are inappropriate. *Supreme Ct.*, *Sp. T.*, 1848, *Spalding v. Spalding*, 8 *How. Pr.*, 297; *S. O.*, 1 *Code R.*, 64; 1849, *Dows v. Green*, 8 *How. Pr.*, 377.

440. Allegations of a fraud, in a complaint upon contract, do not change the substantial nature of the cause of action, nor render it non-assignable. *N. Y. Superior Ct.*, *Sp. T.*, 1854, *Brady v. Bissell*, 1 *Abbotts' Pr.*, 76.

441. Time stated in a pleading is often not material; that is, it may be departed from in evidence; but allegations in respect to time, like all other allegations, are evidence against the party making them, as his admissions. And all presumptions of law in favor of a party must be consistent with his allegations. None will be indulged for his benefit in opposition to them. *Supreme Ct.*, 1854, *Andrews v. Chadbourne*, 19 *Barb.*, 147. Compare *Walden v. Crafts*, 2 *Abbotts' Pr.*, 301; and see *People v. Ryder*, 12 *N. Y. (2 Kern.)*, 433.

442. Omitting to move for correction. Where an answer is vague or uncertain, if the plaintiff goes to trial without moving that it be made more definite and certain, it is to be taken most strongly against him. *Ct. of Appeals*, 1858, *Wall v. Buffalo Water Works Co.*, 18 *N. Y. (4 Smith)*, 119.

2. Sufficiency and Effect of Particular Allegations.

443. Devisee. In a supplemental complaint by a devisee of an original plaintiff, an allega-

tion that the latter died on, &c., and by his last will devised all his interest in the said land to the plaintiff, his son, is sufficient on demurrer. *Supreme Ct.*, *Sp. T.*, 1854, *Spier v. Robinson*, 9 *How. Pr.*, 325. Compare *Phinney v. Phinney*, 17 *Id.*, 197.

444. Title. An averment that the defendant's ancestor was in his lifetime seized in fee and in possession of, &c., sufficiently avers the fact of title in him, and a proof of grants to him is admissible under it. *Supreme Ct.*, *Sp. T.*, 1850, *People v. Livingston*, 8 *Barb.*, 253, 276.

445. A complaint alleged in substance, that W. J. S., being seized of the premises in suit, died, leaving a will whereby a power in trust was granted to his executors to sell his real property. The defendant objected to the sufficiency of the complaint, on the ground that whether the will vested a fee or a mere power in trust in the executors was a question for the court, upon an examination of the will, which was not shown, nor its whole contents stated. *Held*, that the whole statement must be taken together; and this being done, it was obvious that the fee did not pass to the executors. There could be no propriety in saying, in the absence of any statement in the complaint to that effect, that the will made a disposition of the fee during the interval between the death of the testator and the execution of the power. If it did not, then the fee descended to the heirs of the testator, who would hold until the power was executed. *Supreme Ct.*, 1856, *St. John v. Northrup*, 28 *Barb.*, 25.

446. A complaint alleged, that upon the death of W. J. the title of the premises in question descended to F., as sole heir-at-law, subject, &c. *Held*, on objection at circuit, that the fact that F. was the sole heir-at-law of W. J. was here substantially alleged. No one could fail to see that such was the intention of the pleader. Less strictness should be required in considering such a question after the defendant has answered upon the merits, and waits until the trial to raise it, than if the question was presented by demurrer to the complaint. It is only such defects in the complaint as are incurable, that the defendant can take advantage of on the trial. [8 *How. Pr.*, 159; 2 *Duer*, 673.] *Id.*

447. Adverse possession. To an action on a contract for sale of lands, an answer “that

at the time of the alleged agreement, said farm, or a large part thereof, was in possession of persons holding or claiming the same adverse to the plaintiff and all other persons," is not sufficient, because it does not give the name of the possessor, nor allege that he had title, nor state the facts which, by 2 Rev. Stat., 294, §§ 10-12, are necessary to show the possession adverse. *Supreme Ct.*, 1852, *Clarke v. Hughes*, 18 *Barb.*, 147.

448. Legal method of transfer. An allegation that a corporation indorsed and transferred and delivered to the plaintiffs the note sued on, sufficiently implies that the transfer was made pursuant to a resolution of the board of directors, if such resolution is necessary; for the allegation is not true if the transfer was not made by the proper officer, and according to law. So *held*, on demurrer. *Supreme Ct.*, *Sp. T.*, 1857, *Nelson v. Eaton*,* 15 *How. Pr.*, 305.

449. An answer setting up title to land under a sale on execution, is not sufficient on demurrer, unless it alleges that the purchase-money was paid and a deed delivered. It is not enough to allege that the time for redemption has expired. [8 Johns., 520; 2 Id., 248; 14 Wend., 260; 4 Hill, 619.] *Supreme Ct.*, *Sp. T.*, 1856, *Farmers' Bank v. Merchant*, 18 *How. Pr.*, 10.

450. An allegation that certain officers duly leased certain public lands, imports that the lands were of such description as the statute authorized them to lease. So *held*, on demurrer. *Supreme Ct.*, *Sp. T.*, 1858, *People v. Mayor, &c.*, of N. Y., 28 *Barb.*, 240; S. C., 8 *Abbotts' Pr.*, 7.

451. At common law, a sealed contract could be assigned by parol, and a statute which makes a deed necessary to such a transfer, does not change the rule of pleading. The fact which it is necessary to state, is the change of interest, and it is sufficient to aver that the contract was duly assigned. *Supreme Ct.*, *Sp. T.*, 1858, *Horner v. Wood*, 15 *Barb.*, 871.

452. Illegal transfer. In an action to set aside an assignment for the benefit of creditors, an allegation that it was made for the purpose

of delaying, hindering, and defrauding creditors,—*Held*, sufficient on demurrer. If not sufficiently specific, it should be corrected by amendment. *Supreme Ct.*, *Sp. T.*, 1854, *Mott v. Dunn*, 10 *How. Pr.*, 225.

453. To a complaint in an action to set aside an assignment as fraudulent against creditors, alleging that the assignor had, ever since the assignment, had actual possession and managed and controlled the property as before the assignment, and that the assignees had not had the actual possession, and that there had not been an actual and continued change of the possession of the property; an allegation in the answer that the assignees, immediately after the execution of the assignment, took possession of the property, and that it had at all times since the assignment remained in their possession, and been under their exclusive direction and control, disposal, and management, and denying that the assignor had managed and controlled the property, as before the assignment,—is not a denial that the assignor retained the actual possession. *Supreme Ct.*, *Sp. T.*, 1853, *Churchill v. Bennett*, 8 *How. Pr.*, 309.

454. In an action by an assignee of the cause of action, an answer alleging that the plaintiff is an attorney at law, and he obtained the cause of action for the purpose of prosecuting it, contrary to the statute in such case made and provided, is sufficient without setting out in detail the facts and circumstances under which plaintiff procured it. [2 Rev. Stat., 4 ed., 475.] So *held*, on demurrer. *N. Y. Com. Pl.*, *Sp. T.*, 1856, *Brown v. Ryckman*, 12 *How. Pr.*, 313.

455. Breach of statute. An averment that the defendant has acted contrary to a statute, without setting forth in what manner, is not sufficient to entitle the plaintiff to any relief or redress. *Supreme Ct.*, *Sp. T.*, 1852, *Smith v. Lockwood*, 18 *Barb.*, 209; S. C., 10 *N. Y. Leg. Obs.*, 282.

456. Contract regulated by statute. In averring a subscription and payment which a statute requires to be paid in money, it is sufficiently specific to allege that the party subscribed a sum named, and that the subscription was paid, and that the amounts paid were received by the company. So *held*, on demurrer. *Supreme Ct.* (*Sp. T.*, 1854?), *P ham v. Smith*, 9 *How. Pr.*, 436.

457. In an action against a railroad

* Reversed on other grounds, 7 *Abbotts' Pr.*, 305.

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pany to recover upon a bond issued by it under the power conferred by the general railroad act of 1848, the complaint alleged that the bond was issued for the extension of the defendants' road beyond a specified place,—*Held*, on demurrer, sufficient. *Supreme Ct., Sp. T.*, 1859, *Miller v. N. Y. & Erie R. R. Co.*, 8 *Abbotts' Pr.*, 481; S. C., less fully, 18 *How. Pr.*, 374.

458. Separate property of married woman. A complaint by a married woman respecting her separate estate,—*a. g.*, for damages for the loss of her goods by a carrier,—is not bad on demurrer because it alleges in merely general terms that the goods were her separate property. *N. Y. Superior Ct., Sp. T.*, 1856, *Spies v. Accessory Transit Co.*, 5 *Duer*, 662.

459. Plaintiff's business. A complaint for slander, setting forth that plaintiff was "engaged in the wooden-ware business," imports that he was a buyer and seller of such ware. *N. Y. Superior Ct.*, 1849, *Carpenter v. Dennis*, 8 *Sandf.*, 305.

460. Relation of master and servant. An averment that while defendants were running their railroad, the plaintiff's intestate was in the employ of the defendants, as an engineer upon their locomotive, while it was in their use and service,—*Held*, a sufficient allegation to show that the relation of master and servant existed; but that no special contract was to be inferred from such an allegation. *Supreme Ct.*, 1855, *McMillan v. Saratoga & Washington R. R. Co.*, 20 *Barb.*, 449.

461. An allegation that deceased was drowned through the negligence and unskillfulness of "the man rowing and having charge of the skiff," and that the skiff was run at the defendant's ferry, and pursuant to the defendant's license, is not sufficient to warrant the inference that "the man rowing" was in defendant's employ. To make that appear, it should be alleged that the man was in the employ of, or the servant or agent of, the defendant. *Supreme Ct., Sp. T.*, 1855, *Blackwell v. Wiswall*, 24 *Barb.*, 855; S. C., 14 *How. Pr.*, 257; affirmed at *Gen. T.*, 1857, 24 *Barb.*, 862.

462. Acceptance of delivery. In an action to recover for constructing a building, averring that the defendants demanded possession, which the plaintiff delivered up to them, is not a sufficient averment of accept-

ance on the part of the plaintiff. *Supreme Ct.*, 1854, *Smith v. Brown*, 17 *Barb.*, 481.

463. "Duly." An allegation that the meeting was "duly convened," implies that it was regularly convened, and if necessary to its regularity, that it was an adjourned meeting. *Supreme Ct., Sp. T.*, 1856, *People v. Walker*, 23 *Barb.*, 804; S. C., 2 *Abbotts' Pr.*, 421.

464. Lien of judgment. Allegations in a complaint that certain parties recovered each of them judgments against a party, owner of real estate, "both of which judgments were liens and incumbrances upon the said lot or parcel of land, at the time of the conveyance thereof as aforesaid," should be considered on the trial as embracing the fact of the *docketing* of the judgment and its legal effect; and a motion to dismiss the complaint for want of an express statement of that fact, should be denied. *Supreme Ct.*, 1856, *Cady v. Allen*, 22 *Barb.*, 888.

465. Service. In an action upon an undertaking given on the issue of an injunction, an allegation that the injunction was served imports a legal service, and is sufficient on demurrer. *Supreme Ct.*, 1858, *Loomis v. Brown*, 16 *Barb.*, 825.

466. The act of an agent should be pleaded as such, and not as the act of his principal; though its legal effect as such may perhaps also be stated.* *Supreme Ct., Sp. T.*, 1854, *St. John v. Griffith*, 1 *Abbotts' Pr.*, 89.

467. Authority. An allegation, in a complaint, that certain drafts were accepted by a corporation, by their treasurer, includes an averment of authority to the treasurer to accept the drafts; inasmuch as the company could not accept by him, unless he had such authority. What is necessarily understood, or implied, in a pleading, forms part of it, as much as if it was expressed. [7 *N. Y.*, 478; *Steph. on Pl.*, 220; 1 *Ohitt. Pl.*, 640; 2 *Camp.*, 604; *Ohitt. on Bills*, 585.] *Supreme Ct.*, 1857, *Partridge v. Badger*, 25 *Barb.*, 146.

468. The ratification, by a principal, of an unauthorized act of an agent, has a retroactive efficacy, and being equivalent to an original

* The case of *Dollner v. Gibson*, 8 *Code R.*, 153; S. C., 9 *N. Y. Leg. Obs.*, 77; in which it was held that in a complaint for goods sold, the averment that they were sold to defendant's agent for his use, should be struck out on motion, was reversed at *Gen. T.*, 1852. See *supra*, 81.

authority, an allegation of due authority is sustained by proof of such ratification. *Ot. of Appeals*, 1859, *Hoyt v. Thompson*, 19 *N. Y.* (5 *Smith*), 207.

469. Instigation of trespass. A complaint against two defendants for a trespass, is not bad, because it alleges that one entered, &c., at the instigation and request of the other, according to the fact, instead of alleging that both entered, &c., according to the legal effect. *N. Y. Com. Pl.*, 1851, *Ives v. Humphreys*, 1 *E. D. Smith*, 196.

470. Duty. A statement, in a complaint, that by means of a contract which is set forth, it became the duty of the defendant to perform certain acts, does not sufficiently aver the existence of the duty, unless the facts necessary to raise the duty appear. *Ot. of Appeals*, 1852, *City of Buffalo v. Holloway*, 7 *N. Y.* (8 *Seld.*), 498; affirming *S. O.*, 14 *Barb.*, 101. *S. P.*, *N. Y. Superior Ct.*, 1857 [citing 10 *Com. Bench R.*, 849], *Taylor v. Atlantic Mutual Ins. Co.*, 2 *Bow.*, 106.

471. In an action to recover damages for injuries sustained by the plaintiff, by the defective construction of a structure erected by the defendant, the grounds on which he relies to make it appear to have been the defendant's duty to maintain the structure in a safe condition, must be set forth in the complaint. *N. Y. Superior Ct.*, 1855, *Congreve v. Morgan*, 4 *Duer*, 489.

472. A complaint against the owner of premises leased to a third person, to recover damages sustained by plaintiff by the falling of a part of the building through want of repairs, is bad on demurrer, unless it states facts from which the court can say that the owner was bound to keep the premises in repair. [3 *Duer*, 164.] A mere general allegation that defendant was bound to keep the premises in repair, is insufficient. *N. Y. Superior Ct., Sp. T.*, 1857, *Casey v. Mann*, 5 *Abbotts' Pr.*, 91; *S. O.*, *sub nom.* *Corey v. Mann*, 14 *How. Pr.*, 163.

473. Sufficiency of an allegation, that it became the duty of defendant, as ship's husband, to insure. *Gregory v. Oaksmith*, 12 *How. Pr.*, 184.

474. — of officer. In an action against a public officer, for damages incurred by his neglect of duty, the complaint must show the facts out of which a duty arose. If his duty is qualified,—*e. g.*, if it depends on his having funds wherewith to perform it,—his posses-

sion of funds must be averred. [17 *Johns.*, 457; 7 *Wend.*, 477; 2 *Hill*, 619; 6 *Id.*, 463; 5 *Sandf.*, 289; 9 *N. Y.*, 163; 1 *Rev. Stat.*, 508, § 82; 366, § 3, subd. 8.] This rule applied in a peculiar case. *Supreme Ct.*, 1857, *Smith v. Wright*, 27 *Barb.*, 621; reversing *S. O.*, 24 *Id.*, 170; and 12 *How. Pr.*, 555.

475. Breach of charter-party. Sufficiency of allegations in a complaint by owners of a vessel, for the breach of a clause in the charter-party binding the hirers to keep her in repair. *Coster v. N. Y. & Erie R. R. Co.*, 3 *Abbotts' Pr.*, 882; *S. O.*, less fully, 6 *Duer*, 43.

476. Protest. An averment of protest does not imply the necessary previous demand. *N. Y. Superior Ct.*, 1857, *Graham v. Machado*, 6 *Duer*, 514; *Price v. McClave, Id.*, 544; affirming *S. O.*, 5 *Id.*, 670, and 3 *Abbotts' Pr.*, 258; disapproving *Woodbury v. Sackrider, infra*, 477.

477. An averment that payment "was duly demanded at maturity, and the same was thereupon duly protested for non-payment," imports demand, neglect, or refusal to pay, and notice thereof to the defendant. *Supreme Ct., IV. Dist.*, 1856, *Woodbury v. Sackrider*, 2 *Abbotts' Pr.*, 402.

8. Admissions.

478. Conclusion of law. Section 144 of the Code of 1848,—which provides that any material allegation of new matter in the answer, not specifically controverted by the reply, shall be taken as true,—means allegations of fact. An averment of the legal construction or effect of a written instrument, or of the intention or meaning of parties when they executed it, is an immaterial allegation. *Supreme Ct., Circuit*, 1848, *Barton v. Sackett*, 3 *How. Pr.*, 358; *S. O.*, 1 *Code R.*, 96.

479. Where defendant answered payment, to which plaintiff omitted to reply,—*Held*, that the answer was admitted, and a report of the referee, or the verdict of a jury, to the contrary, could not be sustained without amendment. *Supreme Ct., Sp. T.*, 1851, *Willis v. Underhill*, 6 *How. Pr.*, 396; but see amendment of 1852, *infra*, 480.

480. Every material allegation of the complaint, not controverted by the answer, as prescribed in section 149 (*q. v. supra*, 224); and every material allegation of new matter in the answer,* constituting a counter-claim, not cor-

* The original provision of this clause extend

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controverted by the reply, as prescribed in section 168 (*q. v.*, *supra*, 387), shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require. *Code of Pro.*, § 168.

481. Where the defendant has not in his answer denied either of the allegations contained in the complaint, and a cause of action is sufficiently alleged in the complaint, the plaintiff is *prima facie* entitled to recover without giving any evidence of the truth of his allegations. [6 Barb., 144.] *Ct. of Appeals*, 1852, *Bacon v. Cropsey*, 7 *N. Y.* (3 *Seld.*), 195.

482. Fatal defects. That the rule which the Code declares, that averments not controverted are admitted, does not apply where the title itself averred is defective, or where in truth none is averred. *Supreme Ct.*, 1849, *Boyce v. Brown*, 7 Barb., 80; affirming *S. C.*, 3 *How. Pr.*, 391.

483. It is only material allegations that are to be taken as true, if not controverted. *N. Y. Superior Ct.*, *Chambers*, 1849, *Isham v. Williamson*, 7 *N. Y. Leg. Obs.*, 340. To the same effect [citing 5 Sandf., 54], *N. Y. Com. Pl.*, 1854, *Connors v. Meir*, 2 *E. D. Smith*, 314.

484. Qualified denial. To a complaint charging a breach of contract, defendant's answer denied that he violated it, except that after part-performance plaintiff caused defendant to abandon it. *Held*, in effect an admission of non-performance, and an allegation of an excuse, which threw the burden on defendant of proving the excuse. *N. Y. Com. Pl.*, 1852, *Ootheal v. Talmadge*,* 1 *E. D. Smith*, 578.

485. Indirect denial. Where material allegations in a complaint are not directly denied, the statement in the answer of other facts inconsistent with them, will not be construed as a denial so as to prevent them from being taken as true. Every material allegation not specifically controverted, &c., must be taken as true. (*Code*, § 168.) Merely making a counter-statement, or giving a different version of the matter from that contained in the complaint, without denying the

allegations therein contained, is not specifically controverting such allegations. *Supreme Ct.*, 1855, *Wood v. Whiting*, 21 Barb., 190.

486. Special plea. The rule of the old system of pleading, that a special plea admits the matters stated in the declaration, is applicable to pleadings under the Code. *N. Y. Com. Pl.*, 1855, *Gregory v. Trainer*, 1 *Abbotts' Pr.*, 209; *S. C.*, *les fully*, 4 *E. D. Smith*, 58.

487. Admission. In an action on a charter-party, brought by the owner against the charterers, to recover a claim for demurrage, the complaint set out the charter-party, the defendants' agreement to furnish a cargo, and averred that the defendants caused the said bark to be laden with a large cargo of lumber and coal. The answer admitted that the defendants "loaded said bark with the cargo mentioned in the complaint." *Held*, that the defendants were concluded from showing that the coal was not shipped by them as freight under the charter-party, but taken as ballast. *N. Y. Com. Pl.*, 1855, *Robbins v. Codman*, 4 *E. D. Smith*, 315.

488. What is material. Under a complaint averring a sale and delivery of goods "to defendants under their firm-name of," &c., but without positively averring that defendants composed such firm, an omission to deny in the answer that defendants did compose such a firm, does not conclude them from objecting, on the trial, that plaintiff has not proved that the goods were sold to both defendants, and from offering proof that defendants were not partners. No allegations in a complaint should be held "material" within the meaning of section 168 of the Code, which will not prevent a plaintiff from recovering if proved to be untrue, or which, when denied, he is not obliged to prove to entitle himself to a verdict. *N. Y. Superior Ct.*, 1854, *Oechs v. Cook*, 3 *Duer*, 161.

489. Value. In an action in the nature of trover, the usual averment in the complaint, of the value of the property converted, is not traversable matter. The defendant cannot take issue upon it; and his omission to answer it, does not admit its truth. It is not a "material allegation" within section 168. Hence, where the answer does not deny the averment of value, the plaintiff must, notwithstanding, prove the amount of his damages. [*Oro. Jac.*, 129; *Bac. Abr.*, Tit. Tresp., I. 2, and Trov. F., 1; *Com. Dig.*, Act. on Trov., G., 1; *Esp. Dig.*, 586; 2

to all new matter in an answer; and the amendment of 1852 limited it to new matter constituting a counter-claim. That amendment applies to actions previously at issue, as well as to subsequent cases. *Ct. of Appeals*, 1857, *Sibley v. Waffle*, 16 *N. Y.* (2 *Smith*), 180.

* Affirmed, on the merits, 9 *N. Y.* (5 *Seld.*), 551.

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Johns., 420, n.; 2 Selw. N. P., 585; 2 Liv., 425; 2 Chitt. Pl., 410, n.] *N. Y. Com. Pl.*, 1854, *Connors v. Meir*, 2 *E. D. Smith*, 814.

490. Under an averment in the complaint that the value of the property in suit was about a specified sum, though not controverted by the answer, defendant may show the true value of the property. *Supreme Ct.*, 1857, *Woodruff v. Cook*, 25 *Barb.*, 505.

491. **Damage.** So in an action for breach of covenant,—*e. g.*, against the surety for the tenant in a lease, on default of the tenant to keep the covenants of the lease on his part,—the averment in the complaint of the amount of damage is not traversable. [2 *E. D. Smith*, 814.] *N. Y. Com. Pl.*, 1854, *Hackett v. Richards*, 8 *E. D. Smith*, 18.

492. In an action for trespass, where the answer does not traverse the plaintiff's possession or title, he is not put to prove his title, although the land be wild and vacant. *N. Y. Superior Ct.*, 1852, *O'Reilly v. Davies*, 4 *Sandf.*, 722.

493. **Demand.** In an action for a breach of a contract to convey land, if the complaint alleges that the defendant was requested, and refused to convey, and the allegation is not denied by the answer, no proof of a demand of the deed is necessary to be given upon the trial. *N. Y. Superior Ct.*, 1858, *Fagen v. Davison*, 2 *Duer*, 158.

494. **Denial of ownership.** In an action by an administrator against a person claiming to hold the decedent's property by virtue of a gift or transfer from the decedent, if the defendant, in his answer, denies that the plaintiff's intestate, at the time of his death, owned or was in possession of the property, he may, on the trial, claim and establish a title to the property by gift from the intestate; especially after the plaintiff has himself proved that the defendant had claimed the property as such. *Supreme Ct.*, 1857, *Woodruff v. Cook*, 25 *Barb.*, 505.

495. **Admission of transfer.** When, in an action on a note, the answer, by not denying, admits the allegations of the complaint, that the defendant made and delivered the note to the payee, who indorsed and delivered it to the plaintiff, the defendant should not be permitted, at the trial, to prove that the payee had no capacity to transfer, and thus indirectly controvert the transfer. *N. Y. Superior Ct.*, 1857, *Robbins v. Richardson*, 2 *Bow.*, 248.

496. That the capacity of the plaintiffs, as executors, to sue, if averred in the complaint and not denied in the answer, must be taken as admitted. *Supreme Ct.*, 1858, *Dart v. Farmers' Bank*, 27 *Barb.*, 887.

497. **Traverse of answer.** The plaintiff may prove any matter which in legal effect will avoid a defence set up in an answer consisting of new matter which does not constitute a counter-claim, and will prevent its operating as a bar or obstacle to the plaintiff's right to recover. The Code (§ 168) performs, for the plaintiffs, the office of a pleader, who can commit no mistake, in replying to an answer which sets up, by way of defence, new matters not constituting a counter-claim. *N. Y. Superior Ct.*, 1857, *Garner v. Manhattan Building Association*, 6 *Duer*, 589.

XII. MOTIONS TO CORRECT OR SET ASIDE PLEADINGS, OR FOR JUDGMENT THEREON.

1. In General.

498. **Motion for judgment for want of an answer denied,** where the papers contained suspicious erasures, and a memorandum was indorsed by defendant on the back of the complaint, denying its allegations. *Didier v. Warner*, 1 *Code R.*, 42.

499. **Folios.** It is not ground for a motion to set aside a complaint, that the folios are not numbered as required by Rule 87. (*Rule 20 of 1858.*) The remedy for all merely formal defects is to return the pleading with notice of the defect. [Citing 8 *Sandf.*, 716; 4 *How. Pr.*, 126; and explaining 8 *Id.*, 88.] *Supreme Ct.*, *Sp. T.*, 1854, *Strauss v. Parker*, 9 *How. Pr.*, 842.

500. The fact that separate causes of action are not separately stated and numbered is not ground for setting aside the complaint. It seems that the remedy is by motion to make more definite and certain. *Supreme Ct.*, *Circuit*, 1858, *Wood v. Anthony*, 9 *How. Pr.*, 78.

501. **Double statement.** On a motion to strike out a complaint for stating one and the same cause of action in two statements or counts, or to compel the plaintiff to elect on which he would rely, an affidavit that there is but one cause of action is not necessary, if that fact appears from the face of the complaint,—*e. g.*, where both causes of action are claims for goods sold at the same time and place, and in the same amount, and with a deduction of

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the same credit for a payment, and the demand for judgment is for one balance, and not for the amount of both. *Supreme Ct., Sp. T.*, 1856, *Ford v. Mattice*, 14 *How. Pr.*, 91; and see *Molony v. Dow*, 15 *Id.*, 261.

502. Objections to answers. If an entire answer is irrelevant, judgment may be given for the plaintiff under section 247; but if it is only one of several answers or defences, it may be stricken out under section 152; and if it was improperly alleged as a part of another defence, otherwise good, it may be stricken out as irrelevant or redundant under section 160. *Supreme Ct., Sp. T.*, 1855, *Walker v. Hewitt*, 11 *How. Pr.*, 395.

503. A sham answer or defence is one which is false in fact and not pleaded in good faith, but yet may be good in form. A frivolous answer is one that shows no defence. A sham answer may be stricken out on motion. An entire answer cannot be stricken out as frivolous, though a frivolous defence may be struck out of an answer containing other defences. *N. Y. Superior Ct.*, 1851, *Brown v. Jenison*, 3 *Sandf.*, 732; 1852, *Hull v. Smith*, 1 *Duer*, 649; *S. C.*, 8 *How. Pr.*, 149.

504. A sham answer is one good upon its face, but setting up new matter which is false; the remedy is, by motion, to strike it out. A frivolous answer is one which controverts no material allegation in the complaint, and presents no tenable defence; the remedy is by application for judgment, upon five days' notice. *Supreme Ct.*, 1854, *Lefferts v. Snediker*, 1 *Abbotts' Pr.*, 41.

505. Ordinarily, when one good ground of defence is contained in the answer, so that the plaintiff cannot apply for judgment on the ground that the whole answer is frivolous, the true mode of determining whether any particular defence is sufficient, is by demurrer, not by a motion to strike out. *Supreme Ct., Sp. T.*, 1849, *White v. Kidd*, 4 *How. Pr.*, 68.

506. An answer will not be stricken out as insufficient, unless it be so utterly frivolous that the plaintiff ought not to be put to his demurrer. [4 *How. Pr.*, 68.] *N. Y. Superior Ct.*, 1851, *Miln v. Vose*, 4 *Sandf.*, 660. To the same effect, *Supreme Ct.*, 1850, *Bedell v. Stickles*, 4 *How. Pr.*, 432; *S. C.*, 8 *Code B.*, 105.

507. Where the answer is clearly bad, the plaintiffs should not be put to the expense and delay of a demurrer. *Supreme Ct., Chambers*, 1850, *McMurray v. Gifford*, 5 *How. Pr.*, 14.

508. The remedies against bad pleading in answers stated as follows: If an answer, otherwise good, is loaded with unnecessary and redundant matters, the plaintiff should move under section 160; if the answer is deemed insufficient in law, he should demur; if, however, it is palpably insufficient, he should move for judgment on the ground of frivolousness; if a defence can be shown clearly false, he should move to strike it out as sham. *Nichols v. Jones*, 6 *How. Pr.*, 355. Approved, *Ostrom v. Bixby*, 9 *Id.*, 57.

509. The distinctions between sham, frivolous, and irrelevant matter, discussed. *Nichols v. Jones*, 6 *How. Pr.*, 355. Approved, *Winne v. Sickles*, 9 *Id.*, 217; and see *Davis v. Potter*, 4 *Id.*, 155; *Thorn v. N. Y. Central Mills*, 10 *Id.*, 19; affirmed, 1 *Abbotts' Pr.*, 187.

510. Although entire defences cannot be struck out for frivolousness, like sham and irrelevant defences, but must be reached by demurrer or motion for judgment, under section 247 of the Code, an order striking out one defence as sham, and striking out the others as frivolous, with judgment, may be sustained on appeal by modifying it so as to allow the frivolous defences to remain in the answer, and order that they be overruled. *Ct. of Appeals*, 1858, *People v. McCumber*, 18 *N. Y. (4 Smith)*, 315; affirming *S. C.*, 27 *Barb.*, 632; 15 *How. Pr.*, 186.

511. Where a reply is interposed which is entirely uncalled for, a motion to set it aside for irregularity in the verification will be denied, because the irregularity is of no consequence. *Supreme Ct., Sp. T.*, 1853, *Silliman v. Eddy*, 8 *How. Pr.*, 122.

512. A demurrer abandoned, like the original, after service of an amended pleading, is no longer a part of the record, and will be struck out of the appeal-book on motion. *Ct. of Appeals*, 1859, *Brown v. Saratoga R. R. Co.*, 18 *N. Y. (4 Smith)*, 495.

2. Correcting Pleadings.

A. Striking out Improper Matter.

513. Scandalous and impertinent matter in a pleading may be struck out as under the old practice, on motion of any person aggrieved. [Code, § 469; Rule 92.] *Supreme Ct., Sp. T.*, 1850, *Carpenter v. West*, 5 *How. Pr.*, 53.

514. Part of motion granted. The rule in respect to demurrers—*vis.*, that if any part of

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the pleading demurred to is good, the demurrer must be overruled—is not applicable to a motion to strike out parts of an answer as frivolous. The reason of that rule is, that a demurrer admits every thing contained in a pleading to be true; and if so, and one part of the answer forms a good defence, the pleading cannot be said to be frivolous. On a motion, no such admission is made; and the court is not limited, on motions, to granting the whole or none. *N. Y. Com. Pl.*, 1855, *De Santos v. Searle*, 11 *How. Pr.*, 477.

515. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. *Code of Pro.*, § 160, first clause.

516. The adverse party may always be considered as aggrieved by scandalous and impertinent or irrelevant and redundant matter in a pleading. *Supreme Ct., Sp. T.*, 1850, *Carpenter v. West*, 5 *How. Pr.*, 58; 1851, *Williams v. Hayes, Id.*, 470 (qualifying Hynds v. Griswold, 4 *Id.*, 69); 1853, *Putnam v. De Forest*, 8 *Id.*, 146.

517. Contra. A party is not to be deemed aggrieved by unnecessary particularity in the pleading of his adversary, which only gives him more distinct notice than is requisite of the nature of the proof to be given against him. *Supreme Ct., Sp. T.*, 1857, *Denithorne v. Denithorne*, 15 *How. Pr.*, 232. *N. Y. Com. Pl., Sp. T.*, 1858, *Molony v. Dows, Id.*, 261. To similar effect, *Supreme Ct., Sp. T.*, 1858, *Clark v. Harwood*, 8 *Id.*, 470.

518. Mere prolixity not a ground for striking out the matter on motion. *Warrin v. Struller*, 11 *N. Y. Leg. Obs.*, 94.

519. In the New York Common Pleas, it is sufficient to sustain a motion to strike out irrelevant and redundant matter from a pleading to show that it is such. The moving party is not required to show that he is specially aggrieved, otherwise than by being required to answer objectionable statements. *N. Y. Com. Pl., Sp. T.*, 1856, *Isaac v. Velloman*, 3 *Abbotts' Pr.*, 464.

520. Clear case. A motion to strike matter out of a pleading as irrelevant, redundant, or frivolous, should not be granted if there is any reasonable doubt whether the matter is pertinent. *N. Y. Superior Ct.*, 1850, *Anonymous*, 2 *Sandf.*, 682.

521. Only a part to be struck out. On a motion to strike out irrelevant or redundant

matter, it is not proper to strike out the entire pleading, but only such portion as is objectionable, which must be pointed out in the moving papers. If the pleading contains a cause of action, it is not all impertinent; and if it does not, the remedy is demurrer or motion for judgment. *Supreme Ct., Sp. T.*, 1851, *Benedict v. Dake*, 6 *How. Pr.*, 352; 1853, *Stiles v. Comstock*, 9 *Id.*, 48. *N. Y. Superior Ct., Sp. T.*, 1851, *Harlow v. Hamilton*, 6 *Id.*, 475.

522. Facts improperly united with others, may be struck out on motion notwithstanding so doing leaves the pleading demurrable. *Supreme Ct., Sp. T.*, 1855, *Waller v. Raskan*, 12 *How. Pr.*, 28.

523. Where redundant or irrelevant matter in an answer,—e. g., mere mitigating circumstances in an action for assault and battery,—is such that to strike it out would leave the pleading an unintelligible fragment, raising no issue, the proper remedy is not a motion to strike out, but a motion for judgment on account of its frivolousness. *Supreme Ct., Sp. T.*, 1854, *Lane v. Gilbert*, 9 *How. Pr.*, 150.

524. Test. The rule in relation to striking out redundant matter under the Code is, that unless it is clear that no evidence can properly be received under the allegations objected to, they will be retained until the trial. *Supreme Ct., Sp. T.*, 1853, *Follett v. Jewitt*, 11 *N. Y. Leg. Obs.*, 193; *S. C.*, 2 *Liv. Law Mag.*, 189.

525. That a part of an answer which can in any event become material, ought not to be struck out as irrelevant. *Supreme Ct., Sp. T.*, 1850, *Averill v. Taylor*, 5 *How. Pr.*, 476.

526. All allegations which do not state an issuable fact, including all mere statements of evidence, may be stricken out on motion, as irrelevant and redundant. *Supreme Ct., Sp. T.*, 1851, *Williams v. Hayes*, 5 *How. Pr.*, 470 (qualifying Hynds v. Griswold, 4 *Id.*, 69); [citing 5 *Id.*, 58, 470], *Rensselaer & Washington Plank-road Co. v. Wetsel*, 6 *Id.*, 68; *Stewart v. Bouton, Id.*, 71; *S. P.*, *Brown v. Orvis, Id.*, 876; 1853, *Wooden v. Strew*, 10 *Id.*, 48.

527. Matter is irrelevant or redundant in a pleading, which, found in connection with pertinent allegations, has no bearing on the subject-matter, and cannot affect the decision. If the whole pleading is insufficient, its matter is not "irrelevant," but it must be demurred to. *N. Y. Superior Ct.*, 1851, *Fabbriocotti v. Lantz*, 3 *Sandf.*, 748.

528. Specific admissions in detail, of the

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facts alleged in the complaint, and arguments and inferences of law, though such as called for in pleading in chancery, are irrelevant and improper in an answer under the Code, and may be struck out. An answer must be confined to denying the allegations of the complaint, and stating new matter of fact. *Supreme Ct., Sp. T.*, 1858, *Gould v. Williams*, 9 *How. Pr.*, 51.

529. The true rule in respect to striking out irrelevant allegations in a pleading is, that if the matter cannot be made the subject of a material issue, or affect the question of an injunction or costs or other relief to be granted, and will embarrass the opposite party and the court, it should be stricken out. *Supreme Ct.*, 1855, *Martin v. Kanouse*, 2 *Abbotts' Pr.*, 380.

530. It is no sufficient answer to a motion to strike out irrelevant or redundant matter from a complaint, that such matter was inserted solely for the purpose of enabling the plaintiff to obtain an injunction. *Supreme Ct., Sp. T.*, 1849, *Putnam v. Putnam*, 2 *Code R.*, 64.

531. Insufficiency. Matter set up as a defence cannot be treated as irrelevant or redundant because insufficient. It may be struck out as frivolous, or the plaintiff may demur. *N. Y. Superior Ct.*, 1851, *Matthews v. Beach*,* 5 *Sandf.*, 256.

532. Defendant's prayer for relief cannot be struck out as irrelevant, for it is not possible that the plaintiff should be prejudiced by it. *Supreme Ct., Sp. T.*, 1850, *Averill v. Taylor*, 5 *How. Pr.*, 476.

533. Agency of defendant. In an action for goods sold and delivered, defendant, by his answer, denied the sale to himself and his indebtedness to plaintiff, and also alleged that he was the agent of a third person, and that the sale was made under a special contract. *Held*, that allegations as to the terms of the contract were irrelevant and should be struck out. If he was agent, it was immaterial what the terms of the contract were. *N. Y. Com. Pl., Sp. T.*, 1853, *Leconte v. Jerome*, 11 *N. Y. Leg. Obs.*, 126.

534. To a complaint for a libel which charged the plaintiffs with fraudulent attempts to influence the Supreme Court in the determination of a suit, and with bribery of the

Common Council,—averments in the answer of a wasteful and improper course of conduct on the part of the Council, and that certain contracts obtained therefrom by the plaintiffs would result in vast profits to them and in detriment to the city; and that they falsely pretended to possess patent rights for doing work called for by the contract, and made other false pretences, and that they poorly performed previous contracts, and had obtained preferences over lower bidders,—are irrelevant. *N. Y. Com. Pl.*, 1855, *Russ v. Brooks*, 4 *E. D. Smith*, 644.

535. In a complaint for assault and battery, statements that the parties were produce buyers in the streets of P., that the purpose of the assault was to compel the plaintiff to quit the streets and the business, and to bring him into disgrace and ridicule, and that the assault caused him to be ridiculed by the by-standers, though not essential to a cause of action, are not irrelevant or redundant. [3 *Ohitt Pl.*, 466; 2 *Id.*, 858.] *Supreme Ct., Chambers*, 1858, *Root v. Foster*, 9 *How. Pr.*, 37.

536. Fraud. In a case where, by reason of defendant's fraud, plaintiff would be entitled to sue either on contract or in tort, at his election, if it appears from the summons and complaint that he elected to sue upon contract, allegations of fraud may be stricken out of the complaint, on motion, as irrelevant and redundant. *Supreme Ct., Sp. T.*, 1856, *Sellar v. Sage*, 12 *How. Pr.*, 531.

537. Instance of a pleading held indefinite, irrelevant, hypothetical, argumentative, and uncertain. *Hunter v. Powell*, 15 *How. Pr.*, 221.

As to striking out a Defendant's name, see *supra*, 167.

B. Making Definite and Certain.

538. Motion. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment. *Code of Pro.*, § 160.

539. It is the purpose of section 160 of the Code, to provide for the correction of defects in form; while the office of the demurrer upon the ground that facts sufficient to constitute a cause of action are not stated, is to present the questions upon the mere right of a party, free from all questions of form. *Ok. of Appeals*, 1855, *People v. Ryder*, 12 *N. Y. (2 Kern.)*, 433;

* Reversed, on other grounds, *Ct. of Appeals*, 1858, 4 *N. Y. (4 Seld.)*, 173.

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affirming S. C., 16 *Barb.*, 370; and see *Martin v. Kanouse*, 2 *Abbotts' Pr.*, 327; S. C., 11 *How. Pr.*, 567; *Clark v. Dales*, 20 *Barb.*, 42.

540. Thus, where in an action to recover a balance on a note, the answer alleged that the note "was by mistake given for a greater sum than was due from the maker to the payee, to wit, a sum sufficient to cancel the balance claimed,"—*Held*, that an objection that the allegation in the answer was too indefinite to admit proof, should have been taken by motion to make it more certain, and that by taking issue upon it by a reply and going to trial, the objection was waived. *Ct. of Appeals*, 1856, *Seeley v. Engell*, 18 *N. Y. (3 Kern.)*, 542; reversing S. C., 17 *Barb.*, 580.

541. So where an answer in an action for flowing land, set up twenty years' user, but did not allege that it was adverse to the plaintiff,—*Held*, that the plaintiff, by omitting to demur, and by taking issue, waived the objection to the admissibility of evidence under it. *Ct. of Appeals*, 1856, *White v. Spencer*, 14 *N. Y. (4 Kern.)*, 247.

542. The indefiniteness and uncertainty to be relieved, on motion, is only such as appears on the face of the pleading. *Supreme Ct., Sp. T.*, 1856, *Brown v. Southern Michigan R. R. Co.*, 6 *Abbotts' Pr.*, 287.

543. Answer to irrelevant allegations. Defendants cannot be compelled to make more definite and certain, allegations in their answer which respond only to matter in the complaint which is irrelevant. *Supreme Ct., Sp. T.*, 1856, *Parshall v. Tillou*, 13 *How. Pr.*, 7. See, also, *supra*, 61.

544. Stating a date as on or about, &c., is not ground of demurrer; but the remedy, if any, is by motion to make it more definite. *Supreme Ct.*, 1851, *Bement v. Wisner*, 1 *Code R., N. S.*, 143.

545. Several demands. Unless a complaint which seeks to recover upon two causes of action shows how much is due upon each, it will be ordered to be made more definite and certain. *N. Y. Superior Ct., Chambers*, 1854, *Clark v. Farley*, 3 *Duer*, 645.

546. Where a complaint states the subjects of several causes of action as one, a motion to make it more definite and certain may be granted. *N. Y. Superior Ct., Chambers*, 1855, *Forsyth v. Edminston*, 11 *How. Pr.*, 408.

547. Judgment. *Prima facie* a judgment in favor of one party belongs to him, and not

to his attorney, whether it be for costs alone, or for debt and damages and costs; and an answer which seeks to rebut this presumption is not sufficiently definite and certain, unless it shows facts which overthrow it. *Supreme Ct.*, 1855, *Martin v. Kanouse*, 2 *Abbotts' Pr.*, 327; S. C., less fully, 11 *How. Pr.*, 567.

548. Alternative allegation. Alleging that a party made one or other of several representations, is alternative pleading, and obnoxious to a motion to make more definite and certain. *Supreme Ct., Sp. T.*, 1856, *Corbin v. George*, 2 *Abbotts' Pr.*, 465.

549. Account. Not necessary to set forth in pleading, the items of an account, but a copy to be delivered on a demand. *Code of Pro.*, § 158; and see *supra*, 88-90.

550. The proper remedy to obtain the particulars of the plaintiff's claim, is to demand a copy of his account under section 159. After demand for a copy has been complied with, although insufficiently, plaintiff cannot seek the same information by motion to make the complaint more definite and certain. He should apply for an order for a further account. *Supreme Ct., Sp. T.*, 1855, *McKinney v. McKinney*, 12 *How. Pr.*, 22.

551. An answer alleging, by way of set-off, that the plaintiff is indebted on account of previous transactions, in a sum equal to his claim, as will appear by reference to an account current stated in the complaint to have been rendered by the defendant to the plaintiff, is indefinite and uncertain, and is not a compliance with an order requiring him to make his first answer more definite and certain. *N. Y. Superior Ct.*, 1851, *Wiggins v. Gans*, 3 *Sandf.*, 738.

552. The remedy for a defective account rendered under section 159, is to move for a further account, not to move for an order compelling plaintiff to make his complaint more definite and certain. *Supreme Ct., Sp. T.*, 1855, *McKinney v. McKinney*, 12 *How. Pr.*, 22.

553. A complaint for money received, which states that at a specified time the defendants received as agents of the plaintiff, from a specified party, certain sums of money, amounting in the aggregate to a specified sum, and states a demand and refusal to pay, is not obnoxious to motion to make more definite and certain. The defendant, if he wishes more, must seek a bill of particulars. *N. Y. Com. Pl.*, 1858, *Sloman v. Schmidt*, 8 *Abbotts' Pr.*, 5.

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554. Allegations of indebtedness. A complaint alleging that the plaintiff, at the defendants' request, rendered to them services, as agent, for which he is entitled to have, as a fair reward, fifty dollars; also for work, labor and services done, and material furnished by the plaintiff for the defendants, is indefinite and uncertain. *Supreme Ct., Sp. T., 1857, Chesbrough v. N. Y. & Erie R. R. Co., 26 Barb., 9; S. C., 18 How. Pr., 557.*

Compare *supra*, 28, and *note*.

555. Separate estate. In an action by a wife, concerning her separate property, if defendant has a right to be informed of the facts constituting the goods her separate property, his remedy is by motion. *N. Y. Superior Ct., Sp. T., 1856, Spies v. Accessory Transit Co., 5 Duer, 662.*

As to the remedy for repetition of the same demand in **Several Counts**, see *supra*, 75-78.

3. Striking out Pleadings.

556. Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose. *Code of Pro., § 152.*

557. A whole answer, or a whole separate defence may be stricken out, as false, where the pleading is unverified and its falsity is shown. But a part of the allegations going to make up a defence cannot be struck out, leaving the others. *N. Y. Com. Pl., 1854, Slack v. Cotton, 2 E. D. Smith, 398.*

558. One or more of several defences set up in an answer, even though demurrable, may be stricken out under section 152 of the Code. *Supreme Ct., Sp. T., 1855, Van Benschoten v. Yaple, 18 How. Pr., 97.*

559. An answer is sham, only when it sets up new matter known to the defendant to be false. *Supreme Ct., Sp. T., 1855, Benedict v. Tanner, 10 How. Pr., 455.*

560. A sham defence or answer is one that is false in fact, although perhaps good in form. It is only as a false, counterfeit, or pretended defence, that it may be stricken out under this provision. *Supreme Ct., Sp. T., 1855, Walker v. Hewitt, 11 How. Pr., 395.*

561. A defence is sham, which is so clearly false as not to present any substantial issue. [6 Cow., 84; 12 Wend., 196; 18 Id., 565.] *Ct. of Appeals, 1858, People v. McCumber, 18 N. Y. (4 Smith), 815; affirming S. C., 27 Barb., 632; and 15 How. Pr., 186.*

562. A denial, though insufficient in form,

cannot be deemed irrelevant or sham. *Supreme Ct., Sp. T., 1852, Seward v. Miller, 6 How. Pr., 312; but see infra, 566.*

563. Defect of statement. An answer which is so framed that it does not set up a valid defence, but which states facts which may, by being properly averred, constitute a defence, will not be struck out as sham, irrelevant, or frivolous. *Supreme Ct., Sp. T. (1851?), Alfred v. Watkins, 1 Code R., N. S., 348.*

564. Bad faith. An answer cannot be treated as sham, merely because put in for delay. *N. Y. Superior Ct., 1851, Garvey v. Fowler, 4 Sandf., 665; S. C., 10 N. Y. Leg. Obs., 16.*

565. Slight circumstances indicating good faith, are sufficient to prevent a verified answer from being stricken out as sham. [8 Barb., 75; 14 Id., 398.*] *Supreme Ct., Sp. T., 1855, Munn v. Barnum, 1 Abbotts' Pr., 281; S. C., less fully, 12 How. Pr., 563.*

566. Denials. Verified Pleadings. The provision of the Code, that "sham and irrelevant answers and defences may be stricken out on motion," applies equally to mere denials of allegations of the complaint as to affirmative matter,† and equally to verified as to unverified answers. The rules of the old practice, that the general issue could not be struck out, does not apply under the Code. The right of the defendant to have the issues tried by a jury depends on the existence of a real issue, and the court has power to try, on motion, the question whether there is a substantial issue, or only a sham and fictitious one. *Ct. of Appeals, 1858, People v. McCumber,†*

* These authorities were subsequently overruled. See 566 and *note*.

† In *Conklin v. Vandervoort, 7 How. Pr., 433*, the same was held; and in *Walker v. Hewitt, 11 Id., 395*, it was held that a mere denial, though verified, might be struck out as false.

‡ This case overrules *Farmers & Mechanics' Bank v. Smith, 15 How. Pr., 329; Gregg v. Reader, Id., 371; Mier v. Cartledge, 8 Barb., 75*; reversing *S. C., 4 How. Pr., 115; 2 Code R., 125; 7 N. Y. Leg. Obs., 371; Catlin v. McGroarty, 1 Code R., N. S., 291, Caswell v. Bushnell, 14 Barb., 398; S. C., sub nom. Sherman v. Bushnell, 7 How. Pr., 171; Munn v. Voss, 4 Sandf., 660; Goedel v. Robinson, 1 Abbotts' Pr., 116; Tracy v. Humphrey, 5 How. Pr., 156; S. C., 3 Code R., 190; Davis v. Potter, 4 How. Pr., 155; S. C., 2 Code R., 99; Darrow v. Miller, 5 How. Pr., 247; Seward v. Miller, 6 Id., 312; White v. Bennett, 7 How. Pr., 59; Winne v. Sickles, 9 Id., 217; Liv-*

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18 *N. Y.* (4 *Smith*), 315; affirming *S. O.*, 27 *Barb.*, 632; and at *Sp. T.*, 15 *How. Pr.*, 186.

567. Where a complaint is served without verification, an answer merely denying the material allegations of the complaint, cannot be struck out as false, merely on a subsequent verification of the complaint. *Supreme Ct.*, *Sp. T.*, 1852, *White v. Bennett*, 7 *How. Pr.*, 59.

568. **Special affidavit in support of answer.** The power to strike out defences, on motion, as sham or irrelevant, should be carefully exercised, and not extended beyond passing on the question, whether there is any true and substantial issue to be tried. When the defendant supports his defence by an affidavit, stating specially the grounds of it, he cannot generally be deprived of the benefit of a trial in the ordinary mode. *Ot. of Appeals*, 1858, *People v. McCumber*, 18 *N. Y.* (4 *Smith*), 315; affirming *S. O.*, 27 *Barb.*, 632; and 15 *How. Pr.*, 186. To similar effect, *Supreme Ct.*, *Sp. T.*, 1855, *Munn v. Baraam*, 1 *Abbotts' Pr.*, 281; *S. O.*, 12 *How. Pr.*, 563; 1857, *Farmers & Mechanics' Bank v. Smith*, 15 *How. Pr.*, 329; *Gen. T.*, 1845, *Miller v. Miller*, 1 *Id.*, 162.

569. On a motion to strike out a pleading as sham, the pleader is not obliged to disprove the allegations of the affidavits of the moving party, respecting matters not presumed to be within the pleader's knowledge, even though the matters are such as, if proved, will avoid the defence set up in the pleading. *N. Y. Superior Ct.*, *Sp. T.*, 1857, *Wirgman v. Hicks*, 6 *Abbotts' Pr.*, 17.

570. An answer to a complaint on a promissory note, setting up matter—*e. g.*, fraud in the inception of the note—which, if proved, will call upon the plaintiff to show himself to be a *bona-fide* indorsee for value, before maturity, is not to be stricken out as sham because the defendant's affidavits do not fully deny the allegations of the plaintiff's affidavits setting out his title. *Id.*

571. A motion to strike out, as sham and irrelevant, a defence consisting of denials, is properly granted where the falsity of the denials of material allegations of the complaint appears by other parts of the answer, by the affidavit made on behalf of the moving party,

and by the fact that no affidavit to sustain the truth of the denials was produced in opposition. *Ot. of Appeals*, 1858, *People v. McCumber*, 18 *N. Y.* (4 *Smith*), 315; affirming *S. O.*, 27 *Barb.*, 632; and at *Sp. T.*, 15 *How. Pr.*, 186.

572. On a motion to strike out an answer as sham, whether the answer is verified or not, if the motion-papers establish a strong *prima-facie* case of falsity and fraud, defendant should be required to show the particular facts on which he relies in support of his answer, so far as to satisfy the court that his answer is not mere pretence. This is not a trial of the action by affidavits; it is only looking into the case far enough to see whether there is a foundation for the answer. *Supreme Ct.*, *Sp. T.*, 1857, *Manufacturers' Bank v. Hitchcock*, 14 *How. Pr.*, 406.

573. **Clear case.** That a defence, the inadmissibility of which is not clear, cannot be struck out on motion. *Supreme Ct.*, *Sp. T.*, 1850, *Hill v. McCarthy*, 8 *Code R.*, 49.

574. **New matter** in an answer, which, although a good cause of action, is palpably no defence either total or partial, nor a counter-claim, may be struck out, on motion, as an irrelevant defence. *N. Y. Superior Ct.*, *Sp. T.*, 1856, *Kurtz v. McGuire*, 5 *Duer*, 660.

575. **Defence which amounts to general issue.** A defence sufficient in itself is not to be struck out because the matter contained in it is such as might be proved under denials contained in the same answer. *Supreme Ct.*, *Sp. T.*, 1854, *Hollenbeck v. Clow*, 9 *How. Pr.*, 289.

576. **Promise to renew note.** An answer to a complaint on a note, setting up an agreement, contemporaneous with the making of it, to renew it, and a refusal to do so, is irrelevant. *N. Y. Superior Ct.*, 1850, *Fleury v. Roget*, 5 *Sandf.*, 646.

577. **Discharge of joint maker.** In an answer of one of two defendants sued as joint makers of a note, an allegation that the other has been discharged by the holder, is not irrelevant. *N. Y. Com. Pl.*, 1851, *Mott v. Burnett*, 2 *E. D. Smith*, 50; *S. O.* below, 1 *Code R.*, *N. S.*, 225.

578. **Striking out frivolous pleadings.** A pleading should not be struck out as frivolous unless so palpably so as to show that it was not interposed in good faith. *Supreme Ct.*, 1849, *Neefus v. Kloppenburg*, 2 *Code R.*, 76; *Chambers*, 1850, *Darrow v. Miller*, 5 *How. Pr.*,

ington *v. Finkle*, 8 *Id.*, 435; *Stiles v. Comstock*, 9 *Id.*, 43; *Benedict v. Tanner*, 10 *Id.*, 455; *Grant v. Power*, 12 *Id.*, 500.

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247; S. C., 8 *Code R.*, 241. S. P., *N. Y. Superior Ct.*, 1850, *Oorlies v. Delaplaine*, 2 *Sandf.*, 680; S. C., 2 *Code R.*, 117.

579. A pleading should not be struck out as frivolous unless taken merely for delay, or its insufficiency is so apparent that the court can determine it upon bare inspection, without argument. *Supreme Ct., Sp. T.*, 1856, *Sixpenny Savings Bank v. Sloan*, 2 *Abbotts' Pr.*, 414; S. C., 12 *How. Pr.*, 548; 1857 [citing 6 *How. Pr.*, 358], *Kelly v. Barnett*, 16 *How. Pr.*, 185.

580. Indefiniteness. An answer that some part of the demand has been paid, without saying how much,—not to be struck out as frivolous. *Supreme Ct., Sp. T.*, 1851, *Smith v. Shufelt*, 8 *Code R.*, 175.

581. Motion. On an application asking merely for an order that a demurrer be stricken out as irregular and frivolous, the moving party cannot have judgment on the demurrer, under section 247 of the Code. *Supreme Ct., Chambers*, 1851, *Rae v. Washington Mutual Ins. Co.*, 6 *How. Pr.*, 21. Compare *Castles v. Woodhouse*, 6 *N. Y. Leg. Obs.*, 392; S. C., 1 *Code R.*, 71.

582. In an action on a promissory note, an answer admitting giving the note, but alleging that the goods, for the price of which the note was given, were of an inferior quality to those contracted for, is indefinite, and may be struck out as frivolous. *N. Y. Com. Pl., Chambers*, 1848, *Castles v. Woodhouse*, 6 *N. Y. Leg. Obs.*, 392; S. C., 1 *Code R.*, 71.

4. Judgment on Frivolous Pleadings.

583. Under the Code of 1848 (which did not expressly give the right),—*Held*, that on a frivolous answer or demurrer plaintiff may move for judgment as for want of an answer. *Supreme Ct.*, 1848, *Noble v. Trowbridge*, 1 *Code R.*, 38. To the contrary, *Sp. T.*, *Partridge v. McCarthy*, *Id.*, 49.

584. If a demurrer, answer, or reply, be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly. *Code of Pro.*, § 247.

585. A denial by defendant of any knowledge, &c., sufficient to form a belief, respecting material allegations in the complaint, forms a material issue, which compels plaintiff to prove such allegations on the trial. Hence, although when the allegations thus denied are pre-

sumptively within the personal knowledge of the defendant, this fact may render the answer false, and so liable to be stricken out as sham, the plaintiff cannot have judgment upon it as frivolous. [Following 6 *How. Pr.*, 321, 329; 7 *Id.*, 171; 5 *Id.*, 821; 11 *Id.*, 477; 14 *Barb.*, 393; and disapproving 10 *How. Pr.*, 19, 309; 8 *Id.*, 28; 12 *Id.*, 87, 153; 1 *Abbotts' Pr.*, 187; 4 *Saund.*, 708.] *Supreme Ct., Sp. T.*, 1856, *Leach v. Boynton*, 8 *Abbotts' Pr.*, 1.

586. Denial of recollection. An answer to a complaint in an action for goods sold, stating merely that the defendant "has no recollection sufficient to form a belief as to the specific sum to which the bill of goods amounts, and therefore can neither admit nor deny that he remains indebted in," &c., though not sham, is frivolous, and the plaintiffs are entitled to judgment on the pleadings, on motion. *Supreme Ct., Sp. T.*, 1852, *Nichols v. Jones*, 6 *How. Pr.*, 355. Approved, *Winne v. Sickles*, 9 *Id.*, 217.

587. Mere vagueness in pleading is not frivolousness; it is to be corrected by amendment, and not visited by judgment. It is enough on a motion for judgment for frivolousness of the answer, that a good defence is "shadowed forth." *Supreme Ct., Sp. T.*, 1857, *Kelly v. Barnett*, 16 *How. Pr.*, 185.

588. Denial. An answer which denies a material allegation in the complaint, cannot be stricken out, and judgment granted thereon, as frivolous. *Supreme Ct., Sp. T.*, 1849, *Davis v. Potter*, 4 *How. Pr.*, 155; S. C., 2 *Code R.*, 99; *Chambers*, 1852, *Temple v. Murray*, 6 *How. Pr.*, 329.

589. An answer is not frivolous which denies a fact essential to the plaintiff's recovery, although such fact is not directly averred in the complaint. *N. Y. Superior Ct.*, 1852, *Lord v. Cheesebrough*, 4 *Sandf.*, 696.

590. In a foreclosure action, an answer merely denying the recording of the mortgage and of the assignment, and claiming that the assignor had guarantied the payment, and must be therefore made a party, is frivolous. *Supreme Ct., Sp. T.*, 1856, *St. Mark's Fire Ins. Co. v. Harris*, 13 *How. Pr.*, 95.

591. Bad faith. It is not the motive with which an answer is put in, or its truth or falsity, that is the test, on a motion for judgment on the ground of its frivolousness. If it is a good defence on its face, the motion must be denied. Thus in an action by an indorsee

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against the maker of a promissory note, an answer which denies knowledge, &c., sufficient to form a belief whether the allegation of the complaint that the payee of the note indorsed it to the plaintiff is true, is not frivolous. *N. Y. Superior Ct., Sp. T.*, 1857, *Hecker v. Mitchell*, 5 *Abbotts' Pr.*, 453.

592. Several defences. That plaintiff cannot move for judgment under section 247, unless the answer as an entirety is frivolous. *Van Valen v. Lapham*, 13 *How. Pr.*, 240.

593. Clear case. To authorize a judge at chambers to give judgment on account of the frivolousness of the pleading, it should be so palpably bad as not to require an argument in support of the motion. *Supreme Ct.*, 1855, *Shearman v. N. Y. Central Mills*, 1 *Abbotts' Pr.*, 187; affirming *S. C.*, *sub nom.* *Thorn v. N. Y. Central Mills*, 10 *How. Pr.*, 19; *Chambers*, 1851, *Rae v. Washington Mutual Ins. Co.*, 6 *How. Pr.*, 21.

594. A decision in point, adverse to a demurrer or an answer, is good ground for treating it as frivolous, unless the principle of the decision is questionable. *Supreme Ct., Sp. T.*, 1857, *Bank of Wilmington v. Barnes*, 4 *Abbotts' Pr.*, 226; 1858, *People v. McCumber*,* 27 *Barb.*, 632; *S. C.*, 15 *How. Pr.*, 186.

595. On appeal from an order rendering judgment on a demurrer as frivolous, the order will not be reversed, unless the court are of opinion that the demurrer was good. *N. Y. Superior Ct.*, 1857, *Wesley v. Bennett*, 5 *Abbotts' Pr.*, 498.

596. On appeal from an order of the special term rendering judgment for the plaintiff on account of the frivolousness of the answer, the general term should sustain the order where the answer does not establish a good defence, although they might not regard the answer as frivolous. *Supreme Ct.*, 1855, *Martin v. Kanouse*, 2 *Abbotts' Pr.*, 327; *S. C.*, less fully, 11 *How. Pr.*, 567; but compare *Shearman v. N. Y. Central Mills*, 1 *Abbotts' Pr.*, 187; affirming *S. C.*, *sub nom.* *Thorn v. N. Y. Central Mills*, 10 *How. Pr.*, 19.

597. No affidavit is necessary as a foundation of a motion for judgment for a frivolous answer. *Supreme Ct., Chambers*, 1850, *Darrow v. Miller*, 5 *How. Pr.*, 247; *S. C.*, 8 *Code R.*, 241.

598. Chambers. A motion to strike out an answer, and for judgment for its frivolousness, may be made and decided at chambers, as well as at special term. (*Code*, § 247.) *Supreme Ct., Chambers*, 1857, *Witherspoon v. Van Dolar*, 15 *How. Pr.*, 266. To the contrary is *Darrow v. Miller* (1850), 5 *Id.*, 247; *S. C.*, 8 *Code R.*, 241.

599. Conditional order. A motion at chambers for judgment on ground of frivolousness of the answer, may be granted conditionally,—*e. g.*, reserving leave to defendant to serve a new answer upon terms. *Supreme Ct., Chambers*, 1855, *Fales v. Hicks*, 12 *How. Pr.*, 158.

5. Judgment for Failure to Reply.

600. If the answer contain a statement of new matter constituting a defence, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and if the case require it, a writ of inquiry of damages may be issued. *Code of Pro.*, § 164.

601. This provision only applies to the case of an answer which sets up new matter that really constitutes a defence. *Supreme Ct., Sp. T.*, 1850, *Brown v. Spear*, 5 *How. Pr.*, 146; *S. C.*, 9 *N. Y. Leg. Obs.*, 97.

6. Within what time Motions must be Made.

602. Separate statement and numbering. The objection that separate causes of action are not separately stated and plainly numbered is technical, and must be moved against promptly. [10 *Wend.*, 560.] *Supreme Ct., Circuit*, 1853, *Wood v. Anthony*, 9 *How. Pr.*, 78.

603. Motions to correct. Motions to strike out of any pleading, matter alleged to be irrelevant or redundant, and motions to correct a pleading, on the ground of its being "so indefinite or uncertain, that the precise nature of the charge or defence is not apparent," must be noticed before demurring to or answering the pleading, and within twenty days from the service thereof. *Rule 50 of 1858. N. Y. Superior Ct.*, 1850, *Corlies v. Delaplaine*, 2 *Sandf.*, 680; *S. C.*, 2 *Code R.*, 117; 1852, *Bowman v. Sheldon*, 5 *Sandf.*, 657. *Supreme Ct., Sp. T.*, 1853, *Roosa v. Saugerties & Woodstock Turnpike-road Co.*, 8 *How. Pr.*, 287.

604. This rule does not apply to a motion to strike out a part of an answer to a supple-

* *Affirmed, Ct. of Appeals*, 1858, 18 *N. Y. (4 Smith)*, 815.

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mental complaint, on the ground that it is in fact responsive to the original complaint. *Supreme Ct.*, 1855, *Dann v. Baker*, 12 *How. Pr.*, 521.

605. An order, extending the time to answer, is a waiver of a right to move to strike out irrelevant matter, unless the right to make the motion is expressly given by the order. *N. Y. Superior Ct., Sp. T.*, 1852, *Bowman v. Sheldon*, 5 *Sandf.*, 657. To the same effect, *Chambers*, 1849, *Isham v. Williamson*, 7 *N. Y. Leg. Obs.*, 340.

606. Noticing the cause for trial waives the right to move to strike out a part of a pleading. *Supreme Ct., Sp. T.*, 1850, *Esmond v. Van Benschoten*, 5 *How. Pr.*, 44.

607. An answer, served after notice of motion to strike out irrelevant matter in the complaint, waives the motion. *Supreme Ct., Sp. T.*, 1853, *Goch v. Marsh*, 8 *How. Pr.*, 439.

608. A party moving against a pleading need not show that his motion was in time. That is matter of opposition. *N. Y. Superior Ct.*, 1852, *Barber v. Bennett*, 4 *Sandf.*, 705. Followed, *Supreme Ct., Sp. T.*, 1853, *Roosa v. Saugerties & Woodstock Turnpike-road Co.*, 8 *How. Pr.*, 237 (overruling *Rogers v. Rathbone*, 6 *Id.*, 66).

609. Motion to strike out. There is no unyielding rule that a motion to strike out an answer must be made at the first possible term after the service of the answer. And where the delay is not unreasonable, and does not appear to have prejudiced the defendant, such motion ought not to be denied on that ground. *Supreme Ct., Sp. T.*, 1856, *Tibballs v. Selfridge*, 12 *How. Pr.*, 64.

610. A motion to strike out an answer as sham or insufficient, may be made at any time before trial, though the plaintiff has obtained time to reply. *N. Y. Superior Ct.*, 1851, *Miln v. Vose*, 4 *Sandf.*, 660.

611. Motions for judgment; — on answer. The plaintiff, at any time, as well after as before a reply, may move for judgment for the insufficiency of the answer. *Supreme Ct., Sp. T.*, 1848, *Stokes v. Hagar*,* 7 *N. Y. Leg. Obs.*, 16; S. C., 1 *Code R.*, 84.

612. A motion for judgment, on account of the frivolousness of an answer, should be re-

garded as in effect a summary demurrer within the meaning of the provision of the Code, which allows a pleading demurred to to be amended. The plaintiff's election to move instead of to demur, ought not to be held to allow him to limit the defendant's right to amend. *N. Y. Superior Ct., Sp. T.*, 1856, *Burrall v. Moore*, 5 *Duer*, 654.

613. — on counter-claim. A motion for judgment for frivolousness of counter-claim cannot be made after it is too late to demur. *N. Y. Superior Ct., Sp. T.*, 1856, *Van Valen v. Lapham*, 18 *How. Pr.*, 240.

614. — on demurrer. A motion for judgment, on the ground that a demurrer to the complaint is frivolous, may be made, although twenty days have not elapsed since the service of the demurrer. If within the twenty days allowed for amending, the party so amend the demurrer that it is no longer frivolous, the motion will be denied without costs. *N. Y. Superior Ct.*, 1852, *Currie v. Baldwin*, 4 *Sandf.*, 690.

615. Amendment meanwhile. The fact that within twenty days after service of the original answer, setting up new matter as a defence, plaintiff had amended his answer, and served a copy of it, is ground for denying a motion for judgment for the frivolousness of the original answer. *N. Y. Superior Ct., Sp. T.*, 1856, *Burrall v. Moore*, 5 *Duer*, 654.

XIII. RULES APPLICABLE TO PARTICULAR SUBJECTS, CAUSES OF ACTION, AND DEFENCES.

1. Accounting.

616. A complaint which sets forth a part-nership, a dissolution, the existence of unsettled accounts, and a balance in favor of plaintiff, and demands an accounting, and a judgment for the balance, shows facts enough to constitute cause of action. *Supreme Ct.*, 1851, *Ludington v. Taft*, 10 *Barb.*, 447.

617. In an action for an account and pay-ment of moneys collected by defendant,—& *q.*, by an attorney,—the complaint may allege the relation of the parties, and aver generally that defendant, as such attorney, had collected from divers persons divers sums, &c.; and a bill of particulars can be obtained only by an order. *N. Y. Superior Ct., Chambers*, 1852, *West v. Brewster*, 1 *Duer*, 647; S. C., 11 *N. Y. Leg. Obs.*, 157.

Consult, also, *supra*, 101.

* This decision was under the Code of 1848, which contained no express authority for moving for judgment on a frivolous answer.

2. Action for Chattels.

618. Consideration. In an action to recover specific personal property, it is not necessary to allege the consideration of the assignment by which the plaintiff claims title to the property, although such assignment was made after the conversion and during the retention. *Supreme Ct.*, 1854, *Vogel v. Badcock*, 1 *Abbotts' Pr.*, 176.

619. Conversion. A statement in the complaint that the defendant converted the property to his own use, is unnecessary, but does not essentially affect the complaint. *Ib.*

620. A complaint claiming only a part of the property mentioned in the affidavit and requisition originally issued to the sheriff.—*Held*, good, it appearing that the other part had been taken from the defendant by an attaching creditor before the summons could be served. *Supreme Ct., Sp. T.*, 1854, *Kerrigan v. Ray*, 10 *How. Pr.*, 218.

621. Justification. In an action to recover the possession of property distrained doing damage, an answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property. *Code of Pro.*, § 166.

Consult, also, *supra*, 102, 188, 494.

3. Action for Lands.

622. Co-tenant of plaintiff. In an action for the recovery of land, brought against a co-tenant, with plaintiff, it is sufficient for the plaintiff, at the outset, to show that the defendant's entry into possession was under a claim hostile to the rights of the plaintiff; as, where the entry was under an expired lease. *N. Y. Superior Ct.*, 1852, *Clason v. Rankin*, 1 *Duer*, 887.

623. Description of premises. Where the complaint in an action for the possession of real property gave a description of the premises which embraced nothing whatever;—*Held*, 1. That the complaint contained no facts constituting a cause of action, and the defendant had his election to demur or avail himself of the defect, upon the trial. It was not proper for the defendant to apply for a bill of particulars or move to have the pleading made more definite and certain, for the reason that there was no claim set up of which

the particulars could have been given, and nothing to be made definite and certain. 2. That to allow the plaintiff to proceed with the trial in such a case, and to permit him, if he established the right to recover, to take a verdict, and then to amend his complaint in conformity with the evidence, would not be just to the defendant. 3. That the complaint was properly dismissed with leave to the plaintiff to amend upon terms. *Supreme Ct.*, 1854, *Budd v. Bingham*, 18 *Barb.*, 494.

624. Where the complaint described the premises as *about* fifty acres in the southern part of a lot which was fully and perfectly described;—*Held*, that this was a sufficient description; but, if necessary, the complaint could be amended by striking out the word "*about*." *Supreme Ct.*, 1856, *St. John v. Northrup*, 23 *Barb.*, 25.

625. Title. A complaint in an action to recover the possession of real estate, which averred a conveyance to the plaintiff from one P., that by virtue of this conveyance, the plaintiff was seized of the premises, had a lawful title thereto, and was entitled to the possession thereof, but without averring the facts which would prove the title actually to exist, is bad on demurrer. *N. Y. Superior Ct., Sp. T.*, 1853, *Lawrence v. Wright*,* 2 *Duer*, 673.

626. The complaint in an action to recover the possession of land, is sufficient if it alleges what estate plaintiff claims in the land, and that he was in possession on some day after his title accrued, and that the defendant, having afterwards entered into the possession, unlawfully withholds such possession from the plaintiff. [Code, § 455; 2 Rev. Stat., 304, §§ 7-10.] It is unnecessary to superadd a statement of the conveyance under which plaintiff claims. *Supreme Ct., III. Dist., Sp. T.*, 1855, *Warner v. Nelligar*, 12 *How. Pr.*, 402.

627. It is not necessary that the complaint in an action brought under the Code to recover the possession of real property, should contain the allegations required in declarations in ejectment-suits, by the Revised Statutes. Both the complaint and the answer in such actions should conform to the rules of pleading laid down in the Code, and their sufficiency is to be tested by those rules. Thus, a

* Disapproved in *Walter v. Lookwood*, 23 *Barb.*, 228; *S. C.*, 4 *Abbotts' Pr.*, 807; and *Warner v. Nelligar*, 12 *How. Pr.*, 402.

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complaint stating that the plaintiff has lawful title, as the owner in fee simple to the following described real estate in, &c., and giving the boundaries and description, and then stating that the defendant is in possession of the said real estate, and unlawfully withholds the possession of the same from the said plaintiff; wherefore the plaintiff demands that the defendant may be adjudged to surrender the possession of said real estate to the plaintiff, and pay the plaintiff damages for the unlawful withholding of the same to the sum of, &c., is a good complaint. *Supreme Ct., VI. Dist., 1856, Walter v. Lockwood, 28 Barb., 228; S. C., 4 Abbotts' Pr., 307; disapproving Warner v. Nelligar, 12 How. Pr., 402; and Lawrence v. Wright, 2 Duer, 678. Followed, I. Dist., Sp. T., 1858, Sanders v. Leavy, 16 How. Pr., 308; People v. Mayor, &c., of N. Y., 28 Barb., 240; S. C., 8 Abbotts' Pr., 7.*

628. In an action for lands, a complaint merely alleging that the plaintiff has lawful title, as the owner in fee simple, to, &c. (describing the lands), and that the defendant is in the possession of the said real estate, and unlawfully withholds the possession of the same from the plaintiff,—is sufficient on demurrer. It is not necessary to state the requisite facts to show the plaintiff's title. Such a general allegation was sufficient under the Revised Statutes, except in an action to recover dower; and being something which the plaintiff would be bound to prove, on the trial, relates to the subject-matter of the action, and the provision of 2 Rev. Stat., 304, § 10, is still applicable. The charge that the defendant unlawfully withholds the possession, was sanctioned by the Revised Statutes, and when coupled with the allegation of plaintiff's title, is sufficiently explicit. If the defendant has any right of possession which could interfere with the plaintiff's claim, he is bound to show it affirmatively. *Supreme Ct., II. Dist., 1857, Ensign v. Sherman, 14 How. Pr., 439; reversing S. C., 18 Id., 85.*

629. A complaint stated that G. was seized of the premises in question, in his own right in fee, and was in the lawful possession of them on and before, &c. That he died so seized in that year, intestate, leaving one of the plaintiffs, his widow, and the other plaintiffs, his only heirs-at-law, him surviving. That those named as heirs were seized in fee, and entitled to the possession, subject to the life-

estate of the widow in an undivided third part thereof. That the defendants were wrongfully in possession, and claimed a right thereto, and although often requested, refused to give up the possession, and unjustly withheld possession from the plaintiffs; and it prayed judgment that they deliver up possession to the plaintiffs. *Held*, a sufficient statement of a cause of action. *N. Y. Superior Ct., 1857, Garner v. Manhattan Building Association, 6 Duer, 539.*

630. Alternative claim. The People of the State, and certain individuals who were their lessees, united in bringing an action for lands. The complaint alleged that the lands were owned in fee by the People, who, unless a lease thereafter described was valid, were entitled to the possession; that defendants took possession, &c.; that subsequent to such taking possession, the People gave to the individual plaintiffs a lease of the lands, who under the lease, if it was valid, became entitled to the possession, but the defendants wrongfully withheld it. *Held*, that the complaint contained but one cause of action,—a claim for possession, and for damages for the withholding subsequent to the lease,—and this cause of action was sufficiently stated. *Supreme Ct., Sp. T., 1858, People v. Mayor, &c., of N. Y., 28 Barb., 240; S. C., 8 Abbotts' Pr., 7.*

631. Possession. In an action to recover lands, it must appear on the face of the complaint that the plaintiff is out of possession, and that possession is unlawfully withheld from him. While in possession, he cannot maintain his action against another who claims possession or exercises acts of ownership. A complaint which shows that the plaintiff is in possession, is bad on demurrer. *Supreme Ct., II. Dist., Sp. T., 1858, Taylor v. Crane, 16 How. Pr., 358.*

632. Forfeiture of lease. A complaint simply set out the plaintiff's title to land, and alleged that the defendant was in wrongful possession, and unjustly withheld it from the plaintiff, and demanded judgment. The answer set up that defendant held possession under a lease from plaintiff's ancestor, and averred, generally, payment of rent when demanded, and that "all the ordinary and yearly taxes on said lot, which were required to be paid by said lessee, have been fully paid and discharged," and that all the covenants, on

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the part of the lessee, had been performed. *Held*, that the complaint, in connection with the answer setting up the lease and averring performance of its covenants, was sufficient to admit evidence that defendant had omitted to pay the taxes, and had therefore forfeited the lease. *N. Y. Superior Ct.*, 1857, *Garner v. Hannah*, 6 *Duer*, 262; *Garner v. Manhattan Building Association*, *Id.*, 539.

633. Non-payment of rent. In an action under 2 Rev. Stat., 505, § 80, to recover the possession of demised premises for non-payment of rent, the complaint need not allege a demand of payment. No notice of intention to re-enter is necessary in such case, except where there are on the premises sufficient goods and chattels to satisfy the rent. And where it appears on the face of the complaint that there were no goods and chattels upon the premises,—as, for example, where the premises are described as consisting of “a water lot, vacant ground, and soil under water,”—it is not necessary to aver, in so many words, the want of a sufficiency of goods on the premises to satisfy the rent. *Supreme Ct.*, 1854, *Mayor, &c., of N. Y. v. Campbell*, 18 *Barb.*, 156.

634. Controverting title. In an action to recover lands, if the defendant wishes to controvert the plaintiff's title, he must either specifically controvert* the plaintiff's allegation of title, or set out facts which show that the plaintiff has no title. *Supreme Ct.*, 1850, *Corwin v. Corwin*,† 9 *Barb.*, 219.

635. In an action against four defendants to recover possession of land, the complaint stated that one unjustly claimed title, and the others were in possession under him, and that the defendants unjustly withheld the possession from the plaintiff. The answer merely denied the allegation as to withholding possession, and alleged that one was the owner of and entitled to the premises. On the trial it was proved by the defendants, subject to objection, that they occupied severally distinct parcels of the premises. *Held*, that under the pleadings the plaintiff was entitled to recover against all the defendants. *Ct. of Appeals*, 1855, *Fosgate v. Herkimer Manufacturing &*

Hydraulic Co., 12 *N. Y.* (2 *Kern.*), 580; affirming *S. C.*, 12 *Barb.*, 352.

636. In an action to recover possession of real property, an answer denying that defendant is in possession, or that he unlawfully withholds possession, does not raise the question of adverse possession, or authorize a recovery for defendant on that ground. If he seeks to prevail upon an adverse possession, or on the ground that the conveyance under which plaintiff claims was made pending an adverse possession, he should in his answer set up title in himself, or out of the plaintiff. *Supreme Ct.*, 1859, *Ford v. Sampson*, 8 *Abbotts' Pr.*, 382; *S. C.*, 30 *Barb.*, 183; 17 *How. Pr.*, 447.

637. Disaffirmance of conveyance. Where an infant conveys his land, and afterwards, on coming of age, would avoid the deed and recover possession, he must before suit make an entry upon the lands, and execute a second deed to a third person, or do some other act of equal notoriety in disaffirmance of the first deed, or an action cannot be maintained. [17 *Wend.*, 119; 4 *Sandf.*, 420.] His act of disaffirmance must be averred in pleading, and is necessary to be proved. The want of this allegation makes the complaint fatally defective. *Supreme Ct.*, *Sp. T.*, 1857, *Voorhies v. Voorhies*, 24 *Barb.*, 150.

Consult, also, *supra*, 109, 209, 355, 356, 367, 444-447, 449, 450.

4. Action for Office.

638. In an action against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto. On proof that defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, he may be arrested and held to bail. *Code of Pro.*, § 435.

639. In an action to try the title to an office, the complaint need not aver that the relator possessed the requisite qualifications for the office, nor that he has taken the oath and given the bond of office, nor need he state the number of votes given. *Ct. of Appeals*, 1855, *People v. Ryder*, 12 *N. Y.* (2 *Kern.*), 433; affirming *S. C.*, 16 *Barb.*, 370.

Consult, also, *supra*, 86, 205.

5. Awards.

640. Arbitrators or umpire. As a general rule, where an action is founded upon an

* The requirement that the controverting must be *specific*, was dispensed with by the amendment of § 168, in 1852.

† Reversed, on the ground that the facts set forth did controvert plaintiff's title, 6 *N. Y.* (2 *Seld.*), 342.

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award, its true character, as the act of an umpire or of arbitrators, must be set forth in the complaint, in order that a defence adapted to its true character may be set up in the answer. The defence to an action upon an award, purporting to have been made by arbitrators, whether by all or a majority of them, may be wholly different from any that would have been competent to the defendant, had the action been founded upon an award made by an umpire. And when a complaint sets forth an award as made by an umpire, and claims its performance or damages for its breach, an allegation in the answer, or facts tending to prove that the award, treating it as in fact made by arbitrators, was wholly void, may be justly censured as vicious pleading. Such allegations, as raising no issue pertinent to the complaint, would either be stricken out as irrelevant, or would render the answer bad upon demurrer. *N. Y. Superior Ct.*, 1855, *Lyon v. Blossom*, 4 *Duer*, 818.

641. Hence where the complaint set up the award in suit as the award of an umpire, but the submission produced in evidence on the trial authorized a third person to be selected by the two arbitrators to act with them as arbitrator, not as umpire,—*Held*, that the variance was material, and the evidence should have been rejected, and the complaint dismissed. *Id.*

642. Performance of the conditions of an award must, under the Code, be pleaded, as well as in the case of those of a contract. The exception to this general rule, which, before the Code, prevailed in respect to pleading upon an award, is no longer to be observed. *N. Y. Superior Ct.*, 1857, *Cole v. Blunt*, 2 *Bow.*, 116.

643. An award which merely settles the amount due, cannot be pleaded in bar to the action, without alleging performance; for the money until paid is due in respect of the original debt; as, for instance, if the claim be for tolls, the sum awarded is due for tolls still; though it is otherwise if the demand be for a debt, and the award directs, not payment in money, but payment in a collateral way. [*Russ. on Arb.*, 503.] *N. Y. Com. Pl.*, 1852, *Brazill v. Isham*,* 1 *E. D. Smith*, 437.

644. Excess of authority. In an action brought to set aside an award of an umpire,

to whom it was submitted "to value a lot of land at its full and fair worth at private sale, considering the same as an unincumbered lot," the complaint charged that his valuation "was not made upon considering the same as an unincumbered lot, but . . . at a less value, and such valuation was without his powers as umpire." *Held*, upon demurrer, that the complaint sufficiently showed that the umpire had exceeded his authority. *N. Y. Superior Ct.*, 1857, *Borrowe v. Milbank*, 5 *Abbotts' Pr.*, 28. Consult, also, *supra*, 308.

6. Bills, Notes, and Checks.

A. Complaints.

645. A complaint stating that on, &c., at, &c., the defendant, by his note, promised to pay a specified sum to the plaintiff (or to a third party to whom defendant delivered it and who indorsed it to plaintiff), and did not pay it, and is justly indebted to him therefor, is good. *Supreme Ct., Circuit*, 1849, *Peets v. Bratt*, 6 *Barb.*, 662. *N. Y. Superior Ct., Sp. T.*, 1849, *Appleby v. Elkins*, 2 *Sandf.*, 678.

646. A complaint alleging that on, &c., and at, &c., the defendant by his promissory note in writing, for value received, promised to pay to the plaintiff, or bearer, the sum of, &c., and that he has not paid the same but is justly indebted to the plaintiff therefor, is sufficient; for this imports a delivery [7 *T. R.*, 596], and that it is payable immediately [15 *Wend.*, 808; 8 *Johns.*, 146]; and if plaintiff has parted with the note it is for defendant to show that. *So held*, on demurrer. *Supreme Ct., Circuit*, 1849, *Peets v. Bratt*, 6 *Barb.*, 662; and see 15 *N. Y. (1 Smith)*, 435.

647. Payee. A complaint on a note, not referring to a payee, is bad on demurrer; but if defendant's answer admits it to be a promissory note and objects only to plaintiff's title, the defect is waived. *Ct. of Appeals*, 1855, *White v. Joy*, 18 *N. Y.*, 88; rev'g 11 *Hov. Pr.*, 86.

648. Consideration. It is not necessary in a complaint on a promissory note to state a consideration for it, especially where it appears that the payee, defendant, put the note in circulation. *N. Y. Com. Pl., Sp. T.*, 1849, *Hoxie v. Cushman*, 7 *N. Y. Leg. Obs.*, 149; 8 *P.*, *Tibbetts v. Blood*, 21 *Barb.*, 650.

649. In a complaint by an indorsee against an indorser, the words "for value received" import a consideration, and coupled with an

* Affirmed, on another point, 12 *N. Y. (2 Kern.)*, 9.

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avermment that plaintiff is the "lawful holder," show a sufficient cause of action. *Supreme Ct., Sp. T.*, 1848, *Benson v. Couchman*, 1 *Code R.*, 119.

650. It seems, that in an action on a bill of exchange payable in merchandise, an assignment for consideration, by the payee to the plaintiff, should be averred. *Landau v. Levy*, 1 *Abbotts' Pr.*, 376.

651. Acceptance. An averment that a bill of exchange was accepted, is sufficient; it is not necessary to aver that the acceptance was in writing. There can be no valid acceptance under the statute except in writing. *Supreme Ct., Sp. T.*, 1855, *Bank of Lowville v. Edwards*, 11 *How. Pr.*, 216.

652. Presentment. An averment in an action against an indorser, that the note was presented to the maker and payment demanded, is proper, when it was in fact presented at his last place of residence and business, from which he had then recently removed, and after diligent inquiry he could not be found, so that it could be presented to him personally. *N. Y. Superior Ct.*, 1855, *Paton v. Lent*, 4 *Duer*, 281.

653. Making imports delivery. An averment of the making of a promissory note includes delivery to the payee. [7 *T. R.*, 596; 2 *Cow.*, 586.] A complaint which alleges that the defendant made his promissory note in writing, gives a copy of it containing the initial of the plaintiff's Christian name, his surname in full, and alleges that there is due to the plaintiff, on the note, a sum named, for which, with interest, the plaintiff claims judgment,—is sufficient. *Supreme Ct., Sp. T.*, 1854, *Chappell v. Bissell*, 10 *How. Pr.*, 274.

654. In an action on a promissory note, the averment that the defendant made the note, is equivalent to saying that he signed it and delivered it to the payee. *N. Y. Superior Ct.*, 1856, *Burrall v. De Groot*, 5 *Duer*, 379.

655. Payee suing, presumed to be owner. In a complaint by the payee of a promissory note against the maker, it is not necessary to allege that the plaintiff has not parted with the note, or that he is the holder. A complaint showing that the defendant made the note, payable to the plaintiff, and delivered it to him, and that it has not been paid, is sufficient on demurrer. If the plaintiff, since receiving the note, has transferred it to some one else, the defendant may set it up by

answer. [11 *How. Pr.*, 477; 12 *Id.*, 461; 8 *Id.*, 888; 1 *Duer*, 265; 2 *Sandf.*, 678; *N. Y. Superior Ct., Sp. T.*, 1858, *Niblo v. Harrison*, 7 *Abbotts' Pr.*, 447.

656. Ownership. The allegation that the plaintiff is the "legal holder" of the note is sufficient, if the defendant chooses to deny it, to put in issue the title. *Supreme Ct., Chambers*, 1858, *Taylor v. Corbiere*, 8 *How. Pr.*, 885; disapproving *Beach v. Gallup*, 2 *Code R.*, 66.

657. A complaint against the maker of a note payable to a third person, alleged that the plaintiff was the "lawful holder" of the note, but without showing how. *Held*, that a demurrer alleging for cause, that it did not appear that the plaintiff was the "owner" of the note, was not frivolous. *Supreme Ct., Sp. T.*, 1849, *Beach v. Gallup*, 2 *Code R.*, 66. Followed, in the case of a note payable to plaintiff's order at a bank, *Chambers*, 1852, *Temple v. Murray*, 6 *How. Pr.*, 329.

658. A complaint which, after showing that the defendant made and delivered to a third party a promissory note, simply alleges "that the plaintiff is now the *bona-fide* holder and owner of the note," is sufficient on demurrer. That plaintiff is the legal holder and owner is the pleadable fact, of which production of the note indorsed, or other circumstances, would be the evidence.* [1 *Code R.*, 119; 8 *How. Pr.*, 885; 12 *Id.*, 460; 5 *Sandf.*, 52.] *Supreme Ct., III. Dist., Chambers*, 1857, *Holstein v. Rice*; 15 *How. Pr.*, 1. To the contrary (*VII. Dist., Sp. T.*, 1857), *White v. Brown*, 14 *Id.*, 282.

659. Transfer. In an action by the indorsee against the maker of a note, an allegation that the note was duly indorsed by the payee, and transferred to the plaintiff for a good and valuable consideration, and that the defendant had not paid the same, but was justly indebted to the plaintiff therefor, is sufficient to show that the plaintiff was the owner of the note at the time of commencing the suit. *Supreme Ct., Chambers*, 1858, *Taylor v. Corbiere*, 8 *How. Pr.*, 885.

660. In a complaint on notes, an allegation

* In *Vanderpool v. Tarbox*, 7 *N. Y. Leg. Obs.*, 150, the complaint did not aver that the note was indorsed to plaintiff, but averred that the plaintiff was the lawful holder of it. *Held*, bad on demurrer. Plaintiff's ownership is a conclusion of law arising from the indorsement, which must be alleged.

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that the notes were payable to the order of A. B., and were subsequently indorsed by him in blank, and transferred to the plaintiff, is a sufficient averment of the plaintiff's ownership or title to the notes. An indorsement in blank makes the note payable to the holder [1 Duer, 52], and with the allegation that the notes were transferred to the plaintiff, makes out a sufficient averment that the plaintiff was the owner and holder of the notes in question. [2 Sandf., 672.] *Supreme Ct., Sp. T., 1855, Mitchell v. Hyde, 12 How. Pr., 460.*

661. Delivery. A complaint on a promissory note must show the plaintiff's title to the note; and an averment that the note, before it came due, was duly delivered to, and came into the possession of, the plaintiff, without averring by whom it was delivered, or for what purpose, or that it was indorsed, is insufficient. *Supreme Ct., Sp. T., 1854, Parker v. Totten, 10 How. Pr., 238.*

662. In an action against maker and indorser of a promissory note, the complaint contained an averment that the note for "value received lawfully came to the possession of these plaintiffs." *Held*, on demurrer, that this was a sufficient averment of title to the note in the plaintiff. *N. Y. Com. Pl., 1857, Lee v. Ainslee, 1 Hill., 277; S. C., 4 Abbots' Pr., 463.*

663. In an action by an assignee by delivery, of negotiable paper payable to order, the complaint need not allege an indorsement. *Supreme Ct., 1852, Billings v. Jane, 11 Barb., 620.*

664. Indorsement imports delivery. In an action by the holder, against the second indorser of a promissory note, a complaint which states the making of the note, and sets forth a copy of it, and which also states that the payee and the second indorser, before maturity, indorsed it, in writing, and that before it fell due, the plaintiff became, and is now the holder and owner of it, is good in substance, without a formal averment that the second indorser delivered it to the plaintiff. The word indorsement imports a delivery; and the averment of an actual indorsement, and possession by the holder before maturity, are equivalent to an allegation that it was indorsed to the plaintiff; and show title in him. *N. Y. Superior Ct., 1854, Griswold v. Loverty, 12 N. Y. Leg. Obs., 816; S. C., less fully, 8 Duer, 690. Followed, 1855 [citing, also, 8 M.*

& W., 494], N. Y. Marbled Iron Works v. Smith, 4 Duer, 362; 1856, Burrall v. De Groot, 5 Id., 379.

665. In an action upon negotiable paper, an averment in the complaint of its indorsement to the plaintiff, is sufficient to show title in him. Allegations that the instrument was delivered to the plaintiff, or that he was the owner and holder of it, are not essential. The averment of indorsement to the plaintiff legally imports a delivery, a vesting of the title in the plaintiff by transfer. *Supreme Ct., Sp. T., 1855, Bank of Lowville v. Edwards, 11 How. Pr., 216.*

666. — imports power to indorse. In an action against a corporation, as indorser of a promissory note, if the complaint alleges that the note was indorsed by the defendants, that is sufficient; as it implies that the note was lawfully indorsed by them, and the burden is thrown on the defendants, to show that it was not lawfully done. It need not be averred in the complaint that the note was indorsed by the defendants in the course of their legitimate business. *Supreme Ct., 1857, Mechanics' Banking Association v. Spring Valley Shot & Lead Co., 25 Barb., 419; reversing S. C., 18 How. Pr., 227.*

667. — and ownership and indebtedness. A complaint on a promissory note in an action by indorsees against maker, which sets forth the indorsement by which the plaintiffs became holders of the note, need not also allege that they are holders and owners of it. *Supreme Ct., Sp. T., 1859, Connecticut Bank v. Smith, 17 How. Pr., 487; S. C., more fully, 9 Abbots' Pr., 168.*

668. A complaint in such case which sufficiently alleges the making of the note, delivery, indorsement, and non-payment, need not also allege that the defendants are indebted on it to the plaintiff. *Id.*

669. Several indorsements. Where the answer (which alleged usury) admitted that the note was in fact delivered to plaintiff by one of the parties to it, the allegation of the complaint respecting the delivery should be construed most liberally; and in such case, an allegation that the payees, and D. (another defendant), "severally indorsed said note in blank, and that the same so indorsed was delivered to plaintiff, who now holds and owns the same," should be understood to mean that the payees indorsed it to D., and that he in-

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dorsed it to the plaintiff. *So held*, after verdict. *N. Y. Superior Ct.*, 1856, *Burrall v. De Groot*, 5 *Duer*, 379.

670. Object of trust. A complaint on a promissory note, showing that the plaintiff holds it as trustee, as a collateral security under a trust instrument which expressly authorizes him to sell it, but does not expressly authorize him to sue upon it, is bad on demurrer. Such holder is confined to the disposition specified by the trust instrument. *Supreme Ct.*, 1858, *Nelson v. Eaton*, 7 *Abbotts' Pr.*, 805; reversing *S. C.*, 15 *How. Pr.*, 805.

671. A complaint against an indorser must aver the protest necessary to fix his liability. *N. Y. Com. Pl.*, 1849, *Turner v. Comstock*, 7 *N. Y. Leg. Obs.*, 28; *S. C.*, 1 *Code R.*, 102.

672. Acceptor. A complaint which states that a draft was drawn on defendants; that they accepted it; that the payee indorsed it; then sets out a copy of the draft and acceptance; and then avers that defendants were indebted to the plaintiff thereon in a specified amount, is sufficient on demurrer. [Code, §§ 142, 162; 7 *N. Y.*, 476; 5 *Duer*, 379.] *N. Y. Com. Pl.*, *Sp. T.*, 1858, *Levy v. Ley*, 6 *Abbotts' Pr.*, 89; *S. C.*, *sub nom.* *Levy v. Ely*, 15 *How. Pr.*, 895.

673. Drawer. In a complaint against the drawer of a bank check, or of a bill of exchange, properly so called, it is necessary to aver either demand and notice to the drawer, of non-payment, or such facts,—*e. g.*, want of funds at bank,—as excuse demand and notice. *N. Y. Superior Ct.*, *Sp. T.*, 1856, *Shultz v. Deputy*, 8 *Abbotts' Pr.*, 252.

674. Payee against indorser. A complaint by the payee of a note payable to order, seeking to charge as indorser or as guarantor one who wrote his name upon the back of the note before its delivery to the payee, is bad on demurrer. *Supreme Ct.*, 1858, *Waterbury v. Sinclair*, 7 *Abbotts' Pr.*, 899. Compare *BILLS, NOTES, AND CHECKS*, 192, *note*.

675. If in any case one who writes his name on the back of a negotiable promissory note before the payee indorses it, can be liable to such payee as indorser, it is not enough to aver in a complaint by such payee, simply that the defendant "indorsed the note to induce the plaintiff to accept the same." *N. Y. Com. Pl.*, 1855, *Hahn v. Hull*, 4 *E. D. Smith*, 664; *S. C.*, 2 *Abbotts' Pr.*, 352.

676. Where both maker and indorser of a promissory note are sued jointly, the complaint must show, not only the facts necessary to charge the maker, but also a demand of the note at the place where it was payable, and notice of such demand and non-payment. But the omission of the latter allegations is not available on a joint demurrer. *Supreme Ct.*, 1850, *Spellman v. Weider*, 5 *How. Pr.*, 5.

677. A complaint on several promissory notes, only one of which is due, but payment of all of which is claimed under an agreement in writing, made contemporaneously with the notes, that in case of any default in the payment of the notes the whole amount should forthwith become due and payable, is sufficiently definite and certain if it alleges the making of the notes in consideration of an indebtedness to their amount, and the making of the agreement, without stating when, where, or how the indebtedness arose. *Supreme Ct.*, *Sp. T.*, 1858, *Brown v. Southern Michigan R. Co.*, 6 *Abbotts' Pr.*, 287.

678. Action by two of three payees. A., B., and C., being in partnership under the firm-name of A., B. & Co., held a note against the defendant. C. retired from the firm, assigning all his interest to A. and B. Subsequently the defendant gave A. and B., in renewal, his note drawn payable to "A., B. & Co.," and in their action A. and B. averred that they were the payees and the owners of it. *Held*, 1. That an answer merely alleging that when the indebtedness occurred C. was a partner, and claiming that he should have been made a plaintiff, raised no material issue. 2. That, if it was material, evidence that C. had retired before the making of the notes, was decisive in the plaintiff's favor. 3. That evidence of his assignment to the plaintiffs was admissible, to show that he never had any interest in the note. 4. That any presumption which might have arisen from the use of the word "Co.," that there was still a third partner, was overcome by the proof that there was none. *N. Y. Superior Ct.*, 1857, *Whitlock v. McKechnie*, 1 *Bow.*, 427.

679. In an action on notes payable in merchandise, the complaint, after describing them and averring that the defendants made them, alleged that they were duly indorsed to the plaintiff, that he was the lawful owner and holder of them, and that payment of them, before the commencement of the suit, was duly

demanded, and that no part of them had been paid. *Held*, sufficient to sustain a recovery. These allegations having been put at issue, are sufficient to admit proof of an absolute sale and delivery of the notes to the plaintiff, and of a demand of payment of them, and of a refusal by the defendants to pay. *N. Y. Superior Ct.*, 1857, *Brown v. Richardson*, 1 *Bow.*, 402.

680. Draft by one officer on another. In an action by the payee of a draft drawn by the president of a corporation on the treasurer of the corporation, for payment of an indebtedness of the corporation to the payee, the complaint may be framed as on a promissory note of the corporation. [8 *Mann & G.*, 576.] It is not necessary, if the complaint states the indebtedness for which the note was given, to allege presentment to the drawee for payment. The burden of proof is on the corporation to show that the drawee was provided with funds and ready to pay at maturity, in order to exempt them from damages and costs. [17 *Johns.*, 248.] *Ct. of Appeals*, 1857, *Fairchild v. Ogdensburgh, Clayton & Rome R. R. Co.*, 15 *N. Y.* (1 *Smith*), 387.

681. In an action upon a "premium note" given, since the act of 1853 took effect, to a mutual insurance company, assessment or apportionment is a condition precedent, necessary to be averred in the complaint, or proved on the trial. *Supreme Ct.*, 1857, *Devendorf v. Beardsley*, 23 *Barb.*, 656; disapproving *Van Buren v. Chenango County Mutual Ins. Co.*, 12 *Id.*, 671. Followed [citing, also, 23 *Barb.*, 591], *Williams v. Babcock*, 25 *Id.*, 109. To the same effect, *Sp. T.*, 1855, *Hurlbut v. Root*, 12 *How. Pr.*, 511; affirmed at *Gen. T.*, 1856. See *Williams v. Lakey*, 15 *Id.*, 206.

As to the **Short mode** of pleading authorized by section 162 of the Code, see *infra*, 760, 765.

B. Answers.

682. Denial of title. To a complaint upon promissory notes, averring that they were made by defendant, payable to the order of, and by him delivered to, the plaintiff, and that the plaintiff is "the real party in interest in this action, and the lawful holder and owner," an answer that defendant has no knowledge or information sufficient to form a belief whether the plaintiff is the lawful owner and holder, is irrelevant. *N. Y. Superior Ct.*, 1850, *Fleury v. Roget*, 5 *Sandf.*, 646; and see (*Supreme Ct.*,

Chambers, 1857) *Witherspoon v. Van Dolar*, 15 *How. Pr.*, 266.

683. An answer in an action on a promissory note, stating merely that as to the allegation that the plaintiff is the lawful owner and holder thereof, and that the defendant is indebted to him thereon, the defendant has no knowledge or information sufficient to form a belief, and can therefore neither admit or deny the same,—struck out, on motion, and the plaintiff allowed to enter judgment. *N. Y. Superior Ct. (Sp. T., 1852)*, *Flammer v. Kline*, 9 *How. Pr.*, 216.

684. In an action against the maker of a promissory note, where the complaint does not aver the facts by which the plaintiff acquired title to the note, but merely states that he is the lawful owner and holder of it, an answer which contains only a denial that plaintiff was the lawful owner and holder, cannot be considered frivolous. *N. Y. Superior Ct., Chambers*, 1855, *McKnight v. Hunt*, 3 *Duer*, 615.

685. In an action on a note payable to a third person, the complaint stated that the payee, before the commencement of the action, sold, transferred, and delivered it to plaintiff, who is now the lawful owner and holder of, &c. *Held*, that a denial that the plaintiff was the owner or holder of the note, and that the defendant was indebted, &c., was frivolous; being merely denials of conclusions of law. *Supreme Ct., VII. Dist.*, 1857, *Gilbert v. Covell*, 16 *How. Pr.*, 34. *S. P.*, *N. Y. Superior Ct., Sp. T.*, 1858, *Higgins v. Freeman*, 2 *Duer*, 650.

686. When, in an action by an indorsee of a promissory note against the maker, all the allegations of the complaint, employed to show the title and possession of the note to be in the plaintiff, are duly put at issue by the answer, the answer is sufficient. *N. Y. Superior Ct.*, 1858, *Duncan v. Lawrence*, 6 *Abbotts' Pr.*, 304; *S. C.*, 3 *Bow.*, 108. To the same effect, *Sp. T.*, 1855, *Metropolitan Bank v. Lord*, 4 *Duer*, 630; *S. C.*, 1 *Abbotts' Pr.*, 185.

687. An answer not denying that defendants indorsed the note, and not assailing the plaintiff's possession, is not sufficient, although it denies that they indorsed and delivered it to the defendant. *N. Y. Com. Pl.*, 1858, *Kamalah v. Salter*, 6 *Abbotts' Pr.*, 226; *S. C.*, 1 *Hill.*, 558.

688. — of conclusion. To a complaint

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on a promissory note which did not aver the plaintiff to be the owner, the answer admitted the allegations in the complaint, but denied that "by reason thereof" plaintiff was entitled to judgment. *Held*, frivolous. *N. Y. Com. Pl., Sp. T.*, 1849, *Hoxie v. Cushman*, 7 *N. Y. Leg. Obs.*, 149.

* 689. **Presentment. Ownership.** An answer in an action on a promissory note, payable at bank, brought by the payee against the maker, merely taking issue upon an allegation of the presentment of the note at the bank at maturity, and setting up that the plaintiff is not the sole owner and holder of the note, but owns it jointly with another person, naming him, but without showing that the character of his interest is such that plaintiff cannot recover in his own name, is frivolous. *Supreme Ct., Chambers*, 1854, *Tompkins v. Acer*, 10 *How. Pr.*, 309.

690. In an action on a note, the answer of the indorser, in a first defence, admitted that he indorsed a note similar in amount, &c., to that mentioned in the complaint, and then denied all knowledge, &c., that he indorsed the same to the plaintiffs, or that the plaintiffs are the owners or holders thereof, "as stated in the complaint in this action." The second defence contained a denial of an allegation in the complaint, that the defendant, by writing indorsed on "said note," waived demand, &c. *Held*, that the answer, construed literally, was not frivolous. By the reference, in the first defence to the complaint, the defendant treated the allegations of the complaint as applicable to the note which he admitted he had indorsed, and his admissions must therefore be understood to relate to the note described in the complaint. The reference to the "said note," in the subsequent parts of the answer, sufficiently point to the note in suit, and therefore the denial formed a material issue. *Supreme Ct., Sp. T.*, 1854, *Williams v. Richmond*, 9 *How. Pr.*, 522.

691. **Receipt of notice.** In an action against an indorser, a denial that notice of protest was received by defendant, is irrelevant. *N. Y. Superior Ct., Chambers*, 1854, *Edgerton v. Smith*, 8 *Duer*, 614.

692. In an action against an indorser, &c., a denial of having received notice of non-payment, &c., which the statute authorizes him to interpose by affidavit for the purpose of excluding the notary's certificate, is not

proper matter to be set up in his answer, instead of by affidavit. *N. Y. Superior Ct.*, 1856, *Arnold v. Rock River Valley Union R. Co.*, 5 *Duer*, 207; *Burrall v. De Groot*, *Id.*, 379; *S. P.*, 1857, *Young v. Catlett*, 6 *Id.*, 487. Consult, also, *supra*, 85, 81, 182, 240-242, 247, 292, 312, 380, 341, 495, 570, 576, 577, 582.

7. Capacity or Authority to Sue, &c.

A. Corporations, Associations, Partnership.

693. **Complaint against Corporation of New York.** No action to be maintained against the mayor, &c., of the city of New York, unless it appears, by an allegation in the complaint, that at least twenty days have elapsed since the claims upon which the action is founded were presented to the comptroller of said city for adjustment, and not then, unless it further appears, by an additional allegation, that the comptroller, upon a second demand, in writing, made after the expiration of said twenty days, neglected to make an adjustment or payment thereof. *Laws of 1860*, 645, ch. 379, § 2.

694. **Complaint against a foreign corporation** must either allege that the plaintiffs are residents of this State, or that the cause of action arose, or the subject of action is situated, within this State; and if it does not, it may be dismissed on motion. *Supreme Ct., Sp. T.*, 1858, *House v. Cooper*, 16 *How. Pr.*, 292.

695. **When plaintiffs sue in a name** which is appropriate to a corporate body, it is not a necessary averment in the complaint, that plaintiffs are a body corporate. [3 *Harr.*, 105; 4 *Bl.*, 267; 1 *Johns. Cas.*, 132; 2 *Cow.*, 770; 4 *Sandf.*, 675.] In general, it is unnecessary to aver what is not required to be proved. *N. Y. Superior Ct., Sp. T.*, 1858, *Union Mutual Ins. Co. v. Osgood*, 1 *Duer*, 707; *S. C.*, 12 *N. Y. Leg. Obs.*, 85; 1855, *Metropolitan Bank v. Lord*, 4 *Duer*, 630; *S. C.*, 1 *Abbotts' Pr.*, 185. *Supreme Ct.*, 1856 [citing, also, 2 *Ld. Raym.*, 1535; *Hob.*, 211; 14 *Johns.*, 238; 8 *Id.*, 378; 19 *Id.*, 800; 5 *Wend.*, 473; 17 *Id.*, 448; 12 *Id.*, 218; 6 *Hill*, 50; 4 *Barb.*, 127], *Bank of Waterville v. Beltser*, 18 *How. Pr.*, 270; 1858, *Kennedy v. Cotton*, 28 *Barb.*, 59; disapproving *Johnson v. Kemp*, 11 *How. Pr.*, 186; and *Bank of Havanna v. Wickham*,* 7 *Abbotts' Pr.*, 184; *S. C.*, 16 *How. Pr.*, 97; where the contrary was held in reference to banking associations.

* See affirmance, 20 *N. Y. (6 Smith)*, 355.

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696. Where the original act of plaintiff's incorporation is referred to in the complaint, a vague reference to other general statutes affecting it does not render the complaint demurrable. *N. Y. Com. Pl.*, 1856, *Sun Mutual Ins. Co. v. Dwight*, 1 *Hill.*, 50.

697. A foreign corporation, suing, need not state in the complaint the act of incorporation or charter at large, or even by the title of the act or grant, or the date of its passage. *N. Y. Superior Ct.*, 1851, *Holyoke Bank v. Haskins*, 4 *Sandf.*, 675.

698. A foreign corporation, suing in our courts, and not alleging its corporate existence, is bound to prove it upon the trial, if the defendant does not admit it in his answer. The statute dispensing with such proof, unless *null tiel* corporation was pleaded (2 *Rev. Stat.*, 457, 458, § 8), only applies to corporations created by or under any statute of this State. *Supreme Ct.*, 1851, *Waterville Manufacturing Co. v. Bryan*, 14 *Barb.*, 182.

699. The complaint of a foreign corporation must aver the fact of its incorporation, except in the case where the defendants are estopped from denying the incorporation; as, by having contracted with the corporation by their corporate name. It is only where the incorporation is created by a general law of the State or country in which the action is commenced, that it is unnecessary for plaintiffs, suing in an artificial name, to allege at least that they are incorporated. *Supreme Ct.*, *Sp. T.*, 1859, *Connecticut Bank v. Smith*, 17 *How. Pr.*, 487; *S. O.*, 9 *Abbotts' Pr.*, 168.

700. In an action against a corporation created under the laws of this State, it is not necessary for the plaintiff to set out the act of incorporation in the complaint. *Supreme Ct.*, *Chambers*, 1855, *Acome v. American Mineral Co.*, 11 *How. Pr.*, 24.

701. Reply. To an answer that the defendants, sued under a corporate name, are not a corporation, a reply alleging that they are a corporation, need not be more specific than a declaration in a suit brought by a corporation, hence it need not set out or show how they were incorporated. *Supreme Ct.*, 1851, *Stoddard v. Onondaga Annual Conference*, 12 *Barb.*, 578.

702. Where defendants are alleged to be a corporation doing business within this State, the court will not intend, as a matter of law, that it is a foreign corporation. *Supreme Ct.*,

Chambers, 1855, *Acome v. American Mineral Co.*, 11 *How. Pr.*, 24.

703. In an action against a corporation formed under the act of 1848, ch. 40, the court will not presume on demurrer that the defendants ought to be impleaded by the names of their officers instead of by the name of the corporation. *Id.*

704. In an action brought by an assignee of a corporation, as well as where the corporation is plaintiff, upon an agreement with the corporation, no specific allegation of the incorporation is necessary in the complaint; a statement of the name of the corporation, and of the making of the agreement between them, and of what the corporation did in fulfilment of the agreement, includes the idea of the legal existence of the company; and the fact of incorporation is mere evidence in support of it, not essential to be particularly stated in the pleading. [*Hob.*, 211; 2 *Id.* *Raym.*, 1535; 1 *Johns. Cas.*, 182; 8 *Har.*, 105, 158; 4 *Blackf.*, 267; 5 *Id.*, 146; 14 *Johns.*, 289; 2 *Cow.*, 770; 5 *Wend.*, 478.] *Supreme Ct.*, 1858, *Kennedy v. Cotton*, 28 *Barb.*, 59.

705. In an action brought against a receiver of a mutual insurance company by certain makers of premium notes given to the company, the complaint alleged that the corporation was never duly organized, and that there was fraud in the organization, and demanded that the court declare that the corporation was never organized, and that the notes were void; but the complaint did not show that the notes were made at, and in order to, the organization of the company. *Held*, insufficient. If the company had in form a charter authorizing it to act as a body corporate, and was, in fact, in the exercise of corporate powers at the time of its dealing with the plaintiffs, then it was as to them and all third persons a corporation *de facto*, and the validity of its corporate existence could only be tested by proceedings in behalf of the People. [7 *Wend.*, 553; 6 *Cow.*, 28; 9 *Id.*, 194.] *Supreme Ct.*, *Sp. T.*, 1855, *Jones v. Dana*, 24 *Barb.*, 395.

706. Where members of a corporation bring an action on behalf of the corporation, the complaint must allege that the officers whose duty it is to sue have been requested to institute proceedings for that purpose, and have refused to do so. *N. Y. Superior Ct.*, *Sp. T.*, 1856, *Vanderbilt v. Garrison*, 8 *Abbotts'*

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Pr., 361, *Supreme Ct., Sp. T.*, 1858, *House v. Cooper*, 16 *How. Pr.*, 292.

707. An officer of a foreign bank brought an action here in his own name, upon a bill of exchange belonging to the bank, and alleged in his complaint that he was such officer, and "duly authorized" to commence any and all proceedings at law, &c., on behalf of the bank, and that this action was brought on behalf of the bank. *Held*, that the complaint was bad on demurrer for not setting forth the existence and terms of the foreign law, if any, under which the bank was organized, and an authority given to the plaintiff to sue on its behalf. The allegation that the plaintiff was duly authorized, is merely a conclusion of law. *N. Y. Superior Ct., Sp. T.*, 1857, *Myers v. Machado*, 6 *Abbotts' Pr.*, 198.

Consult, also, *supra*, 11, 51, 814.

708. Joint-stock associations. In an action brought in the name of the treasurer of an association consisting of more than seven persons (under *Laws of 1849*, ch. 258; as amended, *Laws of 1851*, ch. 455), the complaint need not show that the association was formed for business purposes; and if it avers that the association consists of seven associates and upwards, it need not state their names. *Supreme Ct.*, 1856, *Tibbetts v. Blood*, 21 *Barb.*, 650.

709. An averment of partnership between plaintiffs is only necessary in their complaint, when their right of action depends upon the partnership. When a joint ownership or joint contract will enable them to recover, it is no objection to the complaint that the partnership is not pleaded. *N. Y. Superior Ct., Chambers*, 1854, *Loper v. Welch*, 3 *Duer*, 644. Compare *Oechs v. Cook*, *Id.*, 161.

B. Receivers. Guardians.

710. Appointment. A receiver suing should at least state the place of his appointment, and distinctly aver that he has been appointed by an order of the court. Alleging that he was duly appointed on such a day is not sufficient. *Supreme Ct., Sp. T.*, 1849, *White v. Low*, 7 *Barb.*, 204; *S. P.*, 1847, *Gillet v. Fairchild*, 4 *Den.*, 80.

711. A demurrer that it does not appear that plaintiff had any title to the note sued on, is insufficient to raise the question as to his right to sue as receiver. *Supreme Ct., Sp. T.*, 1849, *White v. Low*, 7 *Barb.*, 204.

712. A receiver or other party commencing a suit in this court under any special authority, must duly allege his authority in his complaint, and in a traversable form [4 *Den.*, 80; 8 *Kern.*, 88]; and if issue be taken upon such allegation, it must be proved on the trial as much as any other traversable fact. *Supreme Ct.*, 1857, *Bangs v. McIntosh*, 28 *Barb.*, 591.

713. In an action by a receiver, it is not necessary for the plaintiff, in his complaint, to set out all the proceedings by which he was appointed. Alleging that plaintiff is receiver of, &c., appointed by the Supreme Court by an order made on a specified day, on condition of filing security, and that such security was given accordingly, states enough to enable the defendant to take issue upon the legality of the plaintiff's appointment. *Supreme Ct., Sp. T.*, 1858, *Stewart v. Beebe*, 28 *Barb.*, 84. Compare *Crowell v. Church*, 7 *Abbotts' Pr.*, 205, *note*.

714. Change of corporate name. Where a plaintiff claims title to a note sued on by virtue of his appointment as receiver of an insurance company, the note being payable to a company bearing a name different from that of the company of which he is receiver, it is necessary that he should, by proper averments, show that the note is a part of the assets of the company of which he has been appointed receiver. If the change of name was by a reorganization of the company under the general act, a general averment of the fact of reorganization is enough. *Supreme Ct., Sp. T.*, 1857, *Hyatt v. McMahon*, 25 *Barb.*, 457.

715. Contract with receiver. Where the receiver's title to the thing in action is not derived through his appointment, but arises from the fact that the contract was made with him as receiver, it is not necessary for him to set forth his appointment, but he may sue, simply describing himself as receiver. In such case, to an answer denying that the defendant is indebted to him individually, and alleging that the note described in the complaint belongs to a receiver, he may reply that he is the same receiver. The answer in such case, to be sufficient, ought to aver that the receiver whom it alleges to be the holder of the note was a different person from the plaintiff. *Ct. of Appeals*, 1855, *White v. Joy*, 13 *N. Y.* (3 *Kern.*), 88; reversing *S. C.*, 11 *How. Pr.*, 86.

716. The complaint of a receiver appointed in supplementary proceedings under sec-

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tion 292 of the Code, which did not allege that any execution was issued, &c., in the proceedings in which the plaintiff was appointed,—*Held*, bad on demurrer. The court would not presume that execution was issued, and that the defendant resided in the county where it was issued; and this was essential to the plaintiff's authority. *Supreme Ct., Sp. T.*, 1858, *Campbell v. Foster*, 16 *How. Pr.*, 275.

Consult, also, *supra*, 188.

717. Guardian. In an action brought on behalf of an infant by his guardian, the due appointment of the guardian by the court or a judge must be set forth, and set forth as a traversable fact. Merely describing himself as such is not enough. [1 *Lev.*, 224; 1 *Sid.*, 178; 4 *Co.*, 58 v., 54 a.; 8 *Cow.*, 286; 4 *Den.*, 83; 17 *Wend.*, 197; 7 *Barb.*, 206.] *Supreme Ct.*, 1856, *Hulbert v. Young*, 18 *How. Pr.*, 418.

718. The objection that the complaint of an infant, suing by guardian, merely states that he was duly appointed, cannot be taken by demurrer; but if too general, the remedy is by a motion to make it more definite. *Supreme Ct., Sp. T.*, 1857, *Seré v. Coit*, 5 *Abbotts' Pr.*, 481.

C. Officers. Indians.

719. Supervisor. The plaintiff described himself in the title of the complaint as "S., supervisor of the town of," &c., and commenced it,—“The complaint of the plaintiff above named, as supervisor as aforesaid, shows,” &c.;—*Held*, on demurrer, a sufficient statement of the capacity in which he sued. *Ct. of Appeals*, 1858, *Smith v. Levinus*, 8 *N. Y. (4 Seld.)*, 472.

720. Actions by the commissioners of highways may be properly brought in the names of the individuals, with the addition of their name of office. But when actions are thus brought, the complaint should show, by proper averments in the body of it, that the claim is made by the officer and not by the individual. And where the complaint in its title named the plaintiffs as commissioners of highways, but contained no averments showing that they sued in their official capacity, although the complaint was for statute penalties for obstructing a highway,—*Held*, that the action must be deemed to be brought in favor of the plaintiffs as individuals, and not by them in their name of office. The affix to their names in the bill was a mere *descriptio*

personæ. [6 *N. Y.*, 168; 6 *Hill*, 240; 24 *Wend.*, 345; 25 *Id.*, 605.] The plaintiffs should have averred that they were commissioners, that as such they complained of the defendants, &c. *Supreme Ct.*, 1855, *Gould v. Glass*, 19 *Barb.*, 179.

721. The Seneca nation of Indians may sue in that name, under the act of May 8, 1845; and the complaint is not bad on demurrer because it does not allege that the plaintiffs are a State or a corporation, nor show by what right they contracted or sued. *Supreme Ct., Sp. T.*, 1857, *Seneca Nation v. Tyler*, 14 *How. Pr.*, 109.

Consult, also, *supra*, 185, 496.

As to the Description of the capacity of a party, see, also, *supra*, 50, 55.

8. Carriers.

722. Nature of action. In an action against common carriers, if the plaintiff states the custom and also relies on an undertaking, general or special, then the cause of action in reality is founded on contract and to be treated as such [8 *Wend.*, 169; 2 *Shaw*, 478; 1 *Id.*, 29, 101; 8 *Mod.*, 321; 2 *Salk.*, 440]; and it cannot be united with a claim to recover damages for a mere tort. *Supreme Ct., Sp. T.*, 1854, *Colwell v. N. Y. & Erie R. R. Co.*, 9 *How. Pr.*, 311.

723. Statute liability of railroad company. That a complaint appropriate merely to a cause of action on the carriers' common-law duty, is not appropriate to authorize a recovery under section 53 of the general railroad act (1 *Rev. Stat.*, 4 ed., 1249), which makes each of two connecting railroads liable as carriers for goods received by one company to be transported on the road of the other. *Supreme Ct.*, 1858, *Hempstead v. N. Y. Central R. R. Co.*, 28 *Barb.*, 485.

Consult, also, *supra*, 21.

9. Conspiracy.

724. Rules of pleading applicable to complaints in actions for conspiracy, stated. *Forstyth v. Edminston*, 11 *How. Pr.*, 408.

10. Contracts.

A. Stating the Contract.

725. Inducement. Where a policy of insurance is alleged by way of inducement, it is enough if the names of the parties, the amount, and the thing insured are stated, without set-

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ting forth the policy. *Supreme Ct.*, 1852, *Nellis v. De Forest*, 16 *Barb.*, 61.

726. Legality of a previous contract. When a contract, whether statutory or otherwise, is the mere subject-matter of a new engagement, it is not necessary in an action to enforce such new engagement, and not for the purpose of carrying out the provisions of the original contract, to set forth in the complaint that the requisite steps were taken to make such original contract effectual. Both parties by making it the subject of the new engagement impliedly admit its validity. *Supreme Ct.*, *Sp. T.*, 1853, *Horner v. Wood*, 15 *Barb.*, 371.

727. Money paid. In an action to recover back money paid under a special contract, which contemplated such repayment in a certain contingency, the complaint set forth the contract and all the facts necessary to show a right to recover upon it. *Held*, that the contract being deemed void for want of mutuality, the fact that it was set forth in the complaint formed no objection to a recovery as of money had and received, for under the Code, whether the contract was valid or not, it was proper to plead it. *Ct. of Appeals*, 1850, *Eno v. Woodworth*, 4 *N. Y.* (4 *Comst.*), 249.

728. Rescission of contract. A complaint which contained other causes of action on contract, contained a count which set forth substantially that the plaintiffs sold and delivered to the defendant goods to a certain amount, on a credit of six months; that the defendant was insolvent at the time of the sale, and purchased the goods without any intent to pay for them, and with intent to defraud the plaintiffs of their value; and that by reason of this fraud the defendant became liable to pay for the goods immediately upon their delivery; and demanded judgment for the amount of the sales, with interest. The action was brought before the expiration of the time of credit. *Held*, good on demurrer. The cause of action was not to be deemed the tort, but the contract; and the allegations of fraud were sufficiently set forth to justify a rescission of the contract. [1 *Hill*, 802, 811; 13 *Wend.*, 570.] Nothing having been delivered as the consideration of the sale, it was not necessary for the plaintiffs to give any notice other than bringing the action, to manifest their intention to rescind. [2 *Den.*, 139; 2 *Sandf.*, 421; 1 *Hill*, 802; 16 *N. Y.*, 582.] The plaintiffs, on

repudiating the contract, might on such facts elect to sue either as on contract or in tort. [1 *Hill*, 284; 3 *Id.*, 288; 5 *Id.*, 282, 577; 2 *Den.*, 136; 5 *Id.*, 370; 5 *Barb.*, 91; 7 *How. Pr.*, 278; 13 *Wend.*, 154; 1 *Taunt.*, 113; 3 *Id.*, 274; 8 *Bing.*, 43.] And the effect of electing to sue on contract is not necessarily to adopt the express contract, but the plaintiffs may rely on the implied contract arising from the delivery of the goods. [6 *Johns.*, 110; 13 *Wend.*, 154; 5 *Barb.*, 91.] *Supreme Ct.*, 1853, *Roth v. Palmer*, 27 *Barb.*, 652.

729. Illegal contract. In an action for a prize drawn in a lottery alleged to be legalized by the laws of the place where it was established, it is necessary, since it is illegal by the laws of this State, to aver and prove that where the ticket was sold the contract was legal. *Ct. of Appeals*, 1854, *Thatcher v. Morris*, 11 *N. Y.* (1 *Kern.*), 487.

730. Superseded contract. The complaint after setting forth a contract stated that it was afterwards modified by the parties, and in lieu thereof "a final contract" was executed by the parties, which final contract the complaint then set forth. *Held*, that by the terms of the complaint the first contract was *functus officio*, and could not form the basis of any cause of action, and must be struck out. *Supreme Ct.*, *Sp. T.*, 1857, *Chesbrough v. N. Y. & Erie R. Co.*, 26 *Barb.*, 9; 3 *O.*, 13 *How. Pr.*, 557.

731. Stockholder's subscription. In an action by a corporation to recover a stockholder's subscription, a complaint alleging generally the incorporation of the plaintiffs pursuant to a statute referred to, "and that in contemplation of the organization of the company, to wit, on the, &c., upon due notice, subscription books were opened, as required by law, and the defendants subscribed to the capital stock of the company twenty shares, amounting to, &c., and thereby agreed to take twenty shares of the stock, and promised to pay the same to," &c., is good on demurrer. It contains allegations of every fact essential to be proved to support the action. The consideration is implied in the statement of the facts. *Supreme Ct.*, *Circuit*, 1850, *Oswego & Syracuse Plank-road Co. v. Rust*, 5 *How. Pr.*, 890.

732. Superfluous allegations. A complaint which shows a good cause of action on a promise to pay absolutely, is not to be held bad because it contains superfluous allegations ap-

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that is a sufficient allegation of a consideration. [7 Johns., 321; 4 Wend., 575.] *Id.*

742. An averment that defendant promised, in consideration that plaintiff would surrender his lease, that defendant would pay him a certain sum, and that plaintiff did surrender, &c.,—*Held*, a sufficient statement of a cause of action, for the surrender may be understood to have been in pursuance of defendant's offer. *Supreme Ct.*, 1854, *Ambler v. Owen*, 19 *Barb.*, 145.

743. In a complaint on a policy of insurance by an assignee of the policy, an averment that the assured "duly assigned," &c., indicate that the assignment was by a sealed instrument, from which a consideration is to be inferred. *Supreme Ct.*, 1856, *Fowler v. N. Y. Indemnity Ins. Co.*, 23 *Barb.*, 148.

Consult, also, *supra*, 39, 48, 81, 337, 448, 456, 457, 467.

B. Breach.

744. General allegation. In an action to recover damages for the breach of a covenant, a general allegation in the complaint that certain acts alleged to have been done were done "in violation of the defendant's agreement," is a mere averment of a conclusion of law, and is bad upon demurrer. The complaint should show facts from which it appears that the defendant has broken the covenant. *N. Y. Superior Ct.*, *Sp. T.*, 1853, *Schenck v. Naylor*, 2 *Duer*, 675.

745. In an answer alleging a breach of a special contract, if defendant alleges generally that the plaintiffs had failed to fulfil the contract, and also sets forth a number of instances of disregard of its terms, he is not on the trial confined to the particular defaults stated, but may prove any defaults under his general allegation. [14 Johns., 877.] If this clause was too general, the remedy was by motion. *N. Y. Com. Pl.*, 1855, *Trimble v. Stilwell*, 4 *E. D. Smith*, 512.

746. Special allegation. Where a complaint set forth a contract by the defendants to transport the plaintiff in a particular steamer, and alleged a breach in not conveying the plaintiff in that vessel, without either averring an obligation upon the defendants to provide a substitute in the event of the vessel's loss, or claiming any damage by reason of their neglect or refusal to forward him in some other vessel;—*Held*, that the plaintiff

must be confined to the alleged, and could not rely on other grounds. *Supreme Ct.*, 1854, *Derbitt*, 19 *Barb.*, 222.

747. Payment to A. for a breach of an agreement made for the benefit of B., aver that the defendant agreed to pay to B., as well as to the plaintiff, and that the plaintiff to the former is, in law, the party to whom the agreement, it is matter of course, is to be made up in the answer. *N. Y. Superior Ct.*, 1854, *Rowland v. Phalen*, 1 *B. & C.*, 100. Consult, also, *supra*, 9.

C. Performance of

748. Concurrent acts. Where the complaint alleges on the breach of a contract, that the defendant requires a performance of concurrent acts, the complaint must allege an offer or tender of the part of the plaintiff.

of Appeals, 1854, *Smith v. Pr.*, 248; affirming *S. C.*, 1853, *Dunham v. Pettee*, 1 *B. & C.*, 100.

749. Where the acts alleged to be mutual between the plaintiff and defendant are mutual, the plaintiff in an action on the contract need only aver a readiness to perform, and also a notice of such readiness. *N. Y. Superior Ct.*, 1854, *Pl.*, 829; 2 Johns., 207; *supra*, 1852, *Van S. & B.*, 89.

750. In an action upon a contract for the payment of money, by the plaintiff in the form of a promissory note, and states that such money has not been received, and also alleges that the consideration for the money is not paid, it implies, that the consideration must be paid when the money is paid. The plaintiff must allege that the consideration is not paid or tendered the consideration, and that the matter of substance and not of proof is on him. *N. Y. Superior Ct.*, 1854, *Brisbane*,* 14 *Hov. Pr.*, 48.

751. Independent contract. In a complaint for breach of contract, where the contract is independent of the contract in which the defendant

* See a further decision of the same case, amended complaint, 23 *N. Y. Superior Ct.*, 1854, *Brisbane*, 2 *Bow.*, 471.

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762. That the word "party" means the person or persons by whom the conditions were to be performed. *Id.*; and see *Graham v. Machado*, 6 *Duer*, 514.

763. It is not necessary that the statement of due performance should be in the precise language of the Code. Equivalent language is sufficient. Thus in pleading notice of non-payment, &c., an averment that the note was duly demanded, &c., and was duly protested for non-payment, and notice thereof was duly given to the indorser, is sufficient. *Supreme Ct., IV. Dist., Sp. T.*, 1856, *Adams v. Sherill*, 14 *How. Pr.*, 297.

764. Bills and notes. The clause of section 162 of the Code, relating to averring the performance of conditions precedent, has no application to averments necessary to charge the drawer of a bill of exchange. It is applicable to conditions expressed in a contract which, by the terms thereof, are to be performed "on his part,"—i. e., by the party thereto,—and which, but for this section, he must state to have been performed by him in detail. It substitutes a general averment of performance for a statement in detail of each distinct act expressed in such a contract; but its purpose was not to give to the word "duly," when applied to a single specific averment, any such comprehensive force and meaning as to make the use of that word tantamount to an averment of every other fact necessary to make the presentment which is averred a legal presentment. *N. Y. Superior Ct.*, 1857, *Graham v. Machado*, 6 *Duer*, 514; disapproving *Gay v. Paine* (*Supreme Ct., V. Dist., Sp. T.*, 1850, 5 *How. Pr.*, 107), and *Woodbury v. Sackrider* (*IV. Dist., Gen. T.*, 1856, 2 *Abbotts' Pr.*, 402), where, as also in *Adams v. Sherill* (14 *How. Pr.*, 297), the contrary view was adopted.

Consult, also, *supra*, 96.

D. Pleading Instruments for Payment of Money only.

765. Short mode. "In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum which he claims." *Code of Pro.*, § 162, last clause.

766. This provision is permissive merely. *N. Y. Com. Pl., Sp. T.*, 1856, *Mayor, &c.*, of *N. Y. v. Doody*, 4 *Abbotts' Pr.*, 127.

767. Execution of n on a note, by payee again der section 162 of the (and stating a specified cessary that plaintiff shou and delivery of the note *Sp. T.*, 1855, *Marshall v. Pr.*, 452.

768. Indorsement. a suit against the indorser for the payment of money 162 of the Code; since to recover, a regular dema notice of dishonor are ne When the right of the the suit depends upon the instrument itself, the be averred in the compla *Ct., Sp. T.*, 1852, *Alder Duer*, 601; S. C., 10 *N. Approved*, 1854, *Cottrell* 45. *Supreme Ct., Sp. T. Rockwood*, 12 *How. Pr.* effect, 1852, *Lord v. Ohe* 696. The contrary view opinions in *Prindle v. C* (1 *Smith*), 425; reversing 38; and the contrary was *v. Morrison* (*Supreme C. Leg. Obs.*, 60.

769. Acceptance. A in an action against the ment for the payment of the defendant was a corp was addressed to its presid him as such,—*Held*, that was president and autho not necessary in addition quired by section 162. *Sp. T.*, 1853, *Andrews v. 629. Followed*, 1857, *Pri* 544; affirming S. C., 5 *Abbotts' Pr.*, 258.

770. Signing and indo on a promissory note, a c out, prefixing the word " of the maker, and the v that of the indorsers, cou the fact that the compla note was "passed" to the construed as an averment signed and indorsed resp defendants whose names *N. Y. Superior Ct.*, 1857,

Rules Applicable to—Contribution;—Conversion.

Duer, 544; affirming S. C., 5 *Id.*, 670; 3 *Abbotts' Pr.*, 258, where, however, a contrary view was taken of this point; but compare *Bank of Geneva v. Gulick*, 8 *How. Pr.*, 51.

771. In an action against one M. as the maker, and others as indorsers, of a promissory note, the complaint set forth a copy of a note signed M. & Co., upon which it alleged the defendants were indebted, &c. *Held*, on demurrer, that the complaint was bad, as showing a partnership note as a cause of action against an individual. If there was no real firm, it should have been alleged that the note was signed by M., in the name of M. & Co. The objection is not strictly for defect of parties, but that the complaint does not, on its face, show an individual liability on the part of M. *N. Y. Superior Ct.*, 1857, *Price v. McClave*, 6 *Duer*, 544; affirming S. C., 5 *Id.*, 670; 3 *Abbotts' Pr.*, 258.

772. **Title.—Sum due.** The complaint averred that the defendant on, &c., for value received, made and delivered to plaintiff, his promissory note in writing, and payable to the order of the plaintiff, and indorsed by him, setting forth a copy: that there was due and owing the plaintiff the said sum of, &c., with interest thereon from, &c. *Held*, sufficient; and that a demurrer on the ground that it was not stated that plaintiff was owner of the note, or that any thing was due or owing upon it, was frivolous. *Ct. of Appeals*, 1859, *Keteltas v. Myers*, 19 *N. Y. (5 Smith)*, 281; reversing S. C., 3 *E. D. Smith*, 88, and 1 *Abbotts' Pr.*, 408.

773. The complaint in an action founded upon an instrument, for the payment of money only, set forth a copy stating that there was due, &c., according to section 162 of the Code. The instrument was in terms payable to a third party; and the complaint also averred that it was the property of the plaintiff by purchase. *Held*, that this complaint was sufficient as against a demurrer on the ground that it did not show the plaintiff's title. *Ct. of Appeals*, 1857, *Prindle v. Caruthers*,* 15

N. Y. (1 Smith), 425; reversing S. C., 10 *How. Pr.*, 38.

774. The last clause of section 162 of the Code does not dispense with a statement of the facts constituting a cause of action or with any of the requirements of section 142, but only relieves the party from setting out the written instrument according to its legal effect. The plaintiff must still state his interest in or title to the instrument and such other extrinsic facts as are necessary to enable him to recover upon it. *Supreme Ct., Chambers*, 1853, *Bank of Geneva v. Gulick*, 8 *How. Pr.*, 51.

11. Contribution.

775. **A complaint by a surety** upon notes, to recover contribution from the estate of his co-surety, deceased, for money paid in settlement of the notes, which averred the making, &c., of the notes; the payment of them by the plaintiff, the death of the co-surety and appointment of the defendants as his executors, and further averred that defendants had not repaid him;—*Held*, to state facts sufficient. *Supreme Ct., Sp. T.*, 1856, *Van Demark v. Van Demark*, 18 *How. Pr.*, 372.

776. **Taxes, &c.** In an action brought by a widow to whom a life-estate in certain parts of a house have been assigned as dower, against the owner of the fee, to recover a sum averred to be his fair proportion of taxes, &c., upon the whole premises, paid by her to protect her estate under his neglect, no averment of request or promise is necessary. The law implies it. Nor is it necessary, to constitute a cause of action, to state what portion of the premises are in the defendant's possession, nor that any specified portion is in his possession. If the defendant desires that the complaint be made more definite and certain, he should apply by motion. *N. Y. Superior Ct.*, 1857, *Graham v. Dunnigan*, 4 *Abbotts' Pr.*, 426; S. C., less fully, 6 *Duer*, 629.

12. Conversion.

777. **Possession.—Detention.** In an action for conversion of personal property, a complaint which alleges that plaintiff "was possessed" of the goods, and that they "after being in possession of the plaintiff, came into the possession of the defendant, who, although often requested so to do, has not delivered the same to the plaintiff, but wrongfully detains the said goods from him," states facts suffi-

* One of the opinions rendered deems the allegation that the instrument was the plaintiff's by purchase, to be a sufficient averment, on demurrer; the other opinion, conceding that it was insufficient, deems that the mode of pleading prescribed by section 162, is sufficient for the cases therein mentioned, and dispenses with the necessity of any averment as to plaintiff's title.

cient on demurrer. Possession in plaintiff imports lawful possession; and wrongful detention against demand, imports a conversion. *Supreme Ct.*, 1855, *Sheldon v. Hoy*, 11 *How. Pr.*, 11.

778. In an action for the conversion of a negotiable note, alleging that the defendant wrongfully converted and disposed of it to his own use, without saying in express terms that it had passed to the hands of a *bona-fide* holder, is sufficient after verdict. *Ct. of Appeals*, 1855, *Decker v. Mathews*, 12 *N. Y. (2 Kern.)*, 818.

779. Title. In an action to recover damages for the wrongful detention of personal property, it is not necessary to set forth the plaintiff's title in the complaint. A general averment of ownership is sufficient; and under it a bill of sale from the former owner may be given in evidence. *N. Y. Superior Ct.*, 1853, *Heine v. Anderson*, 2 *Duer*, 818.

780. In an action to recover damages for the conversion of personal property, brought by the assignee of the original owner, the complaint must either show an assignment to the plaintiff of the original owner's claim for damages, or an assignment of the property, and a demand thereof by the plaintiff subsequent to the assignment. *N. Y. Com. Pl.*, 1856, *Sherman v. Elder*, 1 *Hill*, 178. See, also, *Duell v. Cudlipp*, *Id.*, 166.

781. Denial. In an action for conversion of chattels, the complaint averred, that, at the time of the alleged conversion, the plaintiff was the owner and entitled to the immediate possession of the goods and chattels so described, which the answer denied. *Held*, that it was competent for the defendant to show that the plaintiff was not the owner, and as such entitled to immediate possession at the time mentioned; by showing that, at the time of the alleged conversion, the ownership and right of possession were not in the plaintiff, but in a third party. To maintain his action, plaintiff was bound to prove that it was in him; and the defendant, under the denial in his answer, was entitled to contest it. The averment in the complaint is not a conclusion of law, for no facts are stated from which such a conclusion would follow. It is affirmation of a fact, the truth of which the defendant, by not denying, would have admitted. *N. Y. Superior Ct.*, 1857, *Davis v. Hoppock*, 6 *Duer*, 254.

782. Malice. In an action of engravings, all defendant with making them are improper, for blame for their value. *See*, *Moffatt v. Pratt*, 12 *How.*

783. Contract. A contract that defendant was employed as agent for the plaintiff, and account for the proceeds of possession goods and money plaintiff which he refused to have converted to his own use, is construed as stating a cause of action, not one of contract standing that the contract is in the complaint. It is not out by way of inducement proper. [1 *Obitt. Pl.*, *Wils.*, 348.] *Supreme Ct.*, *Whitlock*, 12 *How.*

784. Validity of process. In an action to recover damages, the defendant averred that the defendant vessel under an attachment of Connecticut, and aver that the attachment was lawfully concluded by averring unlawfully converted the vessel;—*Held*, bad on demurrer. *See*, 1858, *Fairbanks v. Fairbanks*, 12 *How.*

785. Payment of damages. In a complaint by the maker of a note against a person who, by legal inception, wrongfully converted the *bona-fide* holder for value. *Ct. of Appeals*, 1855, *Mathews*, 12 *N. Y. (2 Kern.)*. Consult, also, *supra*.

18. Creditors'

786. The former rule. In certain allegations (denying that defendant has of \$100) to be inserted in the Code of 1848, *Quick v. Keeler*, 1 *Hammond v. Hudson*, 1 *Co.*, 20 *Barb.*, 378.

787. Execution. A bill of a creditor's bill, need not allege that issued an execution to

insolvent, falsely representing himself to be worthy of credit, the vendor may maintain an action to recover the goods, and in his complaint need not aver a demand of the goods, or the insolvency of the defendant, or any of the facts going to establish the fraud. It is sufficient if it is in the form of the old declaration in replevin in the *detinet*, and charges that the defendants have become possessed of, and wrongfully detain, the goods in question. *Supreme Ct.*, 1855, *Hunter v. Hudson River Iron & Machine Co.*, 20 *Barb.*, 498.

799. False warranty. An action on the case in the nature of deceit, will lie for a false warranty; and in such an action, it is not necessary to allege or prove that there was fraud on the part of the seller. It is enough to aver and establish that the warranty is false. If fraud be averred, it is not necessary that it should be proved to sustain the action. *N. Y. Com. Pl.*, 1854, *Fowler v. Abrams*, 3 *E. D. Smith*, 1.

800. Mode of alleging an implied warranty. *Prentice v. Dike*, 6 *Duer*, 220.

Consult, also, as to Deceit and False Warranty, *supra*, 817.

801. Deed obtained by fraud. A complaint charging that the defendant, through fraud, had obtained the execution of a paper by the plaintiff, who was old, infirm, and blind, of the nature and contents of which he was ignorant, but which he was informed and believes was sealed, and conveyed or affected his interest in land, and that the defendant refused to disclose its contents or return it; and praying that it might be surrendered and cancelled;—*Held*, on demurrer, to show a good cause of action, and that the court had jurisdiction to grant relief in such case. *Supreme Ct., Sp. T.*, 1851, *Johnson v. Wetmore*, 12 *Barb.*, 488.

802. In an action against the directors of a corporation for fraud which rendered plaintiff's stock worthless, it is not ground of demurrer that it does not show the amount which plaintiff paid for his stock. *Supreme Ct.*, 1857, *Ozeaux v. Mali*, 25 *Barb.*, 578; 8 *C.*, *sub nom.* *Mead v. Mali*, 15 *How. Pr.*, 347.

803. Where fraud is set up as a defence, the answer must aver that the defendant has done all in his power to restore the plaintiff to his former condition, or the fact cannot be proved. [2 *Comst.*, 861.] *Supreme Ct.*, 1857, *Devendorf v. Beardsley*, 28 *Barb.*, 656.

804. An admission of fraud, in pleadings, must unexplained denial of fact. The concealed mental purpose does not rebut the legal inference from his acts. *Supra*, *Dykens v. Woodward*, 7 *E. D. Churchill v. Bennett*, 8 *Id.* Consult, also, as to Fraud, *supra*.

16. Defect of Parties.

805. Necessary parties. A defendant insists that he and that others who are jointly indebted to him should be joined in the action under the Code as well as the common law. He pleads the non-joinder, but does not point out all those who, as parties, should be made parties defendants. *Supreme Ct.*, 1855, *Fowler v. Kennedy*, 3 *E. D. Smith*, 1.

806. Reply of infancy. In an action setting up the non-joinder as a defence, who was jointly indebted to him, a third person is an infant, is not a party, his privilege is personal. [2 *Comst.*, 861.] *Supreme Ct.*, 1852, *Slocum v. Slocum*, 12 *Id.*, 167; reversing *S. C.*, 12 *Id.*, 167; and 10 *N. Y. Leg. Ob.* Consult, also, as to Defect of Parties, *supra*, 164, 169, 227-233.

807. Another action. A defendant alleges that prior to the commencement of this action, he had brought an action in this court against others for the partition of land mentioned and described in this action, and that a summons had been personally served on A. and B., and the other parties therein,—is sufficiently definite, and he cannot be required to bring all the parties plaintiff and defendant in the former action. It would be merely that the action was brought by parties; and adding that he was plaintiff in the prior action, and that the plaintiffs in the present action are other persons not named, would be in that action, was unnecessary. *Sp. T.*, 1854, *Ward v. Dewey*, 12 *Id.*, 167.

808. Former suit in justice. An answer setting up the defence of a former suit in justice is one which the plaintiff cannot plead or given notice of

upon as sufficient to establish the general proposition, that there was probable cause. Such allegations will be stricken out on motion. *It seems*, that he should merely deny plaintiff's allegation that there was not probable cause. *N. Y. Superior Ct., Chambers*, 1854, *Radde v. Ruckgaber*, 3 *Duer*, 684.

820. Want of probable cause. A complaint for malicious prosecution must allege a want of a probable cause, by averring that the suit was finally determined in favor of the defendant therein. *Supreme Ct.*, 1855, *Hall v. Fisher*, 20 *Barb.*, 441.

19. Foreclosure.

821. Other liens of plaintiff. That a complaint to foreclose a mortgage need not set forth other liens which plaintiff may have. *Field v. Hawxhurst*, 9 *How. Pr.*, 75.

822. — of defendants. The general allegation in a complaint in foreclosure, that certain of the defendants have or claim some interest in or lien upon the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, is not bad on demurrer as stating no cause of action against them. What those rights are is only important in a contest as to the surplus. *Supreme Ct.*, 1857, *Drury v. Clark*, 16 *How. Pr.*, 424.

823. In an action for the foreclosure of a mortgage, in which there are infant defendants, the complaint must state what their interest is, and whether it is paramount or subordinate to the interest mortgaged. *Supreme Ct., Sp. T.*, 1850, *Aldrich v. Lapham*, 6 *How. Pr.*, 129.

Consult, also, *supra*, 257, 590.

As to foreclosing *Mechanics' Lien*, see *MECHANICS' LIEN*, 99-101.

20. Judgments and Official Decisions.

824. In an action upon a judgment, by the assignee of the judgment-creditor, it is not necessary to aver any demand of payment by the assignee, or any refusal to pay by the debtor. *N. Y. Com. Pl.*, 1856, *Moss v. Shannon*, 1 *Hill*, 175.

825. In a complaint seeking to set off a judgment held by the plaintiff as assignee, against one recovered by defendant against the plaintiff, the time of the assignment is stated with sufficient definiteness if it is said that the judgment against the plaintiff was recovered after the assignment. An allegation

that the third party "assigned over to the plaintiff the said judgment," sufficiently alleges an absolute consideration for the assignment. *Supreme Ct.*, 1855, *2 Abbotts' Pr.*, 380.

826. Special jurisdiction. A judgment, or other determination by an officer of special jurisdiction, is necessary to state the facts of the case, but such judgment or determination may be stated to have been duly given, and such allegation being controverted, the court shall be bound to establish facts conferring jurisdiction.

827. In pleading a judgment, if it is not one of the words "duly given or made," it is necessary to state the same effect and substance, by averring that the judgment was duly given or made. *Supreme Ct., Ct. D.*, 1856, *Dutcher*, 13 *How. Pr.*, 538.

828. A judgment of the Circuit Court is sufficient to allege that the plaintiff, as assignee of the United States, &c., by the judgment and said court having jurisdiction, recovered judgment against the sum of, &c., damages, and that judgment was duly given or made, and still stands in full force, satisfied or annulled, and that the defendants are in default of judgment in the United States Circuit Court. *Supreme Ct.*, 1851, *Bement v. R.*, *N. S.*, 148.

829. Appointment of an executor or administrator by an executor or administrator sufficiently alleges his appointment, and what court or officer it was made by. *[§ 161.]* *Supreme Ct.*, 1856, *Wheeler v. Dakin*, 12 *How. Pr.*, 129.

830. Summary conviction of a mayor of a city to an indictment, is sufficient to allege that on being brought before him, charged with the crime, and after an examination of the charge, the making of the same, and the proceedings and judgment, and execution pursuant thereto, that by virtue of authority with which the mayor was invested by the law, he was invested by the law with the same powers, which were referred

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Cr., 105.]
ton v. Fleet,
Pr., 106.

884. In separate estates contracted by husband for judgment for judgment rate estate of payment of tax and be applied and that a release of the the same, or necessary to satisfaction. In such show the nature evidenced by consideration separate estate contracted, and consideration and value tended to make such separate estate it. *Supreme* John, 12 *How* Brook, 21 *Baner* erer, *Id.*, 286, 17 *How. Pr.*, 1 v. Lemon, 11

885. Charge the separate estate show a sale for pledge of it. credit of her estate *Supreme Ct.*, 1 *How. Pr.*, 98.

886. A contract and delivery was alleging a sale in faith of or for estate, is not sufficient with the price Arnold v. Ring

887. In an estate of a married distinctly alleged given by her for ing, and with the estate with its provisions under the object, which contracted upon the

VOL. IV.—

Rules Applicable to—Negligence;—New Promise.

N. Y. Superior Ct., 1856, *Isles v. Tucker*, 5 *Duer*, 393.

Consult, also, *supra*, 99, 540.

27. *Negligence.*

893. General averment. In an action for damages caused by defendant's negligence, a general averment in the complaint, of negligence, is sufficient to admit proof of the special circumstances constituting it. Thus in an action against a railroad company for running over a child, under such a general averment evidence is admissible that there were no suitable brakes or guards in front of the car where the driver was stationed. *Ct. of Appeals*, 1856, *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 *N. Y.* (4 *Kern.*), 310.

894. Degrees of negligence are matters of proof, and not of averment; and a general allegation of negligence, want of care and skill, &c., is sufficient in an action for injuries caused by such negligence, whether the defendant is liable for ordinary or only gross negligence. *Ct. of Appeals*, 1857, *Nolton v. Western R. R. Co.*, 15 *N. Y.* (1 *Smith*), 444.

895. Officer's neglect to repair way. In an action to recover from defendant damages for his neglect of duty as canal commissioner, the complaint alleged that the defendant, *being canal commissioner*, it was his duty to repair the banks of the canal at the place where the injury in question was sustained. *Held*, that this allegation of official character being made for the purpose of charging him with the duty, if any neglect of it which rendered him liable to an action in any form was alleged, the action was properly brought against him in his private character. *Supreme Ct.*, 1855, *Griffith v. Follett*, 20 *Barb.*, 620.

896. The complaint in such case need not aver that the defendant had funds sufficient to repair the banks. [4 *Hill*, 630.] *Ib.*

897. Since commissioners of highways are not bound to cause the repair of bridges other than those over streams,—*a. g.*, bridges over a ravine or pond,—but in respect to such, their duty is simply to give directions; a complaint against them for negligently permitting a bridge to be out of repair, must either show that the bridge was over a stream, or if not of that class, that the defendants had neglected to give directions for its repair. An averment of possession of necessary funds is also requisite. *Supreme Ct.*, 1857, *Smith v. Wright*,

27 *Barb.*, 621; reversing *S. C.*, 24 *Id.*, 170; and 12 *How. Pr.*, 555.

898. Plaintiff's care. In an action to recover damages arising from the defendant's negligence, it is unnecessary for the plaintiff to allege in his complaint that the injury happened without any want of ordinary care on the part of the plaintiff or the deceased. [2 *M. & W.*, 790; 3 *Id.*, 244.] *N. Y. Superior Ct.*, 1855, *Johnson v. Hudson River R. R. Co.*, 5 *Duer*, 21.

899. In an action for negligence of defendant as a carrier, in losing plaintiff's trunk, it is not necessary for the plaintiff to aver in his complaint that the trunk was lost without his fault. It was enough that the plaintiff states the delivery to the defendants, and that the loss occurred through their negligence. *N. Y. Superior Ct.*, 1858, *Richards v. Westcott*, 2 *Bosw.*, 589.

900. Negligence of plaintiff's employer. In an action to recover damages sustained by an agent or servant, by reason of a defect arising from the negligence of his employer,—*e. g.*, the case of a railroad engineer injured by an accident caused by the neglect of the company to maintain in repair fences, &c., along the line,—the plaintiff must aver actual notice to the defendants of the defect complained of, especially where that defect was peculiarly within his own knowledge. *Supreme Ct.*, 1855, *McMillan v. Saratoga & Washington R. R. Co.*, 20 *Barb.*, 449. To the contrary, 1857, *Byron v. N. Y. State Printing Telegraph Co.*, 26 *Id.*, 89.

901. The Association for the Exhibition of the Industry of all Nations received the plaintiff's goods into their building for exhibition, but the building not being water-tight, the goods were injured by rain beating in. *Held*, that a complaint seeking to render them liable therefor, but without alleging negligence or a guaranty, showed no cause of action. [6 *Cow.*, 266; 9 *Wend.*, 60, 268; 2 *Barb.*, 326.] Such an association are not liable as common carriers. [14 *Wend.*, 215; 7 *Cow.*, 797.] *Supreme Ct.*, *Sp. T.*, 1854, *Davison v. Association for Exhibition of Industry*, 9 *How. Pr.*, 226.

Consult, also, *supra*, 84, 85, 470-475.

28. *New Promise.*

902. After bar of statute. In an action on a note, in a case where plaintiff relies upon a new promise to avoid the defence of the

Statute of Limitations, or of a discharge in bankruptcy, it is not necessary for plaintiff to aver the new promise in his complaint. The cause of action in such case is not the new promise, but the note. And this rule applies though the action is by an assignee, who became such after the making of the new promise. *N. Y. Com. Pl.*, 1858, *Clark v. Atkinson*, 2 *E. D. Smith*, 112.

903. After discharge. Where, after a debt has been released for a nominal consideration, a new promise is made, the action must be on the latter. A variance between the allegation of a subsisting note, as a cause of action, and the evidence of a new promise to pay a note which has been extinguished by a release, cannot properly be disregarded on the trial. The only cause of action alleged in the complaint, viz., the note, is in such case disproved in its entire scope and meaning by the release. Proof of the new promise would substitute a new cause of action, which the defendant had not been required to answer, and to which the defence in his answer was not at all directed. *N. Y. Superior Ct.*, 1856, *Stearns v. Tappin*, 5 *Duer*, 294.

29. Nuisance.

904. Where plaintiff seeks an injunction to restrain an erection in a public street, on the ground of a special injury to him by preventing access to his adjoining lot, he should specify this grievance in his complaint; a general charge that the work will be specially injurious to him, is not sufficient. But if no motion is made to require plaintiff to reform his complaint in that respect, and no objection is made upon the trial to the introduction of evidence tending to show such injury, the objection will be considered as waived. *Supreme Ct.*, 1856, *Wetmore v. Story*, 22 *Barb.*, 414; *S. C.*, 3 *Abbotts' Pr.*, 262.

905. The action for a nuisance, under §§ 453, 454, of the Code, is a substitute for the statutory writ of nuisance, and the plaintiff must aver that he was owner of the freehold at the time of erecting the nuisance, and at that of the commencement of the suit; and that the defendants were tenants of the freehold of the land whereon the nuisance was erected. To obtain judgment for an abatement, the owners must be defendants. *Supreme Ct., Sp. T.*, 1852, *Ellsworth v. Putnam*, 16 *Barb.*, 565.

30. 1

906. Legal title. for partition, is fatal that the legal title is in fee. *Supreme Ct.*, 18. *N. Y. Leg. Obs.*, 116.

907. Apparent devise to have a partition parent devise by the ancestor under the same, to allege devise is void. *Laws of Li*

908. Refusal of verdict a partition suit, an allegation that plaintiff had no right to make partition by descent. *Supreme Ct., Sp. T.*, 1850, 3 *Code R.*, 9.

Consult, also, PART

31. .

909. Use and occupation stating that the defendant in a certain suit occupied certain descent during a certain time, is cause it does not show relation of landlord and tenant. *Sp. T.*, 1853, *Hall v. Scott*.

910. In an action for the payment of a debt alleged that after the death of the estate of the defendant by assignment to the lessor died on, &c., having rent to R., who assigned to whom the same was assigned on, &c.; that after the death of the defendant had part of the premises assigned to he was such assignee, commencement of the action had become, and still was arrear and unpaid, to the

Held, on demurrer, that the complaint showed that the debt accrued and unpaid at the time of the partition to the plaintiff, and that the suit as assignee and as to rent subsequently become due, the allegation constituting him an assignee sufficient allegation that the covenant for its pay

Rules Applicable to—Sales. Services.—Statutes. By-laws. Statute Actions.

necessary to allege that he continued to be owner of the rent till suit was commenced; for that might be presumed. The further allegation, that the rent claimed accrued and became due after the defendant became and while he was assignee, showed the defendant's ownership. *Supreme Ct.*, 1855, *Van Rensselaer v. Bonesteel*, 24 *Barb.*, 865.

911. Admitting possession. In an action for rent, the complaint set up a written lease (not stated to be under seal); but did not allege that the defendant took possession. The answer alleged, 1. That plaintiff had no title, and defendant was indebted to a third party for the use and occupation; and, 2. A breach on plaintiff's part of his covenant for quiet enjoyment. *Held*, on demurrer to the answer, that since defendant had voluntarily shown the fact of occupation, the rule precluding a tenant from denying his landlord's title, in an action for use and occupation, must be held to apply, and that the first defence was therefore insufficient. If there was any other party who had an apparent claim for the use of the premises, the defendant should have sought a remedy by interpleader. *Ct. of Appeals*, 1857, *Vernam v. Smith*, 15 *N. Y.* (1 *Smith*), 827.

912. Denial. In an action to recover rent from the assignee of a lease, an answer denying only the execution of the lease and the assignment to him, will not admit evidence that before the commencement of the action he had parted with all his interest in the lease and assignment. *Supreme Ct.*, 1852, *Kettletas v. Maybee*, 1 *Code R.*, *N. S.*, 868.

913. In pleading an eviction, as defence to an action for rent, it must be stated that the tenant was evicted or expelled from the premises, and kept out of possession until after the rent became due. [1 *Saund.*, 204, n. 2.] *Ct. of Appeals*, 1857, *Vernam v. Smith*, 15 *N. Y.* (1 *Smith*), 827.

914. Mode of averring default in an action against an assignee of the lease. *Holsman v. De Gray*, 6 *Abbotts' Pr.*, 79.

915. Place of payment. To a complaint for rent upon a lease which made it payable at a place to be directed by the lessor, the answer alleged that plaintiff had not directed where it was to be paid, although requested so to do, and that defendant had been ready and willing to pay whenever he should so do. The reply averred that plaintiff did, on, &c., by notice in writing direct the rents to be paid

at, &c., and ignorance of the fact that defendant was ready or willing to pay. *Held*, that the service of notice where the rent should be paid was rendered material by the pleadings. *Ct. of Appeals*, 1858, *Livingston v. Miller*, 8 *N. Y.* (4 *Seld.*), 283.

Consult, also, *supra*, 450.

82. Sales. Services.

916. Request. In an action for goods sold and delivered, when the sale is stated to have been made directly to the defendant, the words "sold and delivered" imply a contract between the parties; and it is not necessary to allege that the goods were sold and delivered at the request of the defendant. *So held*, on demurrer. *Supreme Ct.*, *Chambers*, 1855, *Acome v. American Mineral Co.*, 11 *How. Pr.*, 24.

917. Readiness. When one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment by the purchaser, of a readiness and willingness to receive and pay at that place, in case he sues for a non-delivery, is indispensably necessary; but the omission of it is a defect which is cured by a verdict. *Supreme Ct.*, 1855, *Clark v. Dales*, 20 *Barb.*, 42.

918. Promise. A complaint alleging "the sale and delivery of goods," as a cause of action, need not allege a promise on the part of the defendant to pay, &c. *Supreme Ct.*, *Chambers* (1849), *Glenny v. Hitchins*, 4 *How. Pr.*, 98; *S. C.*, 2 *Code R.*, 56. Approved, *Sp. T.*, 1849, *Russell v. Olapp*, 7 *Barb.*, 482. *S. P.*, in the case of services, 17 *N. Y.*, 227.

As to pleading in actions for Goods sold, see *supra*, 28, 81, 318, 449, 451, 488, 538, 586.

919. Manufacture. A claim for articles made and delivered for a specified sum pursuant to agreement, may be recovered upon a complaint for work, labor, and materials, as well as upon a complaint for goods sold. *N. Y. Com. Pl.*, 1854, *Prince v. Down*, 2 *E. D. Smith*, 525. Compare *Union India Rubber Co. v. Tomlinson*, 1 *Id.*, 864.

As to pleading in actions for Services, see, also, *supra*, 25, 27, 802, 808, 462, 554.

83. Statutes. By-laws. Statute Actions.

920. Legality of contract. Where a statute declares that a deed or contract is void, if or provided it is made in a particular manner or upon a specified consideration,—e. g., upon

usury,—it is not necessary for the plaintiff to negative the condition; he may leave it to the defendant to set up the facts which bring it within the condition upon which, and upon which alone, it is void. But where a statute makes a deed, or agreement, or other act void, unless made upon a specified consideration, or under specified circumstances, the rule is reversed; the plaintiff must show that the circumstances exist under which alone it can have validity; the defendant in such case may rest upon the general prohibition. *N. Y. Com. Pl., Sp. T.*, 1854, *Williams v. Ins. Co. of North America*, 9 *How. Pr.*, 365.

921. Statute of Frauds. In pleading a contract which the Statute of Frauds requires to be in writing, it is not necessary to allege the facts relied on to take the case out of the statute. It is sufficient on demurrer to allege that a contract was made. Such an allegation is to be understood as intending a real contract,—something which the law would recognize as such, and not repudiate as void. There is no reason for departing, under the Code, from the former well-settled rule in law and equity. [4 *Johns.*, 237; 15 *Id.*, 425; 6 *Hill*, 83; 2 *Paige*, 177.] The existence of a writing in such case is matter of evidence, it is not one of the pleadable facts. *Supreme Ct., III. Dist.*, 1855, *Livingston v. Smith*, 14 *How. Pr.*, 490. To the same effect, *N. Y. Com. Pl.*, 1854, *Stern v. Drinker*, 2 *E. D. Smith*, 401; 1855, *Amburger v. Marvin*, 4 *Id.*, 393. *S. P.*, *Supreme Ct., IV. Dist., Sp. T.*, 1858, *Dewey v. Hoag*, 15 *Barb.*, 365; *I. Dist.*, 1858, *Washburn v. Franklin*, 7 *Abbotts' Pr.*, 8; *S. C.*, less fully, 28 *Barb.*, 27. To the contrary, *N. Y. Superior Ct., Sp. T.*, 1853, *Thurman v. Stevens*, 2 *Duer*, 609; and see *Le Ray v. Shaw*, *Id.*, 626; *Merwin v. Hamilton*, 6 *Id.*, 244.

922. In pleading a public statute, it is sufficient, especially since the Code, to set forth the facts which bring the case within it, without an express reference to the statute. *N. Y. Superior Ct.*, 1852, *Goelet v. Cowdrey*, 1 *Duer*, 132; and see *Yertore v. Wiswall*, 16 *How. Pr.*, 8.

923. In an answer setting up as a defence that the contract sued on was made in violation of a statute, it is enough to aver that though apparently valid, it was made with intent of both parties to do certain acts, which are such as the statute prohibits, without

alleging that the transaction was made with intent to evade the statute. *Superior Ct.*, 1857, *Cassari v. Cassari*, 207; affirming *S. C.*, 1857, 207.

924. "In pleading a right derived therefrom" refer to such statute by its passage, and the judicial notice thereof."

925. Foreign law. The cause of action depends on the law of other States, a general effect of those laws is relied on must be averred. *Supreme Ct., Sp. T.*, 1856, *Abbotts' Pr.*, 23. To the same effect, 1859, *Phinney v. Phinney*.

926. Where the cause of the complaint is a contract in violation of the law of another State such law must be pleaded, not by demurrer. *Superior Ct., Humphreys v. Chamberlain*, 387.

927. The ordinances of the city of New York are to be pleaded as such, and they must be pleaded. *Supreme Ct., v. Mayor, &c., of N. Y.*, 1859, 207.

928. Where a statute has created a municipal ordinance an act is alleged to have been made until the trial, and is not surprised. *N. Y. Beman v. Tugnot*, 5 *San*.

929. The provisions of § 10,—relative to the forms of actions for statute penalties by the Code [Code, § 10, of declaring authorized still proper. *Supreme Ct., v. Bennett*,* 5 *Abbotts' Pr.*, 481, which is to the contrary. Consult, also, *supra*, 4.

84. Statute.

930. Consideration. The statute security, if the contract was sealed, imposition is not necessary that it is

* Affirmed, *Gen. T.*, 135

Rules Applicable to—Stockholder's Liability;—Tender.

it was within the statute. *N. Y. Superior Ct., Sp. T.*, 1858, *Clark v. Thorp*, 2 *Bow.*, 680.

931. Where it appears that the instrument was given in pursuance of a statute requirement, in a form prescribed thereby, and in a case within the statute, those facts constitute a sufficient consideration to support it, though it be without seal, and no further averment of consideration is necessary. *N. Y. Com. Pl.*, 1855, *Slack v. Heath*, 4 *E. D. Smith*, 95; *S. C.*, 1 *Abbotts' Pr.*, 381.

932. Attachment bond. A complaint on a bond, given to procure the discharge of an attachment against a vessel, under 2 *Rev. Stat.*, 498, in order to sustain the bond as a statute security merely, must not only aver the facts, showing that the attachment was duly issued, and that the bond was executed by the defendant, and that the claim of the creditor has not been paid, but also must aver that the bond was delivered to the officer by whom the attachment was issued, in such wise that it became his duty to grant a discharge of the warrant; from which averment it will be presumed that the officer did his duty. And if the warrant was not in fact discharged, nor the vessel released, the defendant must set up such facts as a defence. *N. Y. Superior Ct., Sp. T.*, 1858, *Clark v. Thorp*, 2 *Bow.*, 680.

933. The complaint in an action upon a bond given to obtain a discharge from arrest on attachment for contempt must state plaintiff's connection with the attachment proceedings, and how and to what extent he was aggrieved by the acts of the defendant. The order of the court for the prosecution of the bond operates only as an assignment. *Supreme Ct.*, 1850, *Rayner v. Clark*, 7 *Barb.*, 581.

934. — undertaking. In an action against a judgment-debtor and his sureties upon an undertaking given to the sheriff for the appearance of such debtor upon the return of an attachment for contempt issued in supplementary proceedings, it is not necessary to allege in the complaint the issuing and return of an execution unsatisfied, nor that an order had been made for the attachment. The averment of the recovery of the judgment, and that such proceedings were thereupon had, supplementary to execution, that the court issued the attachment under which the instrument sued upon was executed, is sufficient. [17 *Wend.*, 59.] *N. Y. Com. Pl.*, 1854, *Kelly v. McCormick*, 2 *E. D. Smith*, 508.

935. In an action on an undertaking given upon the discharge of an attachment, it is not necessary to allege in the complaint that the attachment was duly issued, nor to show that the officer or court had jurisdiction to issue it, if it be shown that the action in which it was issued was brought and pending in a court of general jurisdiction. *Supreme Ct.*, 1858, *Cruyt v. Phillips*, 7 *Abbotts' Pr.*, 205.

936. Undertaking in claim and delivery. In an action against the sureties in an undertaking given by the defendant in an action for the return of specific personal property, it is not necessary to aver the issuing of execution against the original defendant. *N. Y. Com. Pl.*, 1855, *Slack v. Heath*, 4 *E. D. Smith*, 95; *S. C.*, 1 *Abbotts' Pr.*, 381.

937. In an action by the assignee of an undertaking given in proceedings of claim and delivery, for the payment of such judgment as might be recovered, it is sufficient, by way of showing the plaintiff's title, to allege that the undertaking was duly assigned, &c., to him, without alleging that the judgment in the action was also assigned. [8 *N. Y.*, 188; 1 *Abbotts' Pr.*, 384.] *Supreme Ct., Sp. T.*, 1857, *Morange v. Mudge*, 6 *Abbotts' Pr.*, 248.

85. Stockholder's Liability.

938. Substance of a complaint against stockholders on a judgment against the corporation. *Witherhead v. Allen*, 28 *Barb.*, 661.

939. Herkimer county. If it appears from the complaint filed by a creditor of a manufacturing corporation in the county of Herkimer, against a stockholder, to enforce the individual liability of the latter, that the company was dissolved under the act of April 16, 1852, that fact will be fatal to the action. But if the complaint merely alleges the dissolution of the corporation, without showing that it was dissolved under that act, the court will not, on demurrer, assume that it was. *Supreme Ct.*, 1853, *Herkimer County Bank v. Furman*, 17 *Barb.*, 116.

86. Tender.

940. Readiness. An answer, alleging that on, &c., the defendant tendered to the plaintiff's attorney the principal, interest, and costs then due, without averring a readiness still to pay the same, or that the amount is paid into court, or offering to bring it into court, is defective. It is essential to a perfect tender that

the party should not only once offer to pay the money, but that he should be always ready to pay it; and unless this readiness existed, and is pleaded, the tender is a nullity and does not protect the defendant even from the payment of subsequent costs and interest. *Supreme Ct.*, 1857, Kortright v. Cady, 5 *Abbotts' Pr.*, 858; S. C., less fully, 28 *Barb.*, 490; but see reversal, 21 *N. Y. (7 Smith)*, 843.

941. Specific sum. Costs. To an action on an administrator's bond, to recover an amount decreed by the surrogate to be paid by the administrator, an answer that in a former suit upon the same decree, defendant tendered to the guardian a sum of money equal or greater in amount than the amount then due or claimed to be due upon the order, which sum was rejected and refused by the guardian, and was then deposited with the justice before whom the suit was pending, as the money of, and for the said infants, where the same has ever since been, and still remains, subject to their order or acceptance, of which they and their general guardian had due notice, is insufficient. Defendant should allege that he then tendered and paid into court a specific sum; and should state with more certainty when, and under what circumstances such payment was made. Moreover, it being a tender after suit brought, the amount of costs should also have been tendered to him, and paid into court. *Supreme Ct.*, *Sp. T.*, 1852, *People v. Banker*, 8 *Hov. Pr.*, 258.

87. Trespasses.

942. Force. In an action for a trespass, where the complaint simply alleges an entry upon plaintiff's premises and injury to his property, without charging the employment of force, the issue is confined to the acts of the defendant after the entry, and to the damages resulting from such acts. *N. Y. Com. Pl.*, 1855, *Turner v. McCarthy*, 4 *E. D. Smith*, 247.

943. Wrongful levy. In an action against an officer for levying upon goods exempt from execution, it is not necessary to show in the complaint that the goods were exempt. It is sufficient for the plaintiff to allege an unlawful taking. If the defendant had any authority to take the plaintiff's property, he is bound to set it up in the pleadings, and prove it as matter of defence. *N. Y. Com. Pl.*, 1855, *Stevens v. Somerindyke*, 4 *E. D. Smith*, 418.

Consult, also, *supra*, 469, 492.

38. J

944. Resulting trust. A complaint in an action of a resulting trust. *Lounsbury v. Put* 515.

945. Collusion. W a sale of property to upon his death, the est executor or administrator fraudulent grantee, or title as good, and refuses to proceed to test it, the itor of the estate, in an impeach the sale and ministered as assets, ministerator's collusion, or holding the sale; but may be supplied by an *people*, 1854, *Bate v. Graham* 287. S. P., *Hyer v. B* Consult, also, *supra*,

89. Y

946. Of the proper form of action for waste. *Rob* *Barb.*, 595.

947. Threatened waste. may, in his action to life to account for waste, and have an injunction, and others in *col* *prems Ct.*, 1852, *Rodger* 595.

40. U

948. General allegation. complaint on a note, th its inception," and that it was executed fraudulently above the rate annum, to wit, one and month," does not suffice permit proof to be given under the Code of 1848 *Gould v. Horner*, 12 *Ba*

949. The defence of omitted under a general answer, not stating the agreement; nor ought the allegation to be allowed *Superior Ct.*, 1858, *Wa* 509; but compare *VAR*

950. Material facts.

Certificate of Pension.

the notes, stipulating that if the notes are not paid at maturity the securities shall be under the control of the holder, who is authorized to dispose of them and to apply the proceeds to the credit of the maker,—is a pledge of the stocks and not a mortgage. *N. Y. Com. Pl., Sp. T.*, 1857, *Lewis v. Graham*, 4 *Abbotts' Pr.*, 106.

9. Where the property is not capable of manual delivery,—e. g., shares of stock in an incorporated company,—a pledge may be created by a written transfer thereof; and the transaction may be a pledge, instead of a mortgage, notwithstanding the legal title passes to the pledgee. Thus where there was a transfer of stock absolute in its terms, but a note for borrowed money, given by plaintiff to defendant at the time, stated that the stock was "deposited as collateral security." *Held*, that the transaction was a pledge and not a mortgage. *Ct. of Appeals*, 1849, *Wilson v. Little*, 2 *N. Y. (2 Comst.)*, 448; affirming *S. C.*, 1 *Sandf.*, 851. *S. P.*, *A. V. Chan. Ct.*, 1844, *Vaupell v. Woodward*, 2 *Sandf. Ch.*, 143. Compare *Huntington v. Mather*, 2 *Barb.*, 588; *S. C.*, 6 *N. Y. Leg. Obs.*, 206; *Hasbrouck v. Vandervoort*, 4 *Sandf.*, 74.

10. **Certificate of pension.** By the true construction of the acts of Congress of July 29, 1848 (9 *U. S. Stat. at L.*, 265), and Feb. 3, 1853 (10 *Id.*, 154),—relative to pensions to widows of officers,—a widow to whom a pension has been granted for the services of her husband, cannot pledge the certificate. Such a pledge, no matter to whom made, or for what purpose, is wholly void. *N. Y. Superior Ct.*, 1856, *Payne v. Woodhull*, 6 *Duer*, 169.

11. Hence if an agent has been employed to obtain the pension upon a pledge of the certificate to secure him a compensation for his services, and refuses to deliver the certificate upon request, he is liable to an action. *Id.*

12. **Rights of parties on default.** Non-payment of the debt does not work a forfeiture of the pledge. It simply authorizes the pledgee to file a bill for foreclosure, and proceed to a judicial sale, or to sell without judicial process, upon giving reasonable notice to the pledgor to redeem, and of the intended sale. And this notice is equally necessary, whether the pledge is for a debt overdue, or for one to become due. [Citing many cases.] *Supreme Ct.*, 1847, *Stearns v. Marsh*, 4 *Den.*, 227. See, also, *Hart v. Ten Eyck*, 2 *Johns.*

Ch., 62, 100; *Brownell*, 491.

13. **Demand of pay** cannot sell the pledge, requiring payment of the debt. *Ct. of Errors*, 1805, *Ogden v. Little*, 2 *N. Y. (2 Ch. Cas.)*, * 200. *Ct. of Appeals v. Little*, 2 *N. Y. (2 Ch. Cas.)*, 1 *Sandf.*, 851.

14. A provision in the contract by which the pledgor waives the right to a judicial sale. *Id.*

15. **Notice of sale.** The pledge only upon demand, and giving notice. And the notice should state the time and place of sale. *N. Y. Com. Pl.*, 1842, *Castello v. City Bank*, 1 *Sandf.*, 851.

16. In the absence of the contrary, the pledgor has the right to give notice of the intention to redeem, and the opportunity to redeem, at the time of the sale, to see that it is a fair sale. Hence, a notice which is given by the pledgor of either time, or place, is insufficient. *Ct. of Appeals*, 1842, *Wheeler v. Newbould*, 16 *Ch.*, 100.

17. A notice of time and place, published in the newspapers, is sufficient to bind the pledgor. *Stearns v. Marsh*, 4 *Den.*, 227.

18. Where notice is given to the pledgor personally, and he absconds,—the pledgee is not bound to give notice, but may proceed to a judicial sale. *Supreme Ct.*, 1847, *Stearns v. Marsh*, 4 *Den.*, 227.

19. **Manner of sale.** The pledge should be sold by public sale, in the absence of express agreement to the contrary. Mere private sale cannot be a valid sale. *Ct. of Appeals*, 1842, *Wheeler v. Newbould*, 16 *Ch.*, 100. Compare *Dykera v. Aller*, 2 *Ch.*, 1842, *Castello v. Little*, 2 *N. Y. (2 Ch. Cas.)*, 1 *Sandf.*, 851.

20. Where the stock is pledged, the pledgor has the right to give notice of the intention to redeem, and the opportunity to redeem, at the time of the sale, to see that it is a fair sale. Hence, a notice which is given by the pledgor of either time, or place, is insufficient. *Ct. of Appeals*, 1842, *Wheeler v. Newbould*, 16 *Ch.*, 100.

* See this case in table of cases, ante.

Manner of Sale.

Who may buy.

ration are pledged, they may, upon default, be sold for the debt. But such sale must be at public auction, and can only be made upon demand of payment, and notice to the pledgor of the time and place of sale. *N. Y. Superior Ct., Sp. T., 1854, Brown v. Ward, 3 Duer, 660.*

21. In the city of New York, such sale may be at the Merchants' Exchange. *Id.*

22. A sale of pledged stock cannot be made at the board of brokers in New York city unless there was a stipulation to that effect, for the reason that by the regulations of the board the sales are not public. *N. Y. Superior Ct., Wood v. Hamilton, cited in Castello v. City Bank, 1 N. Y. Leg. Obs., 25. Supreme Ct., 1851, Rankin v. McCullough, 12 Barb., 108. Compare Dykers v. Allen, 7 Hill, 497.*

23. Defendant deposited stock with a banking association in the city of New York, as collateral security to his note, giving the association, by the terms of the note, power to sell in case of non-payment of the note, without stating any restriction as to manner of sale. *Held*, that a sale at the board of brokers, on a two days' notice to defendant, he not objecting, was binding upon him. *Supreme Ct., 1842, Willoughby v. Comstock, 8 Hill, 889.*

24. The pledgee of stock, under a general hypothecation, without any specification of time of redemption, or power or mode of selling, after having repeatedly called on the pledgor to redeem, and apprised him of intention to sell, and having offered the stock without success at the board of brokers, sold it at private sale without notice to the pledgor of the time and place. *Held*, that the sale was unauthorized, and the fact that the pledgor was avowedly unable to redeem did not affect his right. *Id. A. V. Chan. Ct., 1842, Castello v. City Bank, 1 N. Y. Leg. Obs., 25.*

25. Sale before default. Stock held in pledge cannot be sold before the debt for which it stands pledged becomes due. A pledge is not for use but for security. A sale of it before the debt is due is, in the absence of a special agreement permitting it, a breach of trust. [Distinguishing 4 Johns. Ch., 490.] *Ct. of Errors, 1844, Dykers v. Allen, 7 Hill, 497.*

26. Stock-brokers, who receive a number of shares of bank stock as collateral security for the payment of a note held by them, although they do not keep them distinct, but blend them with other shares of the same stock held by them, yet if they have at all times

subject to their absolute control a sufficient number of such shares to replace those assigned, upon the payment of the note, are not liable to account for the highest price of such shares while the note was running, but may treat any like number of such shares, so held by them, as the shares transferred to them. *Chancery, 1820, Nourse v. Prime, 4 Johns. Ch., 490; 1828, The same v. The same, 7 Id., 69.*

27. M. borrowed money, on his note at three months, from R., and pledged stock as collateral, taking back R.'s receipt for the stock, in which he stipulated not to transfer the stock for three months. *Held*, that, under the terms of the agreement, R. might sell the stock at the very expiration of the three months, without waiting for the days of grace on the note to expire. *Supreme Ct., 1851, Rankin v. McCullough, 12 Barb., 108.*

28. No sale of notes pledged. The general property in a promissory note pledged remains in the pledgor. The pledgee acquires only a special property in it. His power extends only to collect the money upon the note. He cannot compromise with the maker for a less sum than is due by the terms of the instrument. *Supreme Ct., 1815, Garlick v. James, 12 Johns., 146.*

29. Where promissory notes are pledged, no right to sell them upon default in payment of the pledgor's debt arises. The pledgee can only hold the collaterals until they mature, and collect and apply the money upon his debt. *Ct. of Appeals, 1857, Wheeler v. Newbould, 16 N. Y. (2 Smith), 892; and see Atlantic Fire & Marine Ins. Co. v. Boies, 6 Duer, 588.*

30. Special partner of pledgee may buy. A special partner of a firm with whom property is pledged is not incapacitated from purchasing the pledge at a sale made by the firm. As he is prohibited from transacting any business on account of the partnership, and cannot be employed as agent, attorney, or otherwise [2 Rev. Stat., 175, § 17],* no duty devolves upon him in reference to the bailment. He cannot aid or direct in the sale; and hence is not within the rule that one shall not be permitted to purchase who has a duty inconsistent with the character of purchaser. *N. Y. Com. Pl., Sp. T., 1857, Lewis v. Graham, 4 Abbotts' Pr., 106.*

* But see PARTNERSHIP, tit., *Limited Partnership*, where recent statutes enlarging the powers of the special partner are cited.

Election of Remedies.

31. Election of remedies where a pledgee sells the pledge without authority. *Henry v. Marvin*, 8 *E. D. Smith*, 71.

32. Conversion of pledge by pledgee. Where a pledgee has sold the pledge without right to do so,—*e. g.*, where he sells without sufficient notice,—no tender of the debt is necessary before suit for the conversion. The pledgee having voluntarily put it out of his power to restore the pledge, a tender would be fruitless. [4 *Den.*, 227.] *Ct. of Errors*, 1805, *Cortelyou v. Lansing*, 2 *Cai. Cas.*, 200; 1844, *Dykens v. Allen*, 7 *Hill*, 497. *Ct. of Appeals*, 1849, *Wilson v. Little*, 2 *N. Y.* (2 *Comst.*), 448. *N. Y. Com. Pl.*, *Sp. T.*, 1857, *Lewis v. Graham*, 4 *Abbotts' Pr.*, 106.

33. If the pledgee sells the pledge without right to do so, and afterwards sues the pledgor for the balance of the debt, the pledgor may set off the actual value of the pledge. *Supreme Ct.*, 1847, *Stearns v. Marsh*, 4 *Den.*, 227.

34. Notwithstanding the death of the pledgor after a conversion of the pledge, by a sale without demand and notice to redeem, his right of action against the pledgee survives to the personal representatives of the former. *Ct. of Errors*, 1805, *Cortelyou v. Lansing*, 2 *Cai. Cas.*, 200.*

35. The pledgee acquires only a special property in the pledge. If it is converted by one who derives title from the general owner, the pledgee can recover only to the extent of his lien. *Supreme Ct.*, 1848, *Brownell v. Hawkins*, 4 *Barb.*, 491.

36. — by pledgor after redelivery. Where promissory notes are pledged by a debtor to secure a debt, the pledgee acquires a special property in them. That property is not lost by their being redelivered to the pledgor to enable him to collect them; the principal debt being still unpaid. Money which he may collect upon them is the specific property of the creditor. It is deemed collected by the debtor in a fiduciary capacity. *Supreme Ct.*, 1848, *White v. Platt*, 5 *Den.*, 269.

37. The pledgee of a bond delivered it to the owner, to exchange it for and bring back stock to be substituted for it as security; and the latter converted it. *Held*, that the pledgee could maintain trover against him, and recover the amount due, not exceeding the value of

the bond with interest. 1848, *Hays v. Riddle*, 1

38. Loss of pledge. debt is duly tendered to him, and the loss in value in his hands, is loss. *V. Chan. Ct.*, 1850, 2 *Edw.*, 461.

39. P. being indebted to a third person as co-obligor in the bond of bond in land at a requested R. to accept the The obligor afterwards the bond was wholly lost not made himself liable the amount. *Ct. of Errors*, *Barrow*, 17 *John*

40. Bill to foreclose debt is unliquidated in der it necessary for the for the debt, before re He may file a bill in e pledge, and have his da proceeding. *A. V. Ch. v. Woodward*, 2 *Sandf.*

41. Bill to redeem. cannot, in every case, redeem the pledged goods if a legal ground is shown, as if the proceeds received by the there has been an assignment, a bill in equity will lie 1850, *Hasbrouck v. Van*

42. Bona-fide purloined protected, although the notice to the pledgor. 1 487.

43. F. delivered to L. belonging to F., with transfer. E. pledged the advanced in good faith right to retain the stock standing that E. acquire and was not entitled, as F., to part with it. The were presumptive evidence which L., having no notice, had a right to rely. *N. Fatman v. Lobach*, 1 *D*

44. Pledge in fraud. a pawnbroker had no pawning a ring with the owner, and that he had

* See this case in table of CASES CITED, Vol. I., *Ante*.

Poisoning.

Police in General.

Metropolitan Police.

the real owner; and he subsequently gave up the pledge to the pawnor on an affidavit of loss of the ticket;—*Held*, he was liable to the real owner for its value. *N. Y. Com. Pl.*, 1856, Duell v. Oudlipp, 1 *Hill.*, 166.

45. **Corporation.** Pledging its notes by a moneyed corporation, forbidden. *Laws of 1842*, 808, ch. 247, § 10.

46. **Penalty.** On factor or agent for pledging merchandise, &c., intrusted to him, with intent to defraud. *Laws of 1830*, 204, ch. 179, § 7.

As to power of an **Agent, Factor, &c.**, to pledge goods of his principal, see **FACTOR; PRINCIPAL AND AGENT.**

POISON.

1. **Administering poison** to human being with intent to kill, made punishable. 2 *Rev. Stat.*, 665, § 37.

2. — to horses, cattle, &c., declared punishable. 2 *Rev. Stat.*, 688, § 14.

3. **Poisoning food, springs, &c.**, with intent to injure human being, made punishable. 2 *Rev. Stat.*, 666, § 28.

4. **Sale of poisons.** Apothecary, druggist, or other person selling poison without label, declared guilty of misdemeanor. 2 *Rev. Stat.*, 694, § 23.

5. **Sale of poisons regulated**; record of sales required to be kept; and labels to be affixed. *Laws of 1860*, 765, ch. 443; amended, *Laws of 1862*, 468, ch. 273.

POLICE.

1. **Rewards.** The policy of the law does not prohibit police officers from participating in extra rewards publicly offered for the discovery of crime or recovery of stolen property. Such rewards are voluntary offerings for extraordinary efforts where ordinary means seem ineffectual. [Citing 9 *Wend.*, 262,* and distinguishing *Hopk.*, 11.] *V. Chan. Ct.*, 1838, *City Bank v. Bangs*, 2 *Edw.*, 95.

2. **Commissioners.** The Board of Police for the Metropolitan Police District, created by 2 *Laws of 1857*, 200, ch. 569, consists of the five commissioners appointed under the act, and the mayors of New York and Brooklyn. The five commissioners appointed by the act, do not constitute the board; and the mayors, although members of the board, are not commissioners. *Supreme Ct., Sp. T.*, 1857, *People*

v. Metropolitan Police Commissioners, 5 *Abbotts' Pr.*, 241.

3. A precept—*s. g.*, an alternative mandamus—addressed to the police commissioners, does not embrace the two mayors, and so is not, even in effect, addressed to the Board of Police. *Id.*

4. The act to establish a Metropolitan Police District (*Laws of 1857*, ch. 569), transferred to the force thereby created the members of the then existing police in New York and Brooklyn, without any affirmative act of acceptance on their part. Officers thus transferred who discharged the police duties required of them, but refused to recognize the authority of the new superiors appointed over them by the act of 1857, are to be deemed as guilty of insubordination in office, subjecting them to removal upon conviction, but not as refusing to accept or as abdicating their office. *Ct. of Appeals*, 1859, *People v. Metropolitan Police Board*, 19 *N. Y. (5 Smith)*, 188. To the same effect, *Supreme Ct., Sp. T.*, 1857, *McDermott v. Metropolitan Police Board*, 5 *Abbotts' Pr.*, 422.

5. **Removal** of a member of the force must be in strict conformity to the provisions of the act and the rules of the board. *Supreme Ct.*, 1858, *People v. Board of Police*, 6 *Abbotts' Pr.*, 162; *Sp. T.*, 1857, *McDermott v. Metropolitan Police Board*, 5 *Id.*, 422. *Ct. of Appeals*, 1858, *People v. Board of Police*, 7 *Id.*, 87.

6. **Certiorari** is the proper remedy for review of proceedings of the board in making removals. *Supreme Ct.*, 1858, *People v. Board of Police*, 6 *Abbotts' Pr.*, 162. *Ct. of Appeals*, 1858, *People v. Board of Police*, 7 *Id.*, 87.

7. As the statute provided that no member removed should be reappointed, proceedings of removal, though absolutely void, should not be permitted to stand on record; but a person, whether a member or not of the force, who has been illegally declared to be removed, is entitled to have such void proceedings reversed. *Ct. of Appeals*, 1858, *People v. Board of Police*, 7 *Abbotts' Pr.*, 87.

8. **Loans.** The Metropolitan Police Act of 1857, ch. 569, confers no authority for raising by loan of moneys for meeting payments due to the members of the force, before the tax authorized by § 26 has been collected. *N. Y. Com. Pl., Sp. T.*, 1857, *Fitzpatrick v. Flagg*, 5 *Abbotts' Pr.*, 218.

* The decision in *Hatch v. Mann* (9 *Wend.*, 262), invoked here as an authority, was reversed 15 *Id.*, 44.

POOR

12. Void contract.
only be paid, but an i

land, either legal or equitable, must be actually acquired. If the vendor, therefore, has no title or interest in the land which he undertakes to sell, the vendee is not a purchaser, within the meaning of the statute, although he may have paid a full consideration for a good title. [11 Johns., 7.] Thus a contract to purchase from an executrix, who has no power to sell, is not enough, nor does a subsequent order of a surrogate, for sale, confirm a title. *Supreme Ct.*, 1824, *Overseers of Bridge-water v. Overseers of Brookfield*, 8 Cow., 299.

13. Equitable interest. Where the pauper pays the consideration, and the deed is taken in the name of a third person, it is a purchase within the statute, and the equitable title gives him a settlement. An indefeasible equitable interest is sufficient. *Supreme Ct.*, 1817, *Overseers of Whitestown v. Overseers of Constable*, 14 Johns., 469. Approved, 1819, *Overseers of Augusta v. Overseers of Paris*, 16 Id., 279.

14. But where the legal title is not acquired, payment and taking possession must be clearly shown. *Supreme Ct.*, 1819, *Overseers of Augusta v. Overseers of Paris*, 16 Johns., 279.

15. A contract for the conveyance of land is not a purchase within the statute. *Supreme Ct.*, 1817, *Overseers of Scaghticoke v. Overseers of Brunswick*, 14 Johns., 199; but compare *Overseers of Whitestown v. Overseers of Constable*, Id., 469.

16. Consideration. It is competent for the overseers to show the true consideration, whatever may be that expressed in the deed. Estoppels from contradicting a writing by parol, do not extend to strangers, who have an interest in the truth of the case. *Supreme Ct.*, 1818, *Overseers of New Berlin v. Overseers of Norwich*, 10 Johns., 229.

17. Distinct proof of the value of the consideration is necessary; conjecture that it was worth over \$75 is not enough. *Supreme Ct.*, 1821, *Overseers of Pompey v. Overseers of Laurens*, 19 Johns., 288.

18. Where the consideration fails or proves to be a nullity, so that the contract could not be specifically enforced, the equitable estate is defective, and cannot lay the foundation of a settlement. *Id.*

19. Interest. Where interest is part of the agreement on the purchase, it is a part of the consideration within the statute. *Supreme Ct.*, 1817, *Overseers of Whitestown v. Overseers of Constable*, 14 Johns., 469.

20. Renting. Living on and occupying a farm of the yearly value of \$100, on shares, for two years,—*Held*, a *bona-fide* renting and payment of rent within the act. *Supreme Ct.*, 1817, *Overseers of Fort Ann v. Overseers of Kingsbury*, 14 Johns., 865.

21. Where the produce rendered by the pauper in such case to the landlord did not amount to \$80, in any year except one,—*Held*, that this was not a sufficient renting and payment within the statute. *Supreme Ct.*, 1818, *Overseers of Plattekill v. Overseers of New Paltz*, 15 Johns., 805.

22. Holding office. Serving as constable for part of a year, and then removing from the town and occasionally returning merely to collect fees and settle old accounts, is not such an execution of a public annual office, during one whole year, as to give a settlement under the act. *Supreme Ct.*, 1819, *Overseers of Sherburne v. Overseers of Norwich*, 16 Johns., 186.

23. Derivative settlements—Husband and wife. Where a woman has land in one town and her husband resides in another, her settlement is the latter place. [1 Bl. Com., 854.] *Id.*

24. If a woman having a settlement marries a man who has none, she retains her maiden settlement, and may be removed to it. [Citing 8 Con., N. S., 602; and disapproving 16 Johns., 186.] *Supreme Ct.*, 1827, *Overseers of Otsego v. Overseers of Smithfield*, 6 Cow., 760.

25. Infant. The place of birth of an infant is *prima facie* his settlement, unless it can be shown that the parents had a settlement elsewhere. *Supreme Ct.*, 1819, *Overseers of Vernon v. Overseers of Smithville*, 17 Johns., 89; 1826, *Overseers of Bern v. Overseers of Knox*, 6 Cow., 433.

26. Where a father gains a settlement, his minor child, though not residing with him, or under his immediate charge or control, has a derivative settlement in the same town. *Supreme Ct.*, 1822, *Adams v. Oaks*, 20 Johns., 282.

27. Bastard. Under 1 Rev. L., 280, the settlement of a bastard child is the last legal settlement of the mother. *Supreme Ct.*, 1819, *Overseers of Canajoharie v. Overseers of Johnstown*, 17 Johns., 41. To the contrary was, 1817, *Delavergne v. Noxon*, 14 Id., 338.

28. Emancipation of son. A father who has a legal settlement cannot by emancipation divest the derivative settlement of his unmar-

ried minor son. Such son must have gained a settlement in his own right, or contracted a relation inconsistent with the idea of his being in a subordinate situation in his father's family. [3 T. R., 356; Burr., S. C., 270; 1 Str., 438, 831.] *Supreme Ct.*, 1823, Adams v. Foster, 20 *Johns.*, 452; and see Adams v. Oaks, *Id.*, 282.

29. Parent and child. If it does not appear that a pauper has gained a settlement in his own right, his settlement is that of his father. *So held*, in the case of an adult. *Supreme Ct.*, 1824, Overseers of Niskayuna v. Overseers of Albany, 2 *Cow.*, 537.

30. If the father has no settlement, that of the mother governs. *Supreme Ct.*, 1826, Overseers of Bern v. Overseers of Knox, 6 *Cow.*, 433.

31. Slave. The proper construction of the provisions of 2 Rev. L. of 1813, 206; and 1 *Id.*, 292, in relation to the removal back to the settlement of the master, of slaves who wander from town to town. Overseers of Claverack v. Overseers of Hudson, 15 *Johns.*, 283.

32. Certificate of manumission of a slave, by overseers of the poor,—*Held*, sufficient to charge the town with his support as a pauper, and consequently to exonerate the former owner's executors from liability for his support. *Supreme Ct.*, 1812, Hopkins v. Fleet, 9 *Johns.*, 225.

33. Where a town is divided and each directed by law to maintain its own poor, one who afterwards becomes a pauper is to be deemed settled within that town which embraces the place of his birth; not that where he may have resided at the time of the division. *Supreme Ct.*, 1808, Overseers of Washington v. Overseers of Stanford, 3 *Johns.*, 193.

34. What order is evidence of settlement. The allowance for the support of a pauper, made on inquiry by a justice and overseer,—*Held*, sufficient evidence of his settlement, and that it authorized the overseer to contract for the support of the pauper within its limits. *Supreme Ct.*, 1829, Palmer v. Vandenbergh, 3 *Wend.*, 193.

35. Where an order is appealed from, but the respondent yielding, the appeal is abandoned by consent, the order, though unreversed, is not evidence of the pauper's settlement. *Supreme Ct.*, 1819, Overseers of Vernon v. Overseers of Smithville, 17 *Johns.*, 89; S. P., 1824, People v. Supervisors of Cayuga, 2 *Cow.*, 580.

36. Removal—Commoval stated to have been of "the poormasters," ces may act on informal source, or on their own *Ct.*, 1806, Overseers of seers of Mamakating, 1

37. Adjudication s order of removal must that the pauper had a came last from, the to removed. *Supreme C* Newburgh v. Overseers 380.

38. An order statin not discover that the settlement, and express from S., is a sufficient ize them to order her *Supreme Ct.*, 1806, Ov v. Overseers of Mamak

39. An adjudication that a pauper's legal equivalent to saying, hi *Supreme Ct.*, 1819, O Overseers of Smithville

40. — as to mode c ces ordered paupers t town of W. whence last to be delivered to the from constable to cons be transferred to their tlement, if such could State. *Held*, that the yond the town of W.; place or purpose, was *Supreme Ct.*, 1811, Ov Overseers of Guilderlar

41. Costs. Under s an order of removal, t costs. *Supreme Ct.*, 18 burgh v. Overseers of I

42. Superseding. moval has been made, a and maintained accor taken, the justices by cannot supersede it. *Se* seers of Southfield v. (grove, 2 *Johns.*, 105.

43. Expense of pau moved. To authorize 1 Rev. L., 571, with th unable to be removed, tlement must have be

section 7, by an order of two justices, after an examination of the pauper on oath. *Supreme Ct.*, 1810, Voorhis v. Whipple, 7 *Johns.*, 89.

So, also, in the case of a charge on the county under section 25. *Supreme Ct.*, 1825, *Exp.* Overseers of Gates, 4 *Cow.*, 187; overruling Adams v. Supervisors of Columbia, 8 *Johns.*, 828; *Exp.* Bennet, 1 *Cow.*, 204.

44. Under section 16, such an adjudication, made subsequent to the warrant, does not make it valid. *Supreme Ct.*, 1810, Voorhis v. Whipple, 7 *Johns.*, 89. Otherwise, under section 25, 1829, People v. Supervisors of Oswego, 2 *Wend.*, 291.

45. **Expenses after removal under order subsequently quashed.** After removal of a pauper, the order for his removal was quashed on appeal, but he was so ill that he could not then be carried back. *Held*, that as quashing the order did not establish that the settlement was in the town from which he had been removed, the overseers of that town were not liable on any implied promise to pay his expenses to the overseers of the other town after the order was quashed. *Supreme Ct.*, 1816, Brooks v. Read, 18 *Johns.*, 880.

46. But an action for such expenses may be sustained on allegations that the pauper had no legal settlement within the State, for this shows that the town which obtained the removal unjustly cast the burden on the other. *Supreme Ct.*, 1818, Overseers of Pittstown v. Overseers of Plattsburgh, 15 *Johns.*, 486.

47. On a subsequent trial of this case, it being shown that the pauper had a legal settlement within the State, in a third town,—*Held*, that the overseers were not liable. Their proceedings must be presumed to have been in good faith, and the statute omits to require a town to take back a pauper thus removed. *Supreme Ct.*, 1820, Rouse v. Moore, 18 *Johns.*, 407; and see Grant v. Fancher, 5 *Cow.*, 809.

48. **Order, when not necessary.** Where a pauper has become actually chargeable to a town, an order that he remove to the place of his last legal settlement is not necessary before issuing a warrant. *Supreme Ct.*, 1819, Overseers of Vernon v. Overseers of Smithville, 17 *Johns.*, 89.

49. **Appeal.** Under section 7 of the act,—giving an appeal where a town is aggrieved by an adjudication for removal,—a town cannot be deemed aggrieved where the pauper dies after the order, and no steps have been

taken, and it does not appear that any will be taken, to collect from them the expenses. *Supreme Ct.*, 1823, Adams v. Foster, 20 *Johns.*, 452.

50. **Abandoned appeal.** An order removing a pauper, appealed from, and abandoned by the town removing him, who consent to take back the pauper without trying the appeal, is not conclusive as between that town and the county. *Supreme Ct.*, 1824, People v. Supervisors of Cayuga, 2 *Cow.*, 580.

51. **Effect of the Revised Statutes** on the jurisdiction of the general sessions of appeals then pending from orders of removal. Overseers of Milan v. Supervisors of Dutchess, 14 *Wend.*, 71.

52. **Support.** An order, signed by two justices, to an overseer of the poor, to provide for the maintenance of a pauper, under the laws of Sess. 82, ch. 90, § 1, is valid. *Supreme Ct.*, 1811, Adams v. Supervisors of Columbia, 8 *Johns.*, 823.

53. And though such order does not recite that the justice and overseer inquired into the state and circumstances of the pauper, before giving the order, such an inquiry will be attended to have been made and implied from the order. *Id.*

54. The justice and overseer need not make the inquiry together, for the order is not to be their joint act. *Id.*

55. Under the act of 1809,—authorizing justices to direct the overseers to provide for a pauper,—the justice has a reasonable discretion as to the nature and extent of the weekly allowance; and medicines and the attendance of a physician are chargeable. *Id.*

56. **A statute dividing a town** directed the overseers to divide the money and the poor, and that each town formed by the division should thereafter support their own poor,—*Held*, that an agreement of the overseers not to divide the poor, but that they should be supported by the towns jointly, was unauthorized, and would not support an action by the overseers of one town against those of the other. *Supreme Ct.*, 1820, Overseers of Norwich v. Overseers of New Berlin, 18 *Johns.*, 882.

57. **Default.** If an overseer, summoned to show cause why a warrant of distress should not issue against him for sustenance of a pauper, omits to appear, he cannot appeal from the adjudication made. The principle that a

judgment by default for want of appearance is, for this purpose, equivalent to a judgment on confession, should be applied to all judicial proceedings, where an appeal is allowed. *Supreme Ct.*, 1822, *Adams v. Oaks*, 20 *Johns.*, 282.

58. Slave. Under the laws of 1817, ch. 187, § 7,—making a person manumitting a slave liable for his maintenance in case he becomes a charge,—no adjudication of settlement is necessary to make it the duty of overseers to relieve him, and to look to the former master for reimbursement. *Supreme Ct.*, 1827, *Warren v. Brooks*, 7 *Cow.*, 218.

59. Support out of poor-house. In counties which have adopted the county poor-house system, an account for supporting a pauper out of the poor-house, in pursuance of a justice's order, need not be audited by the town auditors before allowance by the board of supervisors. *Supreme Ct.*, 1828, *People v. Supervisors of Washington*, 1 *Wend.*, 75.

60. Contracts for the support of a pauper for an indefinite period, are revocable. *Supreme Ct.*, 1829, *Palmer v. Vandenberg*, 8 *Wend.*, 198; 1833, *McLees v. Hale*, 10 *Id.*, 426.

61. By the act of 1824, paupers must be supported by the county in which they happened to be on the day that act took effect. *Supreme Ct.*, 1829, *Palmer v. Vandenberg*, 8 *Wend.*, 198.

62. Testimony of overseer. The Court of Sessions ought not to compel one of the overseers, who is a party to an appeal, to testify before them; but as their proceedings are not before a jury, their doing so is not a ground for reversing their order. *Supreme Ct.*, 1818, *Overseers of Plattekill v. Overseers of New Paltz*, 15 *Johns.*, 805.

63. Matters of form in orders for the relief of paupers,—to be overlooked. *Adams v. Supervisors of Columbia*, 8 *Johns.*, 828.

64. The supervisors of a county are not bound to allow a charge for services relative to a pauper, unless a previous order of a justice has been obtained, or the services were rendered upon the request of the overseers of the poor, and the account presented to them for payment. *Supreme Ct.*, 1821, *Hull v. Supervisors of Oneida*, 19 *Johns.*, 259.

65. Liability of overseers. An overseer of the poor, who with control of the property of a pauper, and as a trustee with the fund in hand, promises in writing to pay a debt, is bound

to pay it. [7 *Johns.*, 99 *Holly v. Rathbone*, 8 *J.*

66. Overseers of the any case for supplies without their request, a quent promise to pay authorize them to ma without an order of a ju not be deemed bound t law will faise no implied *Ct. of Errors*, 1825, *Go* 644; *Flower v. Allen*, effect, 1815, *Everts v. A*

67. A physician can overseers for his service rendered at their reques quently promised to pay *Everts v. Adams*, 12 *Joh*

68. It is no defence to overseer of the poor, for by plaintiff to a pauper overseer, and on his prom plaintiff paid, that no o the pauper had ever been 1818, *King v. Butler*, 10 pare *Olney v. Wickes*, 1 *Fancher*, 5 *Cow.*, 809.

69. An action on the c overseers of the poor for to apply to a justice of t to provide for a paupe from motives of humanity *Supreme Ct.*, 1826, *Minl Cow.*, 276; and see *Pal* 8 *Wend.*, 198.

70. Contracts. Over power to bind themsel tract, and these contract their authority, are bin successors. *Supreme C* *Vandenberg*, 8 *Wend.*,

71. A mandamus will of the party, to compel t county to audit and pay not been adjusted and p in pursuance of the justi *Ct.*, 1811, *Adams v. Sup* 8 *Johns.*, 828.

II. UNDER THE RE

72. Parents and chil support each other. *Moc* 1 *Rev. Stat.*, 614. § 1. **CON** PARENT AND CHILD.

73. That ability to support may consist in ability to earn by daily labor, but in such a case, where the court ordered several sons to contribute to the father's support, it refused to make the order bind them jointly. *Bernardus v. Williamson*, 1 *Wheel. Cr.*, 234.

74. Other remedy. The superintendents of the poor are not bound, before proceeding to compel a relative of a poor person to support such poor person, to resort to a bond given by another relative for the support. *Gen. Sess.*, 1845, Anonymous, 3 *N. Y. Leg. Obs.*, 854.

75. Where there is a relative of a poor person of sufficient ability to support such person, it is not necessary that the superintendent of the poor should make an order as to the manner in which such relative should contribute to such support, before making an application to the general sessions for an order to compel the relative to afford relief. *Id.*

76. Offer to comply. Where a son is ordered, by the Court of Sessions, to support his indigent mother, he performs his duty by providing accordingly, and being ready and willing to support her. If she leaves him without just cause he is not bound to bring her back. It is enough if he gives the superintendents of the poor notice that he is ready to receive her. *Supreme Ct.*, 1854, *Converse v. McArthur*, 17 *Barb.*, 410.

77. Husband and wife. A summary application to the Court of General Sessions does not lie, under the statute, to compel a husband to support his wife. The statute only applies to parents and children. *Chancery*, 1840, *Pomeroy v. Wells*, 8 *Paige*, 406.

78. Superintendents of the poor cannot maintain an action against a husband for the support of his wife as a pauper, which they provided because he had expelled her from his house without just cause, and refused to provide for her, though of sufficient ability to do so. Though he is liable for her necessities, the officers of the poor cannot regard her as a pauper while her husband is abundantly able to support her. *Supreme Ct.*, 1854, *Norton v. Rhodes*, 18 *Barb.*, 100.

79. Absconding parent or husband. When a parent absconds leaving children, or a husband his wife, so that they are likely to be chargeable to the town, an attachment may issue against property. 1 *Rev. Stat.*, 615, § 8.

80. Wife's testimony. A warrant against

a person said to have absconded, leaving his wife or children chargeable to the public, granted upon the testimony of the wife, is not void. *Supreme Ct.*, 1839, *Downing v. Rugar*, 21 *Wend.*, 178.

81. Confirming warrant. Where a warrant is issued by justices, on the application of the overseers of the poor, against the property of an absconding husband and father, under 1 *Rev. Stat.*, 615, § 8, and return is made to the Court of General Sessions, that court has no authority to confirm such warrant and seizure without an inquiry into the facts and circumstances of the case. The mere production of the warrant and return is not enough. The court should require the overseers to produce some evidence to establish the case charged in the warrant against the party whose property is seized, and the case may be contested by such party. *Supreme Ct.*, 1856, *People v. Overseers of Triangle*, 28 *Barb.*, 236.

82. If a lunatic wife is chargeable, the superintendents of the poor must exhaust their remedy by action against the husband, before they can proceed against him in equity. *Chancery*, 1840, *Pomeroy v. Wells*, 8 *Paige*, 406.

83. Bastard. The act of 1838,—providing that on a compromise by the superintendents of the poor with the putative father of a bastard, the mother of the child, on indemnifying the town or county, should be entitled to the money,—is both by its words and on general principles to be deemed prospective, and she is not entitled to money paid previous to the act. *Supreme Ct.*, 1842, *People v. Superintendents of Seneca*, 3 *Hill*, 116.

84. For the present statutes regulating the support, &c., of the poor, and the powers of the officers employed, see 2 *Rev. Stat.*, 5 ed., 838-878.

85. Where a lunatic is to be supported as a pauper, either in or out of the county poor-house, the overseers of the poor of the town should proceed to inquire into the circumstances and make an order for relief [§ 89], after which the superintendents of the county poor-house may provide for the support of such lunatic pauper out of the poor-house, if they think proper. [§ 78.] *Chancery*, 1840, *Pomeroy v. Wells*, 8 *Paige*, 406.

86. Audit. The provision of 1 *Rev. Stat.*, 2 ed., 686, § 62,—requiring the superintendents to audit, &c., all accounts of overseers, &c., and "all other persons," for services relating to the poor,—does not require the audit of ac-

counts of individuals dealing with the overseers in the several towns. They should first be adjusted by the overseer, and charged in general account. *Supreme Ct.*, 1848, *Exp. Green*, 4 *Hill*, 558.

87. The abolition of the distinction between county and town poor is not effected by merely passing a resolution to that effect; but to effect it the supervisors must file their determination, duly certified by the clerk of the board, with the county clerk. [1 *Rev. Stat.*, 620, § 24.] *Supreme Ct.*, 1846, *Thompson v. Smith*, 2 *Den.*, 177. Compare *Baldwin v. McArthur*, 17 *Barb.*, 414.

88. Excise moneys. After the distinction is abolished, the town commissioners of excise must pay over excise moneys to the county treasurer, if they are in any way notified of the change, though the clerk of the board has neglected to serve a copy of the resolution on the clerks of the several towns. The statute, though imperative upon the clerk, is directory as to others. *Supreme Ct.*, 1846, *Thompson v. Smith*, 2 *Den.*, 177.

89. Liability for pauper removed. Under 1 *Rev. Stat.*, 633, §§ 63-65,—to make a county chargeable with the maintenance of a pauper who has been removed or enticed from it to another county,—the removal must be such as would subject the person concerned in it to the penalties imposed by section 63. The statute is not to be construed to prevent a destitute person, or one who happens to be disabled while temporarily residing in one county, from returning to his friends in another. *Supreme Ct.*, 1840, *Coe v. Smith*, 24 *Wend.*, 341.

90. Penalty for removing. Under the act of 1831, 846, § 1 (same stat., 1 *Rev. Stat.*, 796, § 69),—imposing a penalty on any person bringing a pauper from another State into a town or county of this State, with intent to make it chargeable with the pauper's support,—it is not a defence that the pauper's last legal settlement was in such town or county, and that such person brought him there under the authority of another State. *Supreme Ct.*, 1847, *Winfield v. Mapes*, 4 *Den.*, 571.

91. Physician. An overseer, in giving temporary relief to a pauper, is not bound to employ, in case of illness, the physician employed by the county superintendents. *Supreme Ct.*, *Sp. T.*, 1851, *Gere v. Supervisors of Cayuga*, 7 *How. Pr.*, 255.

92. Attorney in suit for penalty. Where

a third person, on g under the act of 1846 the name of the overseer, in case he receives the p the attorney of the o liable to him for his e 1851, *Wright v. Smith*,

93. Temporary relief. If an overseer, in relief to a pauper, exceeds dollars, he does so on l and the board of superv audit and allow a judgment more than that sum, and to do so by mandamus. 1851, *Gere v. Supervisors Pr.*, 255.

94. Title of order. for an order of maintenance to and granted by the Ct Lawrence county, but it purported to be made b of Sessions,"—*Held*, in order, that the word "ordered as mere surplusage, error having been made entered. [5 *How. Pr.*, 8 *Baldwin v. McArthur*, 1

95. Poor-house fund ting to the support of the houses furnish no authority between county and to the application of the house farm. On the col intended the income sh support of the poor of the poor-house, without Stat., 618.] *Supreme Ct.* *ester v. Supervisors of L*

96. Judgment against 2 *Rev. Stat.*, 475, § 10 the overseers of the poor collected of the town there was no distinction town and county poor. 1856, *People v. Supervisors How. Pr.*, 50.

97. Support out of power conferred upon the agents, to support and maintain must be exercised by the county poor-house, or may be provided for the

Pork.

Port-wardens.

PORK

INSPECTION.

PORT-WARDENS.

1. **Act of 1819.** The powers given to the master and wardens of the port of New York by the Laws of 1819, ch. 18, § 5, were in the nature of a franchise, and exclusive. The assumption, by another person, of their functions without authority of law, is an usurpation which the Court of Chancery will restrain. *Chancery*, 1846, *Tyack v. Brumley*, 1 *Barb. Ch.*, 519.

2. The master and wardens are not *ex officio* surveyors of damaged goods imported into the city of New York, except where the goods are required to be sold, by the owner or consignee, on account of such damage, and for the benefit of underwriters who do not reside in New York; although the statute does not prohibit the master and wardens from acting as surveyors in cases not mentioned in the act of 1819. *Id.*

3. **Intended voyage.** The exclusive power to survey vessels and judge of the repairs necessary for safety "on the intended voyage,"—is to be construed strictly, as it is in derogation of common right; and must be limited to cases where a particular voyage is contemplated. The survey, by a private person, of a vessel just arrived from abroad in a damaged state, before the discharge of her cargo, and before a new voyage is determined upon, with a recommendation of repairs, is not a violation of the act. Nor is such an examination and a recommendation of some repairs, and that her bottom should be examined, concerning a vessel that puts into the port in distress, on her voyage between foreign ports, for here is no determination of repairs necessary for the voyage. *N. Y. Superior Ct.*, 1850, *Port-wardens of N. Y. v. Cartwright*, 4 *Sandf.*, 236.

4. The act reorganizing the board of wardens of the port of New York (*Laws of 1857*, ch. 405), does not prohibit any person interested in a vessel or cargo from procuring an examination thereof, for his own information or benefit, by any agent he may select. But employing persons, not port-wardens, to make surveys and issue certificates thereof,

not exclusively for the ties by whom they were made, is one in particular for which the certificates being the certificates of persons professing to be port-wardens, which would have been certificates issued by the port-wardens of the act. *Ot. of A. J. Tapscott*, 17 *N. Y.* (8).
5. It is a violation of the duties prescribed for the port-wardens to act in the case. *Id.*

POSSESSION.

1. Form prescribed. and see *Code of Proc.*, §§

2. Where there is a writ of possession, the premises, the must be guided by the case of *Jackson v. Rathbone*,

3. After order for a writ of possession, judgment recovered on such new trial or order on him to a writ of possession, § 87, if his judgment was not have it. *Suprem. Ct. v. Forkson*, 7 *Hill*, 19.

4. Nor could he have a writ of possession, or one who has the foreclosure of his mortgage.

5. That after the execution of a writ of possession, as laid in the declaration, to enforce his judgment, *Jackson v. Haviland*,

6. Second execution of a writ of possession was issued, and a year after it was returned, and the tenant in the premises,—*Held*, that a second execution with a first execution might be returned down on the roll, and it was a mere matter of form, and have been entered. *Jackson v. Stiles*, 9 *Johns.*
nigal v. Smith, 6 *Id.*,

7. If after the writ of possession is issued, the defendant is dispossessed by the plaintiff, an alias writ of possession may be issued.

Powers relating to Real Property, and Powers of Attorney;—In General.

seems, that the writ may be without a return-day, so that it might be re-executed. *Supreme Ct.*, 1834, Jackson v. Hawley, 11 *Wend.*, 182.

8. **Restitution.** Where the plea and consent rule in ejectment, by a mistake never reached plaintiff's attorney, judgment by default and writ of possession were set aside, and a writ of restitution ordered on payment of costs. *Supreme Ct.*, 1804, Jackson v. Stiles, 1 *Cai.*, 508; S. P., 1809, The same v. The same, 4 *Johns.*, 489.

9. **No tenant, who was in possession anterior to the commencement of an ejectment, can be dispossessed upon a judgment and writ of possession to which he is not a party.** If one, whose possession was distinct from that for which the action was brought, is turned out, he may have a writ of restitution. *Supreme Ct.*, 1804, *Exp.* Reynolds, 1 *Cai.*, 500.

10. **Writ stayed till payment for improvements (under Confiscation Act of 1784).** Jackson v. Munson, 1 *Johns.*, 277.

POSTMASTER.

1. **Liability.** A postmaster should not be held liable to a private person for loss of mail matter by the malfeasance or embezzlement of his clerks. It is the better opinion that he is not liable even for their negligence; for as a public officer he is not subject to the rule *respondet superior*. *Supreme Ct.*, 1849, Wiggins v. Hathaway, 6 *Barb.*, 682.

2. **Keeping the post-office in a room partly used for other business is not of itself negligence.** *Ib.*

3. **Even if he were liable for the negligence of his clerks, the plaintiff must be held to strict proof.** *Ib.*

4. **A postmaster is not liable to a private action for refusing to receive plaintiff's proofs of the circulation of their newspaper, and to employ them to publish the list of letters, in violation of the act of Congress.** *Supreme Ct.*, 1851, Strong v. Campbell, 11 *Barb.*, 185.

5. **— of representatives.** An action on the case will not lie against the representatives of a deceased postmaster for money feloniously taken out of a letter by one of his clerks. The cause of action, if any, does not survive. *Supreme Ct.*, 1806, Franklin v. Low, 1 *Johns.*, 396.

6. **Accounts.** An account of a postmaster with the United States, audited and settled by the auditor of the treasury for the post-office

department under section 8 of the act of July 2, 1836, is conclusive against the United States as to the credits of the postmaster, unless appealed from within a year. *Supreme Ct.*, 1848, Haddock v. Kelsey, 3 *Barb.*, 100.

POUNDS.

1. **Cattle, damage feasant, cannot be impounded until the damage has been ascertained and appraised by two fence-viewers under the statute; and if they are, the party is a trespasser *ab initio*.** *Supreme Ct.*, 1807, Pratt v. Petrie, 2 *Johns.*, 191; 1818, Sackrider v. McDonald, 10 *Id.*, 258; Hopkins v. Hopkins, *Id.*, 869; 1816, Merritt v. O'Neil, 18 *Id.*, 477; and see Palmer v. West, 12 *Id.*, 186.

And this though the pound-master is the owner of the cattle. 1816, Merritt v. O'Neil, 18 *Id.*, 477.

2. **Mere neglect to have the damage appraised within the statute time does not render the party a trespasser *ab initio*, but he forfeits the right to detain the animals.** *Supreme Ct.*, 1838, Hale v. Clark, 19 *Wend.*, 493.

3. **Present regulations respecting strays and pounds.** 1 *Rev. Stat.*, 851; *Laws of 1862*, 844, ch. 459.

POWERS.

I. POWERS RELATING TO REAL PROPERTY, AND POWERS OF ATTORNEY.

1. *In general.*

2. *Revocation. Failure.*

3. *Interpretation and effect of powers.*

4. *Execution.*

5. *Powers given to or by married women.*

II. EXERCISE OF LEGAL POWER VESTED IN TWO OR MORE PERSONS.

I. POWERS RELATING TO REAL PROPERTY, AND POWERS OF ATTORNEY.

1. *In General.*

1. **By the provisions of the Revised Statutes, powers relating to lands, other than mere powers of attorney, as then existing (1st January, 1830), were abolished, and specific and detailed regulations prescribed for the creation, construction, and execution thereof, which provisions should be consulted in connection with this article.** 1 *Rev. Stat.*, 732.

As to Powers in Trust, see TRUSTS.

2. Covenant. Of the creation of powers by covenant to stand seized, and of the execution thereof. *Brant v. Gelston*, 2 *Johns. Cas.*, 884.

3. Power coupled with interest. A naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In a mortgage of lands, a power to the mortgagee to sell on default of payment, is a power coupled with an interest, and is not revoked by the death of the mortgagor. A power simply collateral and without interest, or a naked power, is when, to a mere stranger, authority is given of disposing of an interest, in which he had not before, nor hath, by the instrument creating the power, any estate whatsoever. But when power is given to a person who derives, under the instrument creating the power or otherwise, a present or future interest in the land, it is then a power relating to the land. These last powers are subdivided into powers annexed to the estate, and powers in gross. Both are considered as powers with an interest, because the trustee of the power has an interest in the estate, as well as in the exercise of the power. If the person clothed with the power hath at the same time an estate in the land, the power is not collateral, because it savors of the land, and a power simply collateral is but a bare authority to a stranger, who has not, nor ever had, any estate whatsoever. *Ct. of Errors*, 1804, *Bergen v. Bennett*, 1 *Cai. Cas.*, 1.

4. A power of attorney to sue a third party, on a covenant which the grantor of the power had agreed that the grantee should have the benefit of as a security for his indemnity, is a power coupled with an interest, and is not revocable. *Supreme Ct.*, 1814, *Raymond v. Squire*, 11 *Johns.*, 47.

5. A power to sell personal property for security and indemnity of the grantee of the power and others, if accompanied by possession, survives. [1 *Cai. Cas.*, 1; 11 *Johns.*, 53.] *Chancery*, 1848, *Knapp v. Alvord*, 10 *Paige*, 205.

6. Power coupled with trusts. A naked power to sell, conferred on persons named as executors, does not, at common law, survive. But if executors having a power to sell, are vested with any interest, legal or equitable, in the estate, the power survives. So, also, even where the terms used in creating the power,

detached from the one who is to confer merely a naked power, the other provisions of the will, the testator then is to be sold, in order to the intent of the will, the executors. In this latter power, but is coupled with duties which require power to sell. [Wm. 282; Pow. on Dev., 1; Cro. Oh., 882; Cro. El. 141; 8 Binn., 69.] *Ct. lin v. Osgood*, 14 *Johns.* 2 *Johns. Oh.*, 1. Follow *Jackson v. Burtis*, 14 *J. son v. Ferris*, 15 *Id.*, 8. Compare, however, *Hill*, 861; where the power coupled with an interest in the estate, was held not to act as to the residue.

7. Power to any t *vivor.* The will directs any two of them, to sell the estate, and divide the proceeds. After the death of the executors, the survivor that as the executor has an interest in the avails, to which with an interest, and well executed. The will the will are controlled by *L. of 1818*; 2 *Rev. Stat.* provides that all sales will to be sold, &c.) by the executors, who take charge of the will, shall be of the residue of the executors sale. *Supreme Ct.*, 1816 *Johns.*, 167.

8. Acting executor power, by one of several not having qualified, is *Ct.*, 1849, *Meakings v.* 512; 8 *O. & N. Y. Leg.*

For Other cases on executors and administrators

9. Several must un *Rev. Stat.*, 785, § 112, — vested in several persons

* Affirmed on other point. *S. C.*, 10 *N. Y. Leg. Obs.*, 1.

execution, but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors,—does not apply to the case of executors renouncing. [2 Rev. Stat., 71.] *Chancery*, 1880, *Ogden v. Smith*, 2 *Paige*, 195; and see *Matter of Van Wyck*, 1 *Barb. Ch.*, 565.

10. Power not to be delegated. A power given to executors to sell, is a personal trust and confidence, and they cannot sell by attorney. [9 Co., 75; 2 Atk., 88; 2 Ves., 648; 1 Id., 417; 2 Sch. & Lef., 380; 8 East, 410; Sugd. on Pow., 167.] Thus, where executors were authorized to sell land, if under the circumstances of the times, they should deem it prudent, and one, having gone abroad, sent a power of attorney to the other to sell on such terms as he should deem expedient;—*Held*, that an agreement for the sale, entered into by the latter, for himself and the other, was not valid. *Chancery*, 1820, *Berger v. Duff*, 4 *Johns. Ch.*, 868. Compare *Sinclair v. Jackson*, 8 *Cow.*, 548. See, also, EXECUTORS AND ADMINISTRATORS.

11. A trustee who has only a delegated discretionary power cannot give another a general authority to execute the same, unless he is specially authorized to do so by the deed or will creating the power. If the power be to sell lands, he cannot give a general authority to an agent to sell and convey, or to contract absolutely for a sale; though he may empower the agent to contract, subject to his ratification, and to convey after ratification; but the better practice is for the trustee to execute the conveyance himself. *Chancery*, 1885, *Hawley v. James*,* 5 *Paige*, 318.

12. A power given by an heir, reciting that upon the death of his ancestor he became seized, &c., and authorizing the attorney to convey,—Held, not operative because the heir was not, in fact, seized, but only had a beneficial interest. *A. V. Chan. Ct.*, 1843, *Lord v. Underdunk*, 1 *Sandf. Ch.*, 46.

2. Revocation. Failure.

13. The death of an attorney authorized to appoint an attorney under him, and to revoke such appointment at his pleasure, necessarily revokes the power of a substitute so appointed. *Chancery*, 1847, *Watt v. Watt*, 2 *Barb. Ch.*, 371.

14. When effectual. A revocation of a power takes effect, as to the agent, from the time that it is communicated to him, and, as to third parties, from the time that it is made known to them; but, as respects third persons, the question of notice depends in each case upon its own peculiar circumstances. [Reviewing many cases.] *A. V. Chan. Ct.*, 1840, *Williams v. Birbeck*, *Hoffm.*, 359.

15. Failure of intent. Where the intent of a power to sell, devised by will to executors, wholly fails, the power fails. Thus where the great object of a power was to make a provision for life for the testator's widow,—*Held*, that the power not having been exerted in the widow's lifetime, it could not be exerted at all. *Supreme Ct.*, 1810, *Jackson v. Jansen*, 6 *Johns.*, 78. Followed, *V. Chan. Ct.*, 1845, *Slocum v. Slocum*, 4 *Edw.*, 613.

16. So where the intended dispositions of the proceeds of the sale are to a great extent rendered impossible,—*e. g.*, by the operation of rules of law, or by the death of beneficiaries,—the power fails, and a sale is invalid. *Ct. of Errors*, 1824, *Sharpsteen v. Tillou*, 8 *Cow.*, 651.

17. A power to sell and apply the proceeds for the support of A. and his family during his life, with a direction to pay the residue, if any, to his heirs, continues after A.'s death. *Supreme Ct.*, 1842, *Welch v. Silliman*, 2 *Hill*, 491; qualifying a previous decision in *S. C.*, *sub nom.* *Welch v. Allen*, 21 *Wend.*, 147.

3. Interpretation and Effect of Powers.

18. Powers of attorney are to be strictly construed. *N. Y. Com. Pl., Sp. T.*, 1859, *Ferreira v. Depew*, 17 *How. Pr.*, 418.

19. Power to sell and convey. A power to sell, and on such sale to execute in the name of the principal, such conveyances and assurances in the law of the premises as needful or necessary according to the judgment of the attorney, does not authorize the attorney to execute a deed with covenants so as to bind the principal. *Supreme Ct.*, 1809, *Nixon v. Hyserott*,* 5 *Johns.*, 58. Followed, 1811, *Gibson v. Colt*,† 7 *Id.*, 390.

20. A power to bargain, sell, convey, and

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

† As to this case, compare, however, the cases collected under PRINCIPAL AND AGENT.

* Reversed on other grounds, 16 *Wend.*, 61.

assure, authorizes the execution of a lease or a covenant for a future conveyance in fee simple. It is a good execution of a power if it pursues the intent and design, though not according to the direct terms of it. [Sugd. on Pow., 446.] The greater includes the less. *Supreme Ct.*, *Williams v. Woodard*, 2 *Wend.*, 487; and *Wilson v. Troup*, 2 *Cow.*, 195; affirming *17 Johns. Ch.*, 25. Compare *Contant v. Voss*, 8 *Barb.*, 128; but see *infra*, 21.

21. — does not empower to mortgage. A power to sell and convey does not in itself confer a power to mortgage. There is a substantial difference between raising money by mortgage and sale; and it is enough to say that a power to raise it by one of these modes puts a negative on the other. [Qualify in several cases.] *Supreme Ct.*, 1842, *Bloomer v. Waldron*, 8 *Hill*, 861; 1848, *Contant v. Servoss*, 8 *Barb.*, 128.

Approved and followed, *A. V. Chan.* 1848, *Cumming v. Williamson*, 1 *Sandf.* 17.

22. Power to sell and dispose of such property (in fee-simple or otherwise), as A. by will should request, does not include a power to mortgage. [1 *Sandf. Ch.*, 17; 1 *Hill*, 111 *Id.*, 861.] *Ct. of Appeals*, 1850, *Albany Ins. v. Bay*, 4 *N. Y. (4 Comst.)*, 9.

23. And, a mortgage given where the power does not authorize it, being void, a subsequent deed by the grantee of the power, confirming a foreclosure-sale, is void also. *Supreme Ct.*, 1842, *Bloomer v. Waldron*, 8 *Hill* 861.

24. — exceptions. But where one receives a deed with power to sell for the benefit of another, and at the same time executes a mortgage for the purchase-money, the mortgage is valid, for it is a part of an entire transaction, and is an inseparable qualification of the conveyance. *Supreme Ct.*, 1848, *Contant v. Servoss*, 8 *Barb.*, 128.

25. That where full power is given to dispose of the estate after the death of the grantor, and also, during his life, with his assent, a mortgage by both is a good execution. *Supreme Ct.*, 1850, *Campbell v. Low*, 9 *Barb.* 585.

26. Power to sell at auction, or otherwise together or by parcels, on giving three weeks' notice thereof,—*Held*, to require notice in case of sale by public auction. *Chan.* 1821, *Minuse v. Cox*, 5 *Johns. Ch.*, 441.

Powers relating to Real Property, and Powers of Attorney;—Execution.

under a power to lease for a number of years, a second lease can be made to commence after the expiration of a subsisting term, the residue of the existing term and the future term must not together exceed the power; if they do, the lease is utterly void at law. *Ct. of Errors*, 1826, *Sinclair v. Jackson*, 8 *Cow.*, 543.

35. — to draw and indorse. A power of attorney, among other things, to draw and indorse notes, &c., being apparently designed to enable the attorney to carry on the grantor's mercantile business in his absence, is limited to notes to be used in that business; though *bona-fide* holders of notes not so used may be protected. *Supreme Ct.*, 1842, *North River Bank v. Aymar*,* 3 *Hill*, 262.

36. — to conduct business. A power of attorney given by a merchant, "generally to conduct in my place and stead my commercial business, and to sign my name whenever requisite or expedient in the transaction and conduct of such business as to my said attorney shall seem meet in his good discretion," authorizes drawing bills on drawees who had no effects of the principal. *Supreme Ct.*, 1845, *Dollfus v. Erosch*, 1 *Den.*, 367.

37. A power of attorney "to buy and sell real estate and personal property, and to collect rents, money, and debts, and to do every act and thing necessarily pertaining thereto," and given as the principal was about to leave the State temporarily, and accompanied with a deposit by the principal of \$1,800 in money with the agent,—*Held*, not to authorize the agent to purchase a merchant-tailor's establishment, and give notes in the principal's name therefor. *N. Y. Superior Ct.*, 1857, *Mills v. Oarnly*, 1 *Bow.*, 159.

38. A general power of attorney, given by a member of a firm to one of his copartners, to transact all his business in the city of New York, of whatsoever name, nature, or description the same might be, whether relating to him as a member of the firm, or in his individual capacity, does not authorize the attorney to transfer the individual property of the grantor of the power to trustees, for the payment of his debts. [7 *B. & C.*, 278; 1 *Taunt.*, 847; *Pal. on Ag.*, 192.] *N. Y. Com. Pl., Sp. T.*, 1859, *Ferreira v. Depew*, 17 *How. Pr.*, 418.

39. — to give bond, &c. A power, among other things, to execute any bond, warrant, or other writing, in the name of the principal, the object of power being to secure debts of the principal, authorizes the attorney to give a warrant of attorney to confess judgment. *Supreme Ct.*, 1840, *North River Bank v. Rogers*, 22 *Wend.*, 649. Compare *Rossiter v. Rossiter*, 8 *Id.*, 494.

40. — to bind assets. A power to perform contracts of the testator for the sale of lands by conveying with covenants, and to bind the estate and assets therefor,—*Held*, to be limited to the consideration, whether in money or securities, which the executors might receive under each contract respectively. *Supreme Ct.*, 1853, *Hunter v. Hunter*, 17 *Barb.*, 26.

41. General power. A power given by a plaintiff in an action, simply appointing an attorney with a general clause giving full power and authority to do whatever the former might do in the premises, ratifying and confirming, &c., is sufficient to authorize such attorney to release the action. *N. Y. Com. Pl., Sp. T.*, 1859, *Ferreira v. Depew*, 17 *How. Pr.*, 418.

As to Powers of sale in mortgages, see FORECLOSURE; and MORTGAGE.

4. Execution.

42. Compliance with conditions. To the due execution of a power, there must be a substantial compliance with every condition required to precede or accompany its exercise. [*Ohan. on Pow.*, 172, § 454; 1 *Rev. Stat.*, 737, § 121.] Under a power to executors "to sell the real and personal estate in such parcels and at such times and for such considerations as they should judge proper for the purpose of discharging debts (of the testator), and creating funds for the support of my family;"—with a direction that "after my debts shall have been paid, the avails of my property shall be equally divided among all my children,"—the executors have no authority to convey a parcel of the land, before payment of debts, directly to one of the children to apply on his distributive share; nor, it seems, could this be done after payment of debts; but the land must be sold for money, or funds for distribution, under the will. *Ct. of Appeals*, 1850, *Allen v. De Witt*, 8 *N. Y. (8 Comst.)*, 276.

43. That where the claim of title to real es-

* See this case in table of CASES CITED, Vol. I., *Ante*.

tate is solely through a power, it must, in order to be sustainable, be proved that such power was duly executed. If it is qualified by a condition precedent it must appear that the condition was performed, or the attempted exercise of it will prove ineffectual. *Supreme Ct.*, 1858, *Cleveland v. Boerum*, 27 *Barb.*, 252; affirming S. C., 28 *Id.*, 201; 3 *Abbotts' Pr.*, 294.

44. **Sale under power in mortgage.** Under the provisions of 2 *Rev. Stat.*, 545 (and see 1 *Rev. L.*, 374, §§ 5, 6),—prescribing the mode in which mortgaged premises shall be sold by virtue of a power contained in the mortgage,—the sale, in order to bar the right of redemption, must be made at public auction, and after notice, as prescribed by the statute, even though the power contained in the mortgage expressly authorizes the mortgagee in case of default, to sell “either by public auction or at private sale.” The provisions of these statutes and their whole policy are incompatible with the right of the parties to regulate the mode of sale under powers of this description by their own contract. *Ct. of Appeals*, 1855, *Lawrence v. Farmers' Loan & Trust Co.*, 13 *N. Y. (3 Kern.)*, 200; and see *Id.*, 642.

45. **Designation of persons.** A power may be valid, though the persons to execute it are not designated. Its execution devolves on the Court of Chancery. [1 *Rev. Stat.* 784, §§ 94–101.] *V. Chan. Ct.*, 1839, *Crocheron v. Jaques*, 3 *Edw.*, 207.

46. A devise directing lands to be sold and the proceeds to be divided among, &c., is a devise of money and not of land, and is therefore good, notwithstanding it be to aliens. It is good as a power to the executors to sell, although they are not expressly named as the donees of the power. Section 101 of the Statute of Powers (1 *Rev. Stat.*, 784),—which devolves the execution on chancery when a person is not designated,—does not require that the designation should be by express words; but it may be by implication. In selling under such a power the executor acts in his character as such and not as trustee. *Ct. of Appeals*, 1851, *Meakings v. Cromwell*, 5 *N. Y. (1 Seld.)*, 186; S. C., 10 *N. Y. Leg. Obs.*, 201; affirming S. C., 2 *Sandf.*, 512; 8 *N. Y. Leg. Obs.*, 140.

47. **Witnesses.** A power, the execution of which was required to be signified by an

instrument in writing;—*Held*, well established in the presence of *preme Ct.*, 1814, *Jackso* 169.

48. The omission of deed of appointment or required by a power, non-execution, and vitiation, so as to render the chaser. It is at the execution which the co-ovor of a purchaser for a [Sugd. on Pow., 356, 1 Ambl., 694.] *V. Chan. Ellingwood*, 3 *Edw.*, 171.

49. **Recital of power.** power does not fail because of the power. [6 O 300; 8 Ves., 609.] *Ch. v. Gibbs*, 3 *Johns. Ch.*, 5 *Chan. Ct.*, 1839, *Heyer* See, also, *Van Wert v.* 114.

50. A trustee having with express power or does not express the trust in sion in the deed to him may be regarded as m *preme Ct.*, 1834, *Brad Wend.*, 602; and see 1 *E*

51. **When the consent required to the execution of the power must be strictly on Vend., 319; *Pres. Ch* whose consent is necessary for the execution of the power assented, the power is good was the act of God. [D. 62, pl. 172; *Wilm.*, 36.] sent of several persons of one of them destroys consent of the survivor words of the power. [1 38; *Dyer*, 189, b; *Wilm.*, 1854, *Barber v. Cary*, 11**

52. The provision of 1 (*q. v.*, *supra*, 9), is applicable of a power, not to the power it is to be executed.

53. The provision of consent of a third person be expressed in or indors —applies where such th

quent ratification by him, of the act of the majority does not render the act valid. There must be a joint consultation by all of them. *Supreme Ct.*, 1856, *Keeler v. Frost*, 22 *Barb.*, 400.

91. School-district officers. The provision of 1 Rev. Stat., 555, § 27, is applicable to the action of trustees of school districts in the discharge of their official duties [4 *Den.*, 125], and two trustees of a school district cannot act as such in the performance of their duties, excepting upon a meeting of all three, whether the third one refuses to act or not. *Supreme Ct.*, 1857, *Whitford v. Scott*, 14 *Hov. Pr.*, 302. Compare *Horton v. Garrison*, 23 *Barb.*, 176; *infra*, 94.

92. The remedies against one who refuses to act, stated. *Whitford v. Scott*, 14 *Hov. Pr.*, 302.

93. That the fact that the officers signing an order consolidating school districts met at the time, may be presumed, and the order held valid, though recorded in only one town. *Supreme Ct.*, 1847, *Stevens v. Newcomb*, 4 *Den.*, 487.

94. Refusal to attend. The rule that when an authority is to be exercised by several officers, they must all concur in its exercise, or all meet and consult, and a majority agree to the act (2 *Rev. Stat.*, 555, § 27), is subject to the qualification that if one is notified to attend, and refuses, it is the same as if he had attended and dissented to the act of the majority. [9 *Wend.*, 17.] *Supreme Ct.*, 1856, *Horton v. Garrison*, 23 *Barb.*, 176; and see *People v. Walker*, 23 *Id.*, 304; S. C., 2 *Abbotts' Pr.*, 421.

95. Notice. Where a power is to be exercised by several persons, a majority of the whole number may proceed to act, and their action will be legal, provided all the members composing the body were summoned to attend, or had notice of the time and place of meeting. The right to have such notice is one which the majority cannot take away from the minority. All comprising the body are entitled to reasonable notice of the time and place of the meeting,—*e. g.*, two days where all reside in one city. [1 *Bos. & P.*, 236; 6 *Johns.*, 89; 23 *Barb.*, 304; 23 *Wend.*, 9; 26 *Id.*, 684; 2 *Atk.*, 212; 1 *Kyd on Corp.*, 401.] *Supreme Ct.*, 1858, *People v. Batchelor*, 28 *Barb.*, 310; affirmed, *Ct. of Appeals*, 1861, 22 *N. Y.* (8 *Smith*), 128.

PRACTICE, AT C

[The more important matters which are common to the procedure, are separately treated where; and further illustrations mentioned in this article will there find titles at the end of this article.]

- I. IN GENERAL. C
- TIONS. PROCE
- II. IRREGULARITIES.
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- XII. CASE. SPECIAL V.

I. IN GENERAL. COM

TIONS. P

1. That in cases not own rules, the court for the King's Bench in Eng, 1809, *Dubois v. Philips*, 1

2. The strict principle proceedings in ejectment as in England,—not applicable in this country. *Saltons Cas.*, 221; S. C., *Col. &*

3. Declaration. The commencement of actions by plicable to infant defend 1832, *People v. Hoffman*,

4. Ejectment against commenced by summons § 4.] *Supreme Ct.*, 1848 & *Utica R. R. Co.*, 5 *Hil*

5. Premature action bail and pleads in chief, 1 object that he was arre was due. *Supreme Ct.*, 1 1 *Johns. Cas.*, 398; S. C. Followed, 1801, *Lawrenc Cas.*, 225. To the conti Moncure, 8 *Wend.*, 170.

6. Tests. Process iss

Enlargement of Time.

Feigned Issue.

Consent Rule, &c.

will be entered. *Supreme Ct.*, 1804, Gardener v. Buel, 2 *Cai.*, 108.

25. **Service of a second declaration**, by the plaintiff's agent, though without his knowledge, is a waiver of the first. *Supreme Ct.*, 1800, Kemble v. Finch, 1 *Johns. Cas.*, 414.

26. **Severing**. When defendants in ejectment sever in pleading, the cause is still to be entitled against both. Pleading separately does not make separate suits. *Supreme Ct.*, 1808, Jackson v. Cooper, 1 *Cai.*, 20; S. C., *Col. & C. Cas.*, 154.

27. **Rule to plead** cannot be had till writ is returned and bail filed, or appearance entered. *Supreme Ct.*, 1805, Howell v. Denniston, 3 *Cai.*, 96; S. C., *Col. & C. Cas.*, 448.

28. That on serving an amendedoyer, there must be new rule to plead. *Supreme Ct.*, 1804, Clinton v. Porter, 2 *Cai.*, 176; S. C., *Col. & C. Cas.*, 388.

For **Other cases** as to practice in pleading, see PLEADING, AT COMMON LAW.

V. ENLARGEMENT OF TIME.

29. **Statute. Rule**. Neither a commissioner in vacation, nor the court in term, can enlarge the time fixed by statute for doing an act; though it is otherwise where the time is fixed only by rule or practice. *Supreme Ct.*, 1830, Jackson v. Wisburn, 5 *Wend.*, 186; and see Clark v. McClaughry, 22 *Id.*, 627.

30. **A judge, in vacation**, may enlarge the time for making a case. *Supreme Ct.*, 1812, Black v. Brown, 9 *Johns.*, 264; overruling Jackson v. Hornbeck, 2 *Johns. Cas.*, 115; S. C., *Col. & C. Cas.*, 127.

VI. FEIGNED ISSUE.

31. In ejectment, on a suggestion that plaintiff's lessors had taken more land than given by the verdict, a feigned issue was awarded. *Supreme Ct.*, 1810, Jackson v. Hasbrouck, 5 *Johns.*, 366.

32. **Contradiction**. A feigned issue will not be awarded where the affidavits are contradictory, and the sum in controversy will not justify the expense. *Supreme Ct.*, 1828, Brower ads. Feeter, 1 *Wend.*, 18.

33. **A difficulty between the parties** in making up a feigned issue ordered by the court, must be settled before a judge or commissioner, not by the court. *Supreme Ct.*, 1810, Richards v. Brown, 7 *Johns.*, 320.

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VII. CONSENT RULE
IN EJECTMENT.

34. **Survey**. The lessors in ejectment may stay proceeding but may stay proceeding sent. *Supreme Ct.*, 1808 *Cai.*, 82; S. C., *Col.*
35. The court cannot in ejectment to consent issues. *Supreme Ct.*, 1800, boom, 9 *Johns.*, 83.

36. **Consent rule**. set up title as tenant to enter into the consent wise actual ouster necessary *Supreme Ct.*, 1809, Jackson 311.

37. If a tenant in ousted his co-tenant, he may enter into the court when he does not dispute 89; 8 Burr., 1897.] A judgment as to the res means profits thereof from *Supreme Ct.*, 1814, Lange *Johns.*, 461; 1820, Jackson

38. Where defendant defend as a tenant in court of the plaintiff, on the been no ouster of the apply to the court for leave consent rule specially. *Supreme Ct.*, 1820, Jackson 398.

39. Where defendant possessions are joined, enter into separate court *Ct.*, 1830, Jackson v. explaining Jackson v. I Jackson v. Woods, 5 *Id.* Stiles, 8 *Conn.*, 356.

VIII. NOLLE PROSEQUI.

40. **Several counts**. plaintiff on demurrer to and assessment of damages enter a nolle prosequi and take judgment on the apply to the court before inquiry. *Ct. of Errors*, ardsen, 5 *Johns.*, 476.

41. Plaintiff allowed

Default. Inquest. Writ of Inquiry. Affidavit of Merits.

on the money counts, after having assessed damages on the note. *Seeber v. Yates*, 6 *Cow.*, 40.

42. Entering a *nol. pros.* on one of several counts on the same cause of action, after plea, does not admit the truth of the plea. *Supreme Ct.*, 1834, *Keeler v. Bartine*, 12 *Wend.*, 110.

43. Personal defence. Where one of several defendants who are sued on a joint and several contract, pleads his infancy, plaintiff may enter a *nolle prosequi*, as to him, and proceed to judgment against the others. It is unreasonable to turn him over to another action. *Supreme Ct.*, 1809, *Hartness v. Thompson*, 5 *Johns.*, 160.

44. If several are sued as joint devisees in trust, and one pleads or proves that he is not a devisee, plaintiff may enter a *nol. pros.* as to him. [1 *Saund.*, 207, b. n.; 1 *Wills.*, 90; 5 *Johns.*, 160.] *Supreme Ct.*, 1830, *Judson v. Gibbons*, 5 *Wend.*, 224.

45. The right of a plaintiff to enter a *nolle prosequi*, and the effect of it, considered. *Morton v. Croghan*, 20 *Johns.*, 106.

46. A plaintiff in replevin can be *non-prossed*. [1 *Rev. L.*, 91, 345.] *Supreme Ct.*, 1826, *Fort v. Smalley*, 6 *Cow.*, 439; and see *Exp. Fort*, 6 *Id.*, 43.

47. Infant. A *non-pros.* obtained by an infant appearing by attorney should be set aside. *Supreme Ct.*, 1831, *Cornstock v. Carr*, 6 *Wend.*, 526.

48. Plaintiff being ruled to declare, by one defendant served, will be *non-prossed* unless he obtains time to declare until the other is brought in. *Supreme Ct.*, 1805, *Shawe v. Colfax*, 3 *Cai.*, 98; S. O., *Col. & C. Cas.*, 550.

49. Neglect to comply with order for particulars is ground for judgment as if *non-pros.* *Supreme Ct.*, 1817, *Fleuret v. Durand*, 14 *Johns.*, 329.

So of not complying with order to file security for costs. 1834, *Glover v. Cuming*, 12 *Wend.*, 295.

So of neglect to proceed after interlocutory judgment. 1818, *Kent v. McDonald*, 15 *Johns.*, 400.

50. Discontinuance. Where one who has been discharged as a bankrupt is sued with others as joint-debtors, if plaintiff serves the bankrupt with process he cannot have leave to discontinue as to him except on payment of costs. *Supreme Ct.*, 1844, *Camp v. Gifford*, 7 *Hill*, 169.

As to **Discontinuing**, see **ARBITRATION**, **DISCONTINUANCE**, **NONSUIT**.

IX. DEFAULT. INQUEST. WRIT OF INQUIRY. AFFIDAVIT OF MERITS.

51. A default cannot be entered until the day after the time for pleading has expired. *Supreme Ct.*, 1801, *Thomas v. Douglass*, 3 *Johns. Cas.*, 226.

52. Entry of judgment. After default, rule for judgment must be entered before plaintiff can assess damages. *Supreme Ct.*, 1803, *Griswold v. Stoughton*, 1 *Cai.*, 6; S. O., *Col. & C. Cas.*, 146; and see *Hart v. De Lord*, 17 *Johns.*, 270.

53. Setting aside. Refusal to accept the terms offered by plaintiff as condition of opening default,—*Held*, a sign of bad faith. *N. Y. Superior Ct.*, 1829, *Barrow v. Sabbathon*, 3 *Hall*, 348.

54. In ejectment a regular default may be set aside on an affidavit of merits, and that it was suffered by a mistake. *Supreme Ct.*, 1805, *Jackson v. Stiles*, 3 *Cai.*, 133.

55. After a judgment by default against the casual ejector, the landlord may be let in to appear and defend. *Supreme Ct.*, 1809, *Jackson v. Stiles*, 4 *Johns.*, 439.

56. In ejectment, where the tenant swears to merits, and no trial has been lost, a regular default will be set aside, on payment of costs, to let in the tenant to defend his possession. [1 *Cai.*, 503.] *Id.*

57. A regular default in ejectment, where the premises were vacant so that there was no person in possession to be served, should be set aside on the application of the person claiming to be owner of the land, on paying costs, and stipulating to admit he was in possession at the commencement of the suit. *Supreme Ct.*, 1812, *Wood v. Wood*, 9 *Johns.*, 257.

58. Mistake in calculating the assessment, ground for ordering a new one. *Burr v. Reeve*, 1 *Johns.*, 507.

59. Admission. By a default and interlocutory judgment in an action for libel, the fact of publication and the truth of the innuendoes are admitted, and defendant cannot call attention of the jury of inquiry to the other paragraphs contained in the same publication, in order to show a different meaning of the words complained of than that set up by the plaintiff. *Supreme Ct.*, 1803, *Tillotson v. Cheetam*, 3 *Johns.*, 56.

Supreme Ct., 1805, *Jackson v. Parker*, 2 *Cai.*, 385; 1810, *Yates v. Lansing*, 5 *Johns.*, 367.

99. **Several counts.** Where judgment is assessed on the whole declaration, after judgment for the plaintiff on demurrer to the whole, if some of the counts are bad, the judgment must be reversed. *Ct. of Errors*, 1809, *Backus v. Richardson*, 5 *Johns.*, 476.

100. If some of the counts are bad, and, after default, entire damages are assessed, the judgment must be reversed. *Ct. of Errors*, 1809, *Cheetham v. Tillotson*, 5 *Johns.*, 430.

101. **Assessment.** In debt, since plaintiff recovers the sum *in numero*, the clerk may ascertain the interest or damages, and tax them with the costs. *Supreme Ct.*, 1810, *Fenton v. Garlick*, 6 *Johns.*, 287.

102. **Notice of taxation of costs** must be given, as for a trial of the cause,* but the omission may be cured by a retaxation without setting aside the judgment. *Ib.* To similar effect, 1800, *Jackson v. Spencer*, 3 *Johns. Cas.*, 495.

103. **The clerk, on assessing damages**, may take proof of the loss of the instrument sued on. *Supreme Ct.*, 1817, *Anonymous*, 14 *Johns.*, 347.

104. On bond to submit to arbitration, actual damages must be assessed. *Supreme Ct.*, 1819, *Allen v. Watson*, 16 *Johns.*, 205.

105. **Execution.** Where, on default of payment of interest on a bond, judgment is signed for the penalty, execution will be stayed on the payment of the interest and costs, the judgment to stand as security for the debt. *Supreme Ct.*, 1804, *Bowne v. Hallet*, 1 *Cai.*, 518.

106. A *fi. fa.* tested out of term or issuing into a different county than that where the venue is laid, without a *testatum*, is irregular, and the party serving it out cannot take advantage of it. *Supreme Ct.*, 1804, *Simonds v. Catlin*, 2 *Cai.*, 61; *S. C.*, *Col. & C. Cas.*, 846.

107. After the defendant has been regularly superseded for not being charged in execution, the plaintiff cannot resort again to his first judgment by means of execution, but must commence his action upon it. *Supreme Ct.*, 1804, *Masters v. Edwards*, 1 *Cai.*, 516; *S. C.*, *Col. & C. Cas.*, 827.

For Other cases as to executions, see EX-
ECUTION.

* To the same effect, 1813, *Green v. Guthrie*, 10 *Johns.*, 128.

XI. DOUBLE AND

108. **Verdict.** Where recoverable under *Lev. Stat.*, 261, § 1,—the jury are to find court trebles them. *comb v. Butterfield*, 8 *v. Havens*, 25 *Wend.*, Booth, 1 *Den.*, 339.

109. If the verdict terms, to be for single intend that they found that defendant brought the provisos of the *Livingston v. Platner*,

110. Where double statuta, the proper price find the single value it. *Ct. of Errors*, 182 *Cow.*, 678.

111. A finding of sufficient as a finding *prems Ct.*, 1823, *Be Cow.*, 584.

112. **Motion.** Treble costs can be obtained court. *Supreme Ct.*, *Wend.*, 216.

113. **Computation.** three times single *d* 1841, *King v. Havens*.

114. That double value. *Ct. of Errors*, little, 5 *Cow.*, 678.

XII. CASE. SPECIAL

115. **Case and s** where both a case and beam made, the party them. *Supreme Ct.*, *lander*, 1 *Johns.*, 192.

116. **An exception** plies the right to ma *rior Ct.*, 1850, *Huff v.*

117. **The objection** ment is given for a day the first, is waived un *Supreme Ct.*, 1799, *Ge & C. Cas.*, 89.

118. **A point reser** trial, is in nature of plaintiff must prepare

IV. DECREE. REHEARING. ENFORCING.

V. FEIGNED ISSUE.

VI. MOTIONS. PETITIONS, AND VARIOUS
EXCEUTORARY PROCEEDINGS.I. BILL. PROCESS. APPEARANCE.
FAULT. DISMISSAL, ETC.

1. Application by a creditor at large firm, whose assets are in the hands of a receiver, to be paid out of the funds, must be by bill. *Chancery*, 1846, Matter of Ingraham, *Barb. Ch.*, 85.

2. Cross-bill allowed to be filed under peculiar circumstances. *Brown v. Story*, 2 *Pa.* 594.

3. A new bill before the chancellor, pending a former suit before a vice-chancellor, the same matter, irregular. *Chancery*, 1 Winship v. Pitts, 3 *Paige*, 259; and see *Elliott v. Price*, 2 *Id.*, 388.

4. Practice in bills of interpleader where there is a contest. *City Bank v. Bangs*, *Paige*, 570.

5. — in filing supplemental bills. *Eagle v. Price*, 2 *Paige*, 388.

6. No process, except to appear and answer and to attend as witness, issues in bills. *Chancery*, 1835, *Merrill v. Townsend*, 5 *Pa.* 80.

7. Taking out process with *bona-fide* intent to serve it is the commencement of the suit. *Chancery*, 1829, *Webb v. Pell*, 1 *Paige*, 5. Compare CREDITOR'S SUIT, 71-74.

8. Where complainant amends his bill after personal service of subpoena on defendant who neglects to appear, service of a new subpoena is not necessary to authorize taking an amended bill as confessed. *Chancery*, 18 Bond v. Howell, 11 *Paige*, 233.

9. A defendant who appears is entitled to notice of all proceedings, though he failed to answer. *Chancery*, 1884, *Hart v. Small*, *Paige*, 551; explaining *Rose v. Woodruff*, *Johns. Ch.*, 547. Followed, 1885, *Wells v. Cramer*, 5 *Paige*, 164.

10. Notice of the names of solicitors of the defendants against whom the bill has been taken as confessed, not necessary. *Chancery*, 1841, *Germain v. Beach*, 9 *Paige*, 232.

11. Husband bound to enter a joint appearance, and put in a joint answer for himself and wife. *Chancery*, 1829, *Leavitt v. Cramer*, 1 *Paige*, 421.

12. That on the death of defendant after

Examination of Witnesses.

41. That each party may choose his own examiner. *Chancery*, 1822, *Troup v. Haight*, 6 *Johns. Ch.*, 335.

42. Form of order to produce witnesses. *Murray v. Hay*, 1 *Barb. Ch.*, 59.

43. Cross-examining. After a witness has been called and examined, the party cannot withdraw him, even though he is interested; but the adverse party is entitled to cross-examine. *V. Chan. Ct.*, 1824, *Bogert v. Bogert*, 2 *Edw.*, 399.

44. Interest. After examination and during cross-examination of a witness, he became interested in the suit, by a death, of which all parties were ignorant. Held, that a further direct examination afterwards taken should be suppressed, leaving the residue of the deposition to stand. *V. Chan. Ct.*, 1839, *Fream v. Dickinson*, 3 *Edw.*, 800.

45. Co-defendant. Requisites of application for order to examine. *American Life Ins. & Trust Co. v. Sackett*, 1 *Barb. Ch.*, 535.

46. If the defendant in a creditor's suit consents to be examined, under Rule 191 he cannot be compelled to answer. *V. Chan. Ct.*, 1832, *Merritt v. Blackwell*, 1 *Edw.*, 466.

47. After one examination, defendant cannot be summoned to another; but may be required to appear and answer special interrogatories. *V. Chan. Ct.*, 1839, *Starr v. Morange*, 3 *Edw.*, 345.

48. A nominal complainant, if a material witness for the other complainant, may be struck out, and, if necessary, made defendant. *Chancery*, 1837, *Eckford v. De Kay*, 6 *Paige*, 565. *Supreme Ct., Sp. T.*, 1848, *Leavitt v. Steenbergen*, 3 *Barb.*, 155.

49. Complainant in foreclosure should not, because about leaving the State, have leave to be examined as to payments, before the cause is at the proper stage. If absent, he may be examined by commission. *V. Chan. Ct.*, 1838, *Heyward v. Stilwell*, 3 *Edw.*, 245.

50. Complainant may be examined to prove the allegations in the bill, as against an absentee, if he swears that he cannot prove them except by an answer and discovery from the absent defendant. *Chancery*, 1846, *Anonymous*, 1 *Barb. Ch.*, 408.

51. A witness who demurs to a question cannot bring the matter before the court. Only the party who puts it can. *V. Chan. Ct.*, 1831, *Mowatt v. Graham*, 1 *Edw.*, 13.

52. Documents produced. Under the sys-

tem of open examination a paper before it, though a copy only exhibit; and cannot be compelled, on motion, to be produced for purposes of *Errors*, 1842, *Con Bank*, 4 *Hill*, 516.

53. Furnishing names. Rule 33. Mode of examination. *Gaul v. Miller*, 3

54. Application for names whose names were to re-examination, &c. *v. Tuttle*, 10 *Paige*, 52

55. Master's certificate of examination. (

56. Time to take per unless upon good cause. 1839, *Jewett v. Albany* and see *Osgood v. Josli*

57. Issue of commission does not stay closing of trial order. *V. Chan. Pardow*, 1 *Edw.*, 11.

58. A re-examination on special application. 1820, *Hallock v. Smith*,

59. After the testimony closed, the party cannot out leave of the court. the right to do so, is in *Ct.*, 1846, *Ordronaux v.* 512.

60. Order to close suit not to be opened. show that he has no costs. *Chancery*, 1847, *Sent.*, 79.

61. That examination continued, if necessary, testimony has expired, the proofs is actually 1842, *Greene v. Wheeler*

62. Depositions only the hearing. *Supreme* *Hamson v. More*, 1 *Barb.*

63. After close of proofs to prove release of it not be received. *Chan* *Utica v. Mersereau*, 3 *Bar*

64. Under an order the right to close the pro

original bill, though, by a general order of the court, the depositions taken in the original suit are allowed to be read in the cross-suit, yet such parts of them as relate to fraudulent misconduct not charged in the original suit will be suppressed. *Chancery*, 1817, *Underhill v. Van Cortlandt*,* 2 *Johns. Ch.*, 389.

88. Any writings may be proved at the hearing, on notice and on excuse for not proving them before the examiner; and the witnesses may be cross-examined. *Chancery*, 1817, *Consequa v. Fanning*, 2 *Johns. Ch.*, 481. See, also, *Cogswell v. Burtis*, *Hoffm.*, 198; and compare *Pardee v. De Cala*, 7 *Paige*, 182.

89. To entitle instruments to be read at the hearing, under Rule 17, they must be set forth and their authentication alleged in the pleadings. *Chancery*, 1842, *Latting v. Hall*, 9 *Paige*, 388. Compare *New v. Bame*, 8 *Sandf. Ch.*, 191.

90. If the complainant inadvertently omits to file a replication to set forth an instrument not admitted by the answer, his remedy is to apply for a postponement of the hearing, that he may have leave to file a replication. *Chancery*, 1842, *Latting v. Hall*, 9 *Paige*, 388.

91. What notice of intent to prove at hearing, is necessary. *Kellogg v. Wood*, 4 *Paige*, 578; *Miller v. Avery*, 2 *Barb. Ch.*, 582.

92. The hearing may be suspended to enable a party to make formal proof. *Chancery*, 1835, *Desplaces v. Goris*, 5 *Paige*, 252; affirming 8. C., 2 *Edw.*, 422.

93. Where evidence is documentary, and a slip has occurred, the cause may stand over to produce it. And leave to impeach a document produced at the hearing will be allowed in a proper case. *A. V. Chan. Ct.*, 1839, *Cogswell v. Burtis*, *Hoffm.*, 198. Compare *Morton v. Hudson*, *Id.*, 312.

94. Affidavits taken *ex parte*, after the cause is set down for hearing, are not admissible. *Chancery*, 1821, *Minuse v. Cox*, 5 *Johns. Ch.*, 441; and see *Underhill v. Van Cortlandt*, 2 *Id.*, 389.

95. Points. Each party, on argument before vice chancellor, should furnish his opponent with copy points; and a copy should also be handed to the court, to be marked by the clerk. *Chancery*, 1846, *Beatty v. McNaughton*, 1 *Barb. Ch.*, 819.

96. Where a bill is parties, it should state complainant to bring it without prejudice to a 8 *Monr.*, 862.] *Ch. McCaen*, 7 *Paige*, 451. *Chan. Ct.*, 1834 [citing *v. Heeney*, 2 *Edw.*, 24; *inson v. Reed*, *Hoffm. dunck*, 1 *Sandf. Ch.*, 4

97. Though complaint when objection to the ties is taken by the at the hearing, permit terms. [4 *Paige*, 75; *Ct.*, *Sp. T.*, 1849, *Varwerker*, 7 *Barb.*, 221.

98. Where the complaint by the answer, of a defendant's intention at the hearing, but amend, the court may leave to amend. *Ch. v. Van Deusen*, 4 *Paige* 2 *Paige*, 278], *La Gr. Ch.*, 625.

99. An infant defense hearing, any objection whether the objection bill, or came out in *Chan. Ct.*, 1846, *Jon. Ch.*, 208.

100. Depositions no harmless mistakes in tenses. *A. V. Chan. Laimbeer*, 1 *Sandf. Ch.*

101. Objection to be taken at the hearing. *Wms.*, 348; *Bunb.*, 14 *Douglass v. Sherman*, 1 *Pendleton v. Fay*, 8 *Id.*

102. Where vice-chiefed; mode of hearing a *Whitney v. Post*, 8 *Paig.*

IV. DECREE. REHEAR

103. Cause, how defendant takes issue on whole bill, and the plea tied to a decree as though taken as confessed, or as be necessary, that the de on interrogatories. *Ch. McMichael*, 2 *Paige*, 344

* Reversed on the merits, *Ct. of Errors*, 1819, 17 *Johns.*, 405.

126. Payment of admitted part. Where the answer admits a part, and the controversy is confined to the residue of the claim, payment of the admitted part should be ordered at once. So also on a master's report of the balance due, though exceptions to another part of the report are still pending. *Chancery*, 1824, Clarkson v. De Peyster, *Hopk.*, 274.

127. It is not usual to direct payment of money by one party to another, pending the suit, and where there is no fund in court. *V. Chan. Ct.*, 1834, Bogert v. Bogert, 2 *Edw.*, 899.

128. Obtaining leave for rehearing of decretal order. *Consequa v. Fanning*, 8 *Johns. Ch.*, 364.

129. Where two defendants answer separately, one cannot appeal from an order denying to the other an issue to try the same defence; but may have leave to apply for one in his own behalf. *Chancery*, 1840, New Orleans Gas Light & Banking Co. v. Dudley, 8 *Paige*, 452.

130. Approval of sureties. Where the affidavits of justification by the sureties in an appeal-bond are indorsed upon the bond, the certificate of approval need not repeat the facts apparent from them. *Chancery*, 1845, Coithe v. Crane, 1 *Barb. Ch.*, 21.

131. The denial in the answer to a creditor's bill that defendant has assets exceeding \$100, does not entitle him to a dissolution of the injunction. [4 *Paige*, 864.] *V. Chan. Ct.*, 1840, Sage v. Quay, *Clarke*, 847.

132. Where a writ of error on a judgment does not stay the proceedings on a creditor's bill thereon, the court will dissolve the injunction upon security being given for the payment of the judgment, if affirmed. *Chancery*, 1838, Bradt v. Kirkpatrick, 7 *Paige*, 62.

133. Where the fund enjoined in a creditor's suit is more than enough to pay all defendant's debts, the court may allow him a maintenance without the creditor's consent. *V. Chan. Ct.*, 1834, Craig v. Hone, 2 *Edw.*, 876.

134. He cannot have an advance to enable him to litigate the suit. *V. Chan. Ct.*, 1833, Tuthill v. Lupton, 1 *Edw.*, 564.

135. Permitting a bond to be substituted for payment into court, on granting an injunction after judgment, is a matter of favor which should not be granted unless the complainant will do equity. *Chancery*, 1843, Gee v. Southworth, 10 *Paige*, 297.

136. On a bill of discovery, the injunction is only temporary, and though the ground of defence at law be fraud, when the bill has been answered, it will be dissolved, of course, and the parties left to litigate at law. *Chancery*, 1843, Crane v. Bunnell, 10 *Paige*, 333; 1831, King v. Clark, 3 *Id.*, 76.

137. If an answer sets up a discharge, which the complainant did not impeach in his bill, he cannot, in opposition to the answer, read affidavits to sustain his injunction. *Chancery*, 1844, Hubbell v. Cramp, 11 *Paige*, 810.

138. Injunction-master's power. *Laurie v. Laurie*, 9 *Paige*, 234.

139. Information. A statement, which must be deemed to have been on information and belief, is not sufficient in an opposing affidavit, which the other party has no opportunity to answer. *Chancery*, 1846, Quincy v. Foot, 1 *Barb. Ch.*, 496.

140. All petitions grounded on facts not immediately before the court, must be sworn to. *Chancery*, 1824, Anonymous, *Hopk.*, 101.

141. Scandalous and impertinent matter, in a petition,—*e. g.*, unnecessary imputations against third persons,—will be expunged, on exception, with costs. *Ch. of Errors*, 1841, King v. Sea Ins. Co., 26 *Wend.*, 62.

142. Title. Petitions which relate to a proceeding pending, should be entitled in it, or so refer to it, with sufficient distinctness, that perjury might be assigned. But original petitions need not be entitled. *Chancery*, 1844, De Zeng v. Mann, 4 *Ch. Sent.*, 22.

143. Signing. A petition or affidavit in chancery, must be signed by the party who swears to it, but need not, except petitions for rehearing or appeal, be signed by counsel. *Chancery*, 1844, Hathaway v. Scott, 11 *Paige*, 173.

144. Removal of cause from before a vice-chancellor before hearing. *Ames v. Blunt*, 3 *Paige*, 94.

145. The clerk is not entitled to fees or commissions, on receiving a delivery of bonds and mortgages taken in his name by a guardian *ad litem*; nor to commissions for receiving interest, but only to commissions for paying over the interest. *V. Chan. Ct.*, 1839, Matter of Post, 3 *Edw.*, 865.

146. Extra allowance to master, how applied for. *Woodruff v. Straw*, 4 *Paige*, 407.

147. An appraisement made by appraisers appointed by the Court of Chancery, upon the

8. Omitting to serve copy complaint within 49 days after demand, is an unreasonable delay. *N. Y. Com. Pl., Chambers*, 1850, *Ecles v. Debeand*, 2 *Code R.*, 144.

9. Notice of object of action, and no personal claim, may be served with summons instead of complaint. *Code of Pro.*, § 181.

10. Amended complaint. Section 146 of the Code,—requiring an amended complaint to be served on the defendant,—is to be construed by section 417,—requiring service of papers to be made on the attorney, if a party has an attorney;—and where a defendant has appeared by attorney, an amended complaint is to be served on the attorney, and service on the defendant personally in such case is irregular. *N. Y. Superior Ct., Sp. T.*, 1858, *Mercier v. Pearlstone*, 7 *Abbotts' Pr.*, 825. To the same effect, *Supreme Ct.*, 1850, *Tripp v. De Bow*, 5 *How. Pr.*, 114.

11. Where the defendant omits to answer in due time in an action where an application to the court is necessary, the court may order the damages to be assessed by a sheriff's jury. An omission to give him notice of adjusting the costs, will not vitiate the judgment. *Supreme Ct., Chambers*, 1849, *Rickards v. Sweetzer*, 8 *How. Pr.*, 418; *S. Ct.*, 1 *Code R.*, 117.

12. If defendant fails to answer, he is not entitled to notice of ordinary proceedings in the action,—*e. g.*, of insertion of costs in the judgment-roll,—notwithstanding that he appeared. *N. Y. Superior Ct., Sp. T.*, 1849, *Wilcox v. Curtis*, 1 *Code R.*, 127. Compare *Tracy v. N. Y. Steam Faucet Co.*, 1 *E. D. Smith*, 349.

13. A defendant who has not answered, is not entitled to notice of an application for an injunction. It is not an "ordinary proceeding" in the action within section 414. *Supreme Ct., Sp. T.*, 1852, *Becker v. Hager*, 8 *How. Pr.*, 68.

14. An irregularity committed after notice that the proceeding, if taken, would be irregular, should be set aside with costs. *Supreme Ct., Sp. T.*, 1849, *Kellog v. Klook*, 2 *Code R.*, 28.

15. Division of action. Of the origin and object of the amendment of 1852 of section 172 of the Code, providing that the court on allowing a demurrer for misjoinder, to divide the action into several. *Robinson v. Judd*, 9 *How. Pr.*, 878.

16. Dismissal of complaint. In a foreclosure-action, one of the lienors, who was made defendant, died, and the plaintiff, for more than a year, neglected to revive or continue the action against his heirs or devisees, who by his death became necessary parties. *Held*, that on motion of another defendant, the complaint should be dismissed as to the moving defendant, with costs, unless plaintiff, within sixty days, continued the action. *Supreme Ct., Sp. T.*, 1856, *Chapman v. Foster*, 15 *How. Pr.*, 241.

17. Where the defendant has been offered his costs of circuit, and it does not appear that they have ever been made out or adjusted in any way, or he prepared to receive them, he is not entitled to a dismissal of the complaint, for not bringing the cause to trial at the circuit. *Supreme Ct., Sp. T.*, 1853, *Hawley v. Seymour*, 8 *How. Pr.*, 96.

18. When the plaintiff has proceeded to get his cause in readiness for trial, but neglects to move it on, the proper mode of proceeding on the part of the defendant, if he would expedite its determination, is to set it down for trial upon his own notice. Then, if the plaintiff does not choose to try it, he may move for a dismissal. A motion at special term for dismissal of the complaint, upon affidavits showing plaintiff's delay, should be denied, where the cause is in readiness for trial, but neither party has moved it on. *Supreme Ct., Sp. T.*, 1855, *Moeller v. Bailey*, 14 *How. Pr.*, 359. Compare *Schroeder v. Kohlenback*, 6 *Abbotts' Pr.*, 66. Consult, also, DISMISSAL OF COMPLAINT, and NONSUIT.

19. When a party obtains a postponement of the trial for the term, on payment of costs, the adverse party may, on his omission to pay them, insist on having the trial proceed; or he may waive that right and compel payment by motion. But if he neglects to apply for an order for their payment without delay after the term; his costs of the term will abide the event of the suit. *N. Y. Superior Ct.*, 1850, *Bulkeley v. Keteltas*, 2 *Sandf.*, 735.

20. Default. On a motion to be let in to defend, after a default, where the complaint has not been served, defendant should not be required to produce an affidavit of merits. *Supreme Ct., Sp. T.*, 1849, *Engs v. Overing*, 2 *Code R.*, 79.

21. The inexperience of a clerk who is entrusted by counsel with the duty of moving

In General.

for an adjournment, is no ground for opening a default taken because the affidavit the clerk drew was insufficient to oppose it. *N. Y. Superior Ct., Sp. T., 1856, Fake v. Edgerton, 6 Duer, 658.*

22. Decision of judge. On the trial of questions of fact by the court, the decision filed by the judge should distinctly pass upon, and find all the material issues presented by the pleadings. If the decision and judgment are contrary to the legal effect of the case as admitted by the pleadings, the objection may be taken without a case, and perhaps, without exceptions, if the point be passed upon in the court below. [2 N. Y., 188.] *Supreme Ct., Sp. T., 1852, Gilchrist v. Stevenson, 7 How. Pr., 273.*

23. Hearing at general term. Where a decision of the case or bill of exceptions at special term will not be likely to terminate the cause, they should be ordered to be heard in the first instance at general term, on suitable terms for the security of the party who obtained the verdict; especially where there are exceptions on points ruled adversely at the trial. *N. Y. Superior Ct., 1852, Watrous v. Lathrop, 4 Sandf., 700.*

24. Notes of issue and order of causes for general term. *Rule 41 of 1858; Laws of 1860, 270, ch. 167.*

25. The date of issue (for the calendar) on appeal from an inferior court, should be the date of filing the return. *Supreme Ct., 1849, Anonymous, 2 Code R., 41.*

26. On appeal from a judgment, on the report of a referee, the cause should take its place on the calendar according to the date when the report was filed and judgment entered. *Supreme Ct., 1850, Gould v. Chapin, 5 How. Pr., 358; S. C., 9 N. Y. Leg. Obs., 187.*

27. Proper mode of making out notes of issues, and placing causes on the calendar for the circuit. *Supreme Ct., VII. Dist., Circuit, 1856, Regulations of Circuit Calendars, 18 How. Pr., 345.*

28. Requisites of cases and points, &c. *Rule 46 of 1858.*

29. Certiorari to subordinate tribunals or magistrates; how heard. *Rule 47 of 1858.*

30. Motion to dissolve injunction. Under § 225 of the Code,—which allows a motion to dissolve an injunction to be made at any time,—the affidavit to move need not state that the suit has been commenced. *Supreme*

Ct., Sp. T. (1851?), Newbury v. Newbury, 6 How. Pr., 182; S. C., 10 N. Y. Leg. Obs., 52; disapproving Osborn v. Lobdell, 2 Code R., 77. Consult, also, INJUNCTION.

31. An affidavit to reclaim property seized under an execution, need not state the facts which prove the property exempt from such seizure. It is enough to state that it is exempt. *Supreme Ct., Sp. T. (1848?), Roberts v. Willard, 1 Code R., 100; disapproving Spalding v. Spalding, Id., 64.*

32. The "affirmative relief," to which the defendant may be entitled under § 274 of the Code, means such relief as may properly be given within the issues made by the pleadings, or according to the legal or equitable rights of parties, as established by the evidence; not that redress which is equally applicable after as before judgment, and may be obtained on motion or by action. Thus, in an action to enforce a forfeiture, the fact that defendant has, pending the suit, offered indemnity, which plaintiff refused to accept, is not a defence, without an offer to pay into court what may be just. All the court can do, by way of relief, is to stay the plaintiff's proceedings, on compensation being made. The plaintiff is entitled to judgment in such case; but leave should be given to the defendant to move for equitable relief, or bring his action therefor as advised. The fact that on the trial it appears that he was entitled to such relief, is not ground of allowing a supplemental answer, or of embodying it in the judgment as affirmative relief, where he does not waive his legal defence. *N. Y. Superior Ct., 1857, Garner v. Hannah, 6 Duer, 262.*

33. The power of the court to determine the ultimate rights of the parties on each side, as between themselves (*Code, § 274*), does not necessarily require the court to do so; and it seems that, in order to do so, in a common-law action, allegations, in the nature of pleadings, should first be allowed to be put in between the parties who are to become adverse litigants. *Ct. of Appeals, 1857, Decker v. Judson, 16 N. Y. (2 Smith), 439.*

34. Executing judgment. Where a decree is made in an action for limited divorce, ordering one party to give up the custody of children to the other, the proper way to enforce the decree is by attachment, or by habeas corpus. A process directing the sheriff to take the children wherever they might be found.

In Suits pending when the Code took effect.

and deliver them to the party, is not warranted. *N. Y. Superior Ct., Chambers*, 1854, *Nicholls v. Nicholls*, 8 *Duer*, 642.

35. Restitution. Where a successful appellant to the Common Pleas from an inferior court, is entitled to a restoration of money paid by him upon the judgment appealed from, his remedy is by motion in the Common Pleas, for restoration; and on that motion being granted, it becomes a part of the judgment in the Common Pleas, and the amount can be collected in the execution with the costs. *N. Y. Com. Pl.*, 1851, *Kennedy v. O'Brien*, 2 *E. D. Smith*, 41.

36. A defendant cannot obtain an injunction on a petition. He must serve a complaint, &c., in the nature of a cross-suit. *Supreme Ct., Sp. T.*, 1848, *Thursby v. Mills*, 1 *Code R.*, 88.

37. Enlargement of time. Section 405 of the Code applies only to orders enlarging the time within which proceedings in the action must be had. *Supreme Ct., Sp. T.*, 1854, *Harris v. Clark*, 10 *How. Pr.*, 415; and see *Rule 22 of 1858*.

38. At the hearing of a cause, only one counsel on each side for one hour to be heard. *Rule 54 of 1858*.

39. All papers to be legibly written, folioed, &c. *Rules 20 and 56 of 1858*.

40. Joint-debtors. Of the nature of the proceedings under section 875, to enforce a judgment against joint-debtors not served. *Fairchild v. Durand*, 8 *Abbotts' Pr.*, 805.

As to practice in **Inferior courts**, see their titles, as **DISTRICT COURTS (OF NEW YORK)**; **JUSTICES' COURTS**; **MARINE COURT**.

As to practice in the various **Special proceedings**, see their respective titles, which are referred to under the title of **SPECIAL PROCEEDINGS**.

II. IN SUITS PENDING WHEN THE CODE TOOK EFFECT.

41. Abatement. An equity suit, which abated by complainant's death prior to July 1, 1848, not affected by section 121 of the Code. [5 *How. Pr.*, 369.] *Spier v. Robinson*, 9 *How. Pr.*, 325.

42. Amendments, &c. The provisions of the Code as to amending and disregarding errors, &c., not affecting substantial rights,—not applicable to existing suits. *Denniston v. Mudge*, 4 *Barb.*, 248; and see *Brown v.*

Woodworth, 5 *Id.*, 550. *Contra*, *McCormick v. Graves*, 7 *N. Y. Leg. Obs.*, 45.

43. Section 176 of the Code does not cure a bad pleading demurred to in a suit under the old practice. *Supreme Ct.*, 1850, *Vandenberg v. Van Valkenburgh*, 8 *Barb.*, 217.

44. The provisions of the Code respecting the disregard of variances—applicable to suits commenced before the Code. [Laws of 1849, 705, § 2, subd. 1.] *N. Y. Superior Ct.*, 1857, *Millbank v. Dennistoun*, 1 *Bow.*, 246.

45. Notice for trial. Actions at issue before the Code, may be noticed for trial by defendant, as well as by plaintiff. *Reynolds v. Davis*, 5 *Duer*, 611; *S. C.*, 2 *Abbotts' Pr.*, 168.

46. References. Construction of subd. 8 of § 4 of Laws of 1848, 567, relating to compulsory references of questions of fact. *Flagg v. Munger*, 3 *Barb.*, 9; *S. C.*, 2 *Code R.*, 17.

47. Power of a referee to fix the costs, not implied. *Van Valkenburgh v. Allendorph*, 4 *How. Pr.*, 89.

48. Reference pending as to surplus moneys not affected by the Code or supplementary act. *Rogers v. Mouncey*, 1 *Code R.*, 68.

49. Rehearing. What matters could be reheard under the act of 1848. *Sheldon v. Weeks*, 2 *Barb.*, 582; *S. C.*, 1 *Code R.*, 87.

50. Rehearing, ordered under the supplementary act, suspends proceedings. *Finchly v. Mills*, 1 *Code R.*, 88.

51. Security is not required for a rehearing, without a stay. *Supreme Ct.* (1848?), *Crane v. Crane*, 1 *Code R.*, 92.

52. Motion. In proceedings pending on July 1, 1848, a special motion cannot be heard at chambers. *Supreme Ct.*, 1850, *Matter of Hicks*, 4 *How. Pr.*, 316; *S. C.*, 2 *Code R.*, 128.

53. Order. Of the power of judges to make orders out of court. *Low v. Cheney*, 3 *How. Pr.*, 287.

54. The word "decree" in sections 7 and 8 of the act of 1848 and 1849, includes a *final decree*. The service of a copy of a decree marked "*copy*," and signed by the clerk, is notice of the decree, and the time to appeal will commence to run from the service of such copy. *Supreme Ct.*, 1851, *Mason v. Jones*, 1 *Code R.*, *N. S.*, 385.

55. The mode of reviewing the decision of a single judge under the Code of 1851, applies to suits commenced before the Code, except as changed by the Code of 1852. *Supreme Ct.*,

List of Titles relating to Practice.

Indictments.

Sp. T., 1852, *Gilchrist v. Stevenson*, 7 *How. Pr.*, 273.

56. The mode of reviewing report of referees in a suit commenced before the Code, is by a motion to set it aside. *Supreme Ct., Sp. T.*, 1850, *Grigg v. La Wall*, 8 *Code R.*, 141.

57. *Dismissing suit.* A defendant in a situation to notice the cause for hearing, cannot move to dismiss. *Supreme Ct., Sp. T.*, 1851, *Lee v. Brush*, 8 *Code R.*, 220.

58. *Enlargement of time* to make a case or bill of exceptions, may be by the judge who tried the cause, *ex parte* and without affidavit, and may stay proceedings for any length of time. *Supreme Ct., Sp. T.*, 1849, *Thompson v. Blanchard*, 8 *How. Pr.*, 399; 8 *C.*, 1 *Code R.*, 105.

59. In an action of *quo warranto* commenced before July, 1848, motion for judgment to be made at general term. *People v. Gilbert*, 2 *Code R.*, 31.

The Following topics are the subject of separate articles: ABATEMENT AND REVIVAL; ACTION; AFFIDAVIT; AFFIDAVIT OF MERITS; AMENDMENT; APPEARANCE; ARREST; ASSISTANCE (WRIT OF); ATTACHMENT; BAIL; BILL OF PARTICULARS; CAUSE OF ACTION; CLAIM AND DELIVERY; CONFESSION OF JUDGMENT; CONSOLIDATION OF ACTIONS; CONTEMPT; COSTS; COUNTER-CLAIM; COUNTY CLERK; COUNTY COURT; COUNTY JUDGE; COURT, &c.; DEBT (ACTION OF); DEFAULT; DEFENCES; DEMAND; DEPOSITION; DISCONTINUANCE; DISMISSAL OF COMPLAINT; ERROR (WRIT OF); EVIDENCE; EXCEPTIONS (AND BILL OF); EXECUTION; FOREIGN CORPORATIONS; FORMER ADJUDICATION; FORMS; GUARDIAN AD LITEM; IMPRISONMENT; INFANT; INQUEST; INQUIRY (WRIT OF); JOINER OF ACTIONS; JOINT-DEBTORS; JUDGE; JUDGMENT AND DECREE; JUDICIAL SALE; JURISDICTION; JURY; LAOSES; LIMITATIONS; MESNE PROFITS; MISNOMER; MOTIONS AND ORDERS; NEW TRIAL; NONSUIT; NOTICE; OATH; PARTIES; PARTITION; PAYMENT INTO COURT; PLACE OF TRIAL; PLEADING; QUESTIONS OF LAW AND FACT; REMOVAL OF CAUSES; SATISFACTION OF PART OF PLAINTIFF'S CLAIM; SECURITY FOR COSTS; SERVICE (AND PROOF OF); SET-OFF; SHERIFF; STAY OF PROCEEDINGS; STIPULATION; SUBMISSION OF CONTROVERSY; SUMMONS; SUPPLEMENTARY PROCEEDINGS; TIME; TRIAL; UNDERTAKING; VARIANCE; WAIVER.

PRACTICE, IN CRIMINAL CASES.

1. *Proceedings* in criminal cases are regulated in detail by the provisions of 2 Rev. Stat., 704; 5 ed., vol. 3, 990, which should be consulted in connection with the cases collected under this and related titles.

2. *Copy indictment.* A counsel has no right to demand a copy of the indictment of the district-attorney. The clerk of the court will furnish it on payment of fees. *Gen. Sess.*, 1823, *People v. Warner*, 1 *Wheel. Cr.*, 140; and see 2 *Rev. Stat.*, 728, § 53.

3. *Quashing* an indictment is in the discretion of the court; and where the insufficiency is clear, it will be done. *Supreme Ct.*, 1827, *People v. Eckford*, 7 *Cow.*, 535.

4. Quashing it on the motion of one defendant, quashes it as to all. *Id.*

5. Forging a check, and falsely personating another in presenting it at the bank, are distinct offences, and where there are indictments for both, neither will be quashed, because of the other. *Supreme Ct.*, 1834, *People v. Rynders*, 12 *Wend.*, 425.

6. Since error will not lie on an order quashing an indictment, the Oyer and Terminer should vacate such an order on the district-attorney's application, within a reasonable time, and enter judgment for the defendant, as upon demurrer, to enable him to bring error. *Supreme Ct.*, 1832, *People v. Stone*, 9 *Wend.*, 182.

7. *Superseding.* Under 2 Rev. Stat., 726, § 42,—which provides that an indictment is superseded by a second indictment for the same matter,—finding a second indictment for the same offence, does not absolutely supersede the first. The first must be superseded by the court, and the time of entering the motion to quash, rests somewhat in discretion. *Supreme Ct.*, 1838, *People v. Monroe Oyer & T.*, 20 *Wend.*, 108. Compare *People v. Fisher*, 14 *Id.*, 9.

8. *Nolle prosequi.* The court will not order a *nol. pros.* to be entered on an indictment for challenging another to fight a duel, where the party challenged is ready to acknowledge satisfaction for the injury; for the offence is not within the statute. (1 *Rev. L.* of 1813, 499, § 19.) *Gen. Sess.*, 1818, *Wood's Case*, 3 *City H. Rec.*, 139.

9. *Jurors.* Where the court directed the sheriff to summons for an adjourned term of

Affidavits for Postponement;—In Mitigation. Defects in Indictment.

court, sixty jurors, to be drawn in the usual way; and at the adjourned term, part of the number so drawn and summoned, and also a part of the panel which had been drawn and summoned for the regular term appeared; and the jury which tried the cause was drawn from a box containing the names of both panels, no objection being made until after conviction,—*Held*, that the informality in the direction as to the drawing of the jurors, furnished no reason for setting aside the verdict and arresting judgment. *Supreme Ct.*, 1857, *People v. Cummings*, 3 *Park. Cr.*, 343.

10. An affidavit of the want of material witnesses, made for the postponement of a trial during the same term an indictment is found, and within a few days after such finding, need not allege the particular matters which the defendant expects to prove by such witnesses. *Gen. Sess.*, 1818, *Broad's case*, 3 *City H. Rec.*, 7.

11. Mitigation of punishment. Affidavits submitted to the court, after verdict, for the purpose of mitigating the punishment, should not controvert the facts upon which the verdict is founded. *Gen. Sess.*, 1818, *Rooney's Case*, 3 *City H. Rec.*, 128; 1819, *Ball's Case*, 4 *Id.*, 118.

12. In a prosecution for an assault and battery, the court will receive affidavits in mitigation of the punishment, from the defendant, after conviction, and affidavits in aggravation on behalf of the prosecution; but in the absence of affidavits in mitigation, affidavits in aggravation should not generally be received. *Gen. Sess.*, 1818, *Hagerman's Case*, 3 *City H. Rec.*, 73, 89.

13. Service of affidavits on opposite party not to be required. *Id.*

14. The practice of suspending sentence, for the purpose of enabling the court below to take the opinion of the Supreme Court upon questions of mere regularity, in no way affecting the merits of the case, not to be recommended. *People v. Cummings*, 3 *Park. Cr.*, 343.

15. Defects in indictment. Where the sufficiency of an indictment is not involved in some decision made, or opinion advanced at the trial, the only mode of reaching the defect in the indictment is on a motion in arrest of judgment, or by a writ of error brought on the record of judgment itself. *Supreme Ct.*, 1853, *People v. Stockham*, 1 *Park. Cr.*, 424.

16. The defendant may avail himself of the omission of any material averment in an indictment, by demurrer, writ of error, or motion in arrest of judgment. [*Archb. Cr. Pl.*, 5 ed., 42; *Barb. Cr. L.*, 320; 2 *East*, 333.] *Supreme Ct.*, 1854, *People v. Johnson*, 1 *Park. Cr.*, 564.

17. After conviction and sentence it is too late to question the indictment if it contained the substance of the offence, so that the defendant had intelligible notice of the charge. [2 *Rev. Stat.*, 728, § 52; 6 *N. Y.*, 50; 3 *Barb.*, 470; 8 *Id.*, 547; 5 *Wend.*, 10 12, 271; 12 *Id.*, 431; 8 *Den.*, 91; 4 *Id.*, 68.] *Supreme Ct.*, 1856, *Thompson v. People*, 3 *Park. Cr.*, 308.

18. That a bill of exceptions does not lie in a criminal case. *People v. Holbrook*, 13 *Johns.*, 90; *Exp. Barker*, 7 *Cow.*, 143; but see **EXCEPTIONS**.

The Following subjects are treated as separate titles: **ARREST; BAIL; COMMITMENT; EVIDENCE; EXCEPTIONS; GRAND JURY; HABEAS CORPUS; INDICTMENT; PUNISHMENT; RECOGNIZANCE; SEARCH-WARRANT; SECOND OFFENCE; TRIAL; VARIANCE; WITNESS.**

PREScription.

1. Prescription applies only to incorporeal hereditaments. It cannot give a right to erect or use a building, on another's land. *Supreme Ct.*, 1807, *Cortelyou v. Van Brundt*, 2 *Johns.*, 357; 1848, *Ferris v. Brown*, 3 *Barb.*, 105.

2. Time. That immemorial use is fixed in analogy to the time prescribed for bringing a writ of right [10 *Pick.*, 188, 295]; and in this State was twenty-five years, previous to 1880, and is now twenty years. *Supreme Ct., Sp. T.*, 1850, *Miller v. Garlock*, 8 *Barb.*, 158; *Gen. T.*, 1856, *Hammond v. Zehner*, 28 *Id.*, 478.

3. Adverse use. To warrant a presumption of the grant of an easement, the user or twenty years must have been continuous, and must have been adverse in the sense required to warrant the application of the Statute of Limitations. Proof of such continuous user is but *prima-facie* evidence of its being adverse, and may be rebutted. *Supreme Ct.*, 1887, *Colvin v. Burnet*, 17 *Wend.*, 564; 1838, *Hart v. Vose*, 19 *Id.*, 365.

Powers of Agent;—Authority, how conferred.

4. **Public use.** Prescription cannot be predicated upon a user of less than twenty years; and as it supposes a grant, it is not applicable to a public usage; that being a case where there can be no grantee. *Supreme Ct.*, 1849, *Munson v. Hungerford*, 6 *Barb.*, 265; *Sp. T.*, 1852, *Curtis v. Keesler*, 14 *Id.*, 511; *Circuit*, 1854, *Clements v. Village of West Troy*, 10 *How. Pr.*, 199.

Consult, also, ADVERSE POSSESSION; ANCIENT LIGHTS; BOUNDARIES; COMMON; EASEMENT; DEDICATION; HIGHWAYS; PARTY-WALLS; PRIVATE WAYS; WATERCOURSES.

PRESS.

Its liberty declared. *Const. of 1846*, art. 1, § 8.

PRESUMPTION.

EVIDENCE.

PRINCIPAL AND AGENT.

I. POWERS OF AGENT.

1. <i>Authority, how conferred</i>p.	596
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I. POWERS OF AGENT.

1. *Authority, how conferred.*

1. **Married women** and other persons not *sui juris*, disqualified from appointing an agent or attorney. *Snyder v. Sponable*, 1 *Hill*, 567; affirmed on other grounds, 7 *Id.*, 427.

2. **Agency and Partnership.** The distinction between the authority of an agent and that of a partner,—considered. *Ct. of Ap-*

peals, 1849, *Sage v. Sherman*, 2 *N. Y. (2 Const.)*, 417; 1851, *Worrall v. Munn*, 5 *N. Y. (1 Seld.)*, 229.

3. **Power to act by deed.** If an act is required to be by deed, the authority to the agent to execute it must be conferred by deed. *Ct. of Appeals*, 1851, *Worrall v. Munn*, 5 *N. Y. (1 Seld.)*, 229. *N. Y. Superior Ct.*, *N. P.*, 1835, *Purcell v. Potter*, *Anth. N. P.*, 310.

4. — **to execute simple contract.** Where an instrument or contract executed by an agent is not required to be under seal, his authority to execute it need not be under seal. If executed under a parol authority, or if subsequently adopted or ratified by parol, the instrument will be valid. And it will make no difference that the agent has in fact affixed a seal, provided the instrument be one to which a seal was not essential. *Ct. of Appeals*, 1851, *Worrall v. Munn*, 5 *N. Y. (1 Seld.)*, 229. Followed, 1853, *Wood v. Auburn & Rochester R. Co.*, 8 *N. Y. (4 Seld.)*, 160; and see *Van Ostrand v. Reed*, 1 *Wend.*, 424; *Purcell v. Potter*, *Anth. N. P.*, 310.

5. *So held*, of a contract to sell lands, executed by an agent, under seal. *Ct. of Appeals*, 1851, *Worrall v. Munn*, 5 *N. Y. (1 Seld.)*, 229.

6. *So held*, of an agreement to submit to arbitration. *Ct. of Appeals*, 1853, *Wood v. Auburn & Rochester R. Co.*, 8 *N. Y. (4 Seld.)*, 160.

7. A parol authority is sufficient to empower an agent to make an executory contract to convey land; though a power to convey must be in writing, and under seal. *Supreme Ct.*, 1843, *Lawrence v. Taylor*, 5 *Hill*, 107. *S. P.*, *Chancery*, 1843, *McWhorter v. McMahan*, 10 *Paige*, 386; affirming *S. C.*, *Clarke*, 400; 1845, *Champlin v. Parish*, 11 *Paige*, 405; and see *Coleman v. Garrigues*, 18 *Barb.*, 60; *Mortimer v. Cornwell*, *Hoffm.*, 351.

8. Hence, where an agent has negotiated a contract to sell land in the name of his principal, without authority, but the principal has subsequently ratified it,—*e. g.*, by claiming an interest in the sale,—he is bound. *Supreme Ct.*, 1843, *Lawrence v. Taylor*, 5 *Hill*, 107.

9. **Who may impeach unauthorized act.** A stranger to a contract executed, upon one part, by an agent, cannot impeach it on the ground that the agent exceeded his authority. The contract is not void for that reason. It

Powers of Agent:—General and Special Agency.

may be that the principal has ratified it. *Supreme Ct.*, 1809, Jackson v. Van Dalfsen, 5 *Johns.*, 48.

10. Thus, where an owner of land gave a power of attorney to survey it and lay it out into lots, and to sell it for the best price, so that no lot should sell for less than a proportionate share of twelve hundred pounds for the whole tract; and the agent sold the whole tract for twelve hundred pounds;—*Held*, that a stranger could not invalidate the sale. *Ib.*

11. A sheriff holding an execution against a principal is not deemed a stranger within the rule that a stranger cannot impeach an act of an agent on the ground it was beyond his authority. He may show, in support of his right to levy on goods which are claimed through a sale made by an alleged agent of the execution-debtor, that such sale was unauthorized by the debtor. *Supreme Ct.*, 1820, Beals v. Allen, 18 *Johns.*, 368.

2. General and Special Agency.

12. The distinction. There is a well-settled distinction between a general and a special agent. The acts of the former bind the principal, whether in accordance to his instructions or not; those of the latter do not, unless strictly within his authority. *Supreme Ct.*, 1818, Munn v. Commission Co., 15 *Johns.*, 44; 1820, Beals v. Allen, 18 *Id.*, 368; 1832, Rossiter v. Rossiter, 8 *Wend.*, 494; 1838, Tradesmen's Bank v. Astor, 11 *Id.*, 87; 1840, Lightbody v. North American Ins. Co., 23 *Id.*, 18; 1849, Scott v. McGrath, 7 *Barb.*, 53.

13. General agent. In the case of a general agent, the principal is responsible for the acts of the agent, when acting within the general scope of his authority, and the public cannot be supposed cognizant of any private instructions from the principal to the agent. *Supreme Ct.*, 1818, Munn v. Commission Co., 15 *Johns.*, 44.

14. It is not necessary to constitute a general agent, that he should before have done an act the same in specie with that in question; it is enough that he has usually done things of the same general character and effect, with the assent of his principals. Thus, where a general agent has been accustomed to draw and indorse commercial paper for his principals, his power to accept may be inferred, even for accommodation. *Supreme Ct.*, 1841, Com. Bank of Lake Erie v. Norton, 1 *Hill*, 501; S.

P., 1858, Exchange Bank v. Monteath, 17 *Barb.*, 171; Medbury v. N. Y. & Erie R. R. Co., 26 *Id.*, 564.

15. Agent to sell. An agent appointed to sell a particular thing, but without limitation as to mode and terms of sale, is to be regarded a general agent so far as the sale of that subject-matter is concerned. *Supreme Ct.*, 1835, Jeffrey v. Bigelow, 18 *Wend.*, 518; 1839, Anderson v. Coonley, 21 *Id.*, 279.

16. Thus an agent authorized in general terms to contract for a particular description of goods, has an implied authority to modify or cancel a contract made by him for his principal. *Ib.*

17. A special authority must be strictly pursued. *Supreme Ct.*, 1843, Davenport v. Buckland, *Hill & D. Supp.*, 75.

18. A special authority must be strictly pursued, and when such authority is given by statute, every purchaser is presumed to know that special authority, and purchases at his peril. *Chancery*, 1818, Denning v. Smith, 8 *Johns. Oh.*, 332. *Ct. of Errors*, 1841, Delafield v. State of Illinois, 26 *Wend.*, 192, and 2 *Hill*, 159; affirming S. C., 8 *Paige*, 527.

19. Defendant authorized his agent to sign his name to a note at six months, and the agent signed a note at sixty days. *Held*, that the defendant was not bound. The power was special and ought to have been strictly pursued. *Supreme Ct.*, 1806, Batty v. Carswell, 2 *Johns.*, 48.

20. A father authorized his son to accept for him \$3,000, at not less than thirty days' sight, to enable him to go into partnership with S. The son accepted S.'s draft in favor of N., for \$400, at ninety days, in payment of a debt due from S. to N. *Held*, that the draft was unauthorized. *Ct. of Appeals*, 1858, Nixon v. Palmer, 8 *N. Y. (4 Seld.)*, 398.

21. Warranty. A special agent empowered to exchange a horse for a horse fit for staging, exchanged it for one confessedly unfit for staging, and gave a warranty. *Held*, that the principal was not bound by the warranty. *Supreme Ct.*, 1848, Scott v. McGrath, 7 *Barb.*, 53.

22. Representations. The owners of a ship authorized the master to sell her in the same manner as they themselves might or could do. The master at the time of sale, represented to the vendee that she was a registered ship, when, in fact, she only sailed

Powers of Agent;—Construction of Particular Powers;—Implied Powers.

under a coasting license. *Held*, that the master was only a special agent for the purpose of the sale, and the owners were not answerable for the false representation of the master in excess of his authority. *Supreme Ct.*, 1811, *Gibson v. Colt*, 7 *Johns.*, 390.

23. An agent employed for a special purpose,—*e. g.*, to obtain subscriptions to a project of forming a joint-stock company in relation to lands,—may use the ordinary means of accomplishing the object of his appointment; such as representing the location and quality of the lands, and the like; and if he makes false representations, inducing purchasers to enter into contracts, the principal is affected by such representations, the same as if made by himself. *Supreme Ct.*, 1840, *Sandford v. Handy*, 23 *Wend.*, 260.

3. Construction of Particular Powers.

24. Power to mortgage lands. A power of attorney to mortgage land to raise money to make improvements upon it, will authorize the agent—the work being done, and it being impracticable to effect a loan—to mortgage the land to the contractor for the amount due him. *A. V. Chan. Ct.*, 1843, *Cumming v. Williamson*, 1 *Sandf. Ch.*, 17; 8 *C.*, less fully reported, 2 *N. Y. Leg. Obs.*, 153.

25. — to sell land. The owner of land posted a notice upon it, "For sale: inquire of W." Complainant, knowing the ownership, applied to W., and negotiated a contract with him. It appearing that W. was not authorized to sell but only to give information,—*Held*, that the advertisement did not import a power to sell, and the owner was not bound. *A. V. Chan. Ct.*, 1840, *Mortimer v. Cornwell*, *Hoffm.*, 851.

26. — "to settle trespasses." A power to an agent intrusted with the management of lands, to "bring suits for trespasses, and to exercise a distinction in the settlement of trespasses," implies a power to settle for trespasses without commencing suits. *Supreme Ct.*, 1850, *Taylor v. Harlow*, 11 *Barb.*, 322.

27. — to convey. A power to "execute conveyances and assurances," does not import a power to bind the principal by covenants—*e. g.*, covenant of seizin. *Supreme Ct.*, 1809, *Nixon v. Hyserott*, 5 *Johns.*, 58.

28. — to make notes. A power of attorney authorizing the agent "in my name to draw any notes," is limited to notes made in

the proper business of the principal; and is so, independently of its containing the words, "to my use." *Supreme Ct.*, 1842, *North River Bank v. Aymar*, 3 *Hill*, 262.

29. A power of attorney to a special agent, authorizing him to collect all demands due his principal, to sell his real estate, and to accomplish a complete adjustment of all his concerns, does not confer authority to make a note in the name of the principal. *Supreme Ct.*, 1832, *Rossiter v. Rossiter*, 8 *Wend.*, 494.

30. An authority to collect debts cannot, by any construction, amount to an authority to give notes. *Supreme Ct.*, 1802, *Dusenbury v. Ellis*, 3 *Johns. Cas.*, 70.

31. — to alter instrument. K. was to give security to M., to be approved by H. He and his surety executed a bond for that purpose, and delivered it to their agent, with verbal directions and authority to submit it to H., and if he thought alterations or additions necessary, to make them. Upon the suggestion of H., the agent made certain alterations. *Held*, that the agent had competent authority to make them. *Supreme Ct.*, 1835, *Knapp v. Maltby*, 13 *Wend.*, 587. Compare *BILLS, NOTES, AND CHECKS*, 78-77.

32. — to "take care" of property. An authority to "take care" of personal property, and to give the principal notice of the existence of liens upon it, does not involve an authority to make an agreement with a third person, to purchase the property on account of the principal, at a sale under a distress-warrant. *Ct. of Appeals*, 1849, *Brisbane v. Adams*, 3 *N. Y. (8 Comst.)*, 129.

For other illustrations of the Interpretation of written instructions in particular cases, see *CONSIGNOR AND CONSIGNEE*, 22; *FACTOR*, 1-18; *POWERS*. Compare, also, cases cited, *CONTRACTS*, 447-558.

4. Implied Powers.

33. Powers of agent to sell. That an agent employed to sell, generally, has power, in the exercise of a sound discretion, to sell on a reasonable credit. *Supreme Ct.*, 1828, *Leland ads. Douglass*, 1 *Wend.*, 490.

34. An authority to sell stocks such as are usually sold in the market, does not authorize a sale on credit. [1 *Campb. N. P.*, 258; *Story on Ag.*, 78.] In general, authority to sell does not authorize a sale on credit, unless it is a known usage of trade that the article-

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should be so sold. *Ct. of Errors*, 1841, *Delafield v. State of Illinois*, 26 *Wend.*, 192; and 2 *Hill*, 159; affirming S. C., 8 *Paige*, 527.

35. An agent, who has a discretionary power to sell goods and collect the price, has an implied authority to entertain a claim by the purchaser for a deduction from the price, on the ground of defect in quality; and a deduction agreed on in good faith by the agent, will be binding upon the principal. *N. Y. Superior Ct.*, 1853, *Taylor v. Nussbaum*, 2 *Duer*, 302.

36. An agent, intrusted with goods for sale, with discretionary powers,—*e. g.*, a master, who is also consignee,—may bind his principal by a contract to give a part of the profits of sale to a third person, in compensation for services in selling. *Supreme Ct.*, 1808, *Lyle v. Clason*, 1 *Cai.*, 323.

37. To render the memorandum, in writing, of a sale, made by an agent, binding upon the vendee, the agent must have authority from the vendee, or be agent of both parties,—*e. g.*, an auctioneer or broker. A mere agent for the vendor cannot make a memorandum to bind the vendee. *Supreme Ct.*, 1828, *Sewall v. Fitch*, 8 *Cow.*, 215.

38. Though an agent to sell, has not authority, as such, to warrant, yet where an agent sells animals, knowing that they have a contagious disease, and does not communicate the fact, the principal is liable for damages; not as for a breach of warranty, but on the ground of a suppression of truth. *Supreme Ct.*, 1835, *Jeffrey v. Bigelow*, 13 *Wend.*, 518.

39. An agent to sell goods, has no authority to pledge them, to secure a debt of his own. *N. Y. Com. Pl.*, 1854, *Henry v. Marvin*, 8 *E. D. Smith*, 71. See *Factor*, 28-43.

40. Agent to buy. A general authority to an agent, to purchase goods on credit, implies an authority to the agent to make the necessary representations as to the credit and solvency of the principal. Hence, the agent, in making such representations, is deemed to act within the scope of his employment; and if he makes false and fraudulent representations, the seller has the same right to reclaim the goods from the principal, that he would have had if the false representations had been made by the latter in person. *Supreme Ct.*, 1855, *Hunter v. Hudson River Iron & Machine Co.*, 20 *Barb.*, 498.

41. Correspondents. Where by the usual

course of business between two dealers in different places, one sends to the other produce, &c., and orders from him such goods as he needs for his own trade, such orders are no authority to buy goods on the credit of the dealer ordering them. The other should buy on his own account such goods required by the orders as he does not himself have on hand. *Supreme Ct.*, 1829, *Jaques v. Todd*, 3 *Wend.*, 83.

42. Agent of estate. An administrator sent a creditor of his intestate to an agent of the intestate having funds of the estate in his hands, for payment. *Held*, a clear authority to the agent to apply the moneys to discharge the creditor's demand. *N. Y. Com. Pl.*, 1855, *Walkley v. Griffith*, 4 *E. D. Smith*, 343.

43. Delivery of bond. P. hired a house, and defendant executed a covenant of suretyship, under P.'s covenant to pay the rent, and P. took the paper to deliver to the landlord;—*Held*, that P. had authority from defendant to complete the delivery of both instruments; and his erasing his own name, and re-executing his covenant, in the presence of a subscribing witness, at the landlord's request, was not an excess of authority. *N. Y. Superior Ct.*, 1829, *Dusenberry v. O'Shiel*, 2 *Hall*, 379.

44. — of policy. An agent of an insurance company authorized by an applicant for insurance to complete the filling up of his application,—*Held*, the agent of the applicant, under the circumstances, so far that the latter was bound by a false representation inserted by him in the application. *Supreme Ct.*, 1857, *Smith v. Empire Ins. Co.*, 25 *Barb.*, 497.

45. Clerk to a merchant, not authorized, as such, to make notes in the name of his employer. *Terry v. Fargo*, 10 *Johns.*, 114.

46. Authority to sell land. A mere authority to negotiate a contract for the sale of land, does not carry with it an authority to the agent to sign the vendor's name to the written contract, required by the Statute of Frauds. *Supreme Ct.*, 1854, *Coleman v. Garrigues*, 18 *Barb.*, 60.

47. — to manage an estate. That a general power to manage an estate does not authorize the agent to put in an answer for his principal to a bill in chancery. *Rogers v. Oruger*, 7 *Johns.*, 557.

48. — to manage a suit. An agent of a party to a suit, relative to title to land, employed for the purpose of managing the cause,

Notice to Agent.

collecting testimony, and employing counsel, has not implied authority to bind his principal to remunerate counsel by a part of the land. *A. V. Chan. Ct.*, 1840, *Berrien v. McLane, Hoffm.*, 421.

49. What will operate as a ratification of his engagement for such remuneration. *Id.*

50. Agent of corporation. Though the by-laws of a corporation do not confer on its general agent the power of accepting bills, yet if the agent has been in the habit of accepting bills which the company has paid, it will be bound by an acceptance given by him under like circumstances. *Supreme Ct.*, 1818, *Munn v. Commission Co.*, 15 *Johns.*, 44; *S. P.*, 1841, *Com. Bank of Lake Erie v. Norton*, 1 *Hill*, 501; 1858, *Exchange Bank v. Monteath*, 17 *Barb.*, 171.

51. Where the agent of a corporation has been accustomed to submit controversies to which it is a party to arbitration, and the corporation has adopted his acts, a subsequent submission of a controversy by him, under like circumstances, will be binding upon it. *Ct. of Appeals*, 1858, *Wood v. Auburn & Rochester R. R. Co.*, 8 *N. Y.* (4 *Seld.*), 160.

52. As to wrongful acts. An agent's authority, however generally expressed, if capable of being executed in a lawful manner, is never to be extended by construction to embrace acts prohibited by law, so as to render his principal liable to a criminal prosecution, or to a statute penalty. *N. Y. Superior Ct.*, 1854, *Clark v. Metropolitan Bank*, 3 *Duer*, 241.

53. Thus a bank will not be held liable for a statute penalty imposed for receiving a prohibited currency, upon the ground that it had been received by their teller, under a mere general authority to receive payment of paper held by the bank. Authority to receive the prohibited paper,—or a ratification,—must be shown. *Id.*

54. A general agent,—*e. g.*, one who is president and general manager of a corporation,—has no implied authority to commit a trespass. His principal is not liable for a trespass committed by him, or by his direction, no express authority to do the act being shown. *Ct. of Appeals*, 1849, *Vanderbilt v. Richmond Turnpike Co.*, 2 *N. Y.* (2 *Comst.*), 479.

55. The captain of a boat owned by a corporation wilfully ran her into the plaintiff's boat; and his act was sanctioned and approved

by the president who was the general manager of the corporation. *Held*, that this did not make the corporation liable for the damage. *Id.*

56. Employing attorney. An agent of owners of a boat employed in their name, but without special authority, an attorney to sue persons who had assaulted the hands;—*Held*, that under the circumstances the owners were not liable to the attorney. *Supreme Ct.*, 1848, *Cochran v. Newton*, 5 *Den.*, 482.

II. NOTICE TO AGENT.

57. General rule. Notice to the agent is notice to the principal, if received by the agent while he is acting for the principal in the course of the transaction which becomes the subject of the suit. It is taken for granted that the principal knows whatever the agent knows. *Supreme Ct.*, 1842, *Bank of U. S. v. Davis*, 2 *Hill*, 451; 1848, *Sutton v. Dillaye*, 3 *Barb.*, 529.

The grounds of this rule stated. *Bank of U. S. v. Davis*, 2 *Hill*, 451.

58. Instances. Thus, where an agent at the time of dealing with A. has notice that the former firm of A. & B. has been dissolved, this affects the principal with notice of the dissolution. *Supreme Ct.*, 1848, *Sutton v. Dillaye*, 3 *Barb.*, 529.

59. The agent of the judgment-creditor was present at a sale, by the debtor to a third party, of certain lands on which the judgment was a lien,—drew the conveyance, and was informed of the terms of the sale; and the debtor soon delivered to such agent, as security for the judgment-debt, the notes given in payment for the land conveyed. *Held*, 1. That although the judgment-creditor had no actual knowledge of these facts, yet she was chargeable with notice of them by reason of the notice to her agent. 2. That the receipt of these notes by her agent with knowledge of their consideration, although it did not affect her lien upon the lot as security for the judgment, in case it should not be otherwise satisfied, imposed on her, in equity, a duty to apply the proceeds of the notes in reduction of the judgment. She was bound in equity to retain all other property which had been delivered to her as security for the judgment, and apply its proceeds in satisfaction of the judgment, before resorting to the lands which had been so sold and paid for. *Ct. of Ap-*

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peals, 1854, *Ingalls v. Morgan*, 10 N. Y. (6 *Seld.*), 178.

60. Restriction. The rule that notice to the agent is notice to the principal applies only where the agent is acting in the course of his employment. *Ct. of Appeals*, 1854, *Weisser v. Denison*, 10 N. Y. (6 *Seld.*), 68.

61. Where checks forged by the confidential clerk of the depositor were paid by the bank, charged to the depositor in his pass-book, the book balanced, and with the forged vouchers, among others, returned to the clerk, who examined the account at the request of the principal, and reported it correct, and the principal did not discover the forgeries until several months afterwards, when he immediately made them known to the bank;—*Held*, in an action to recover the balance of the deposit, that the bank could not retain the amount of the forged checks. *Id.*

62. Corporations. The rule that notice to the agent is notice to the principal, where it is the duty of the agent to act upon such notice, or to communicate it to his principal in the proper discharge of his duty as agent, applies to the agents of corporations as well as others. *Chancery*, 1883, *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 *Paige*, 127.

63. Funds of the corporation were by the directors placed under the control of a finance committee. B., one member of this committee, was president of the corporation and a director of the F. Bank; and C., another member of the committee, was also president of the bank. The finance committee, B. and C. being present, authorized the fund to be deposited in the F. Bank, subject to be drawn out only by the finance committee. B. made the deposit, entering his own name in the books of the bank, as the one in which checks would be drawn; and he afterwards drew out the money for his own use, and became insolvent.

Held, 1. That notice to an individual director, having no duty in relation to the notice, is not notice to the corporation. Therefore the knowledge which B. and C. acquired at the meeting of the finance committee that the fund was only to be drawn by the finance committee, was not of itself, notice to the bank that B. was not authorized to draw the money. 2. That if C. had had personal knowledge that B. had left his individual signature on the book, it would have been his

duty as president of the bank to have notified the teller of the facts known to him as member of the finance committee, and to have forbidden them from paying individual checks of B., and his failure to do so, would have made the bank liable to pay the fund again. 3. That there being no proof that C. had such knowledge, the bank was protected in its payment of B.'s check. *Id.*

64. Where a principal appoints several agents to act jointly in the transaction of business, notice to any one of them is notice to the principal. Thus notice to one of several bank directors authorized to conduct the business of the bank, acting as a board, is notice to the bank. *Supreme Ct.*, 1842, *Bank of U. S. v. Davis*, 2 *Hill*, 451.

65. A bill of exchange was sent to one of the directors of a bank to be discounted for the benefit of the drawer. The director, being at the time a member of the board ordering the discount, received the avails himself, representing the discount to be for his own benefit, *Held*, that the bank was chargeable with notice of the fraud, and could not recover upon the bill. *Id.*

66. Acts of sub-agent. The principal is chargeable with notice of the acts of a sub-agent duly appointed by an agent having power to appoint. *Chancery*, 1846, *Boyd v. Vanderkemp*, 1 *Barb. Ch.*, 273.

III. RATIFICATION.

67. Instances. Where an agent to sell is sued for a breach of warranty upon the sale, and the principal acknowledges his liability for whatever damages may be recovered against the agent, and gives him an indemnity, the principal cannot afterwards set up that the warranty was unauthorized. *Ct. of Errors*, 1834, *Rogers v. Kneeland*, 18 *Wend.*, 114.

68. An executor sold growing wheat belonging to a widow, supposing it to be his own, and took a note for the price with an oral agreement for measurement and correction. The widow, with notice that the purchaser claimed that the sale was subject to measurement, accepted the note from the executor, and sued it. *Held*, she was bound by the agreement for measurement. By consenting to adopt the sale, she became bound by its terms. *Ct. of Appeals*, 1854, *Carter v. Hamilton*, *Seld. Notes*, No. 6, 80; reversing S. C., 11 *Barb.*, 147.

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69. Where an agent empowered to collect a bill receives a part, and delivers a receipt in full, and the principal, with knowledge of the facts, receives from the agent the sum paid to him, this is a ratification of the compromise entered into by the agent; and the principal cannot afterwards sue for the balance. *Supreme Ct.*, 1847, *Palmerton v. Huxford*, 4 *Den.*, 166. Compare *Armstrong v. Gilchrist*, 2 *Johns. Cas.*, 424; *Houston v. Shindler*, 11 *Barb.*, 36.

70. During a creditor's absence from the country, an attorney, without the creditor's knowledge, accepted from a debtor a confession of judgment. Afterwards the partner of the creditor requested the attorney to issue execution. *Held*, sufficient to show acceptance of the judgment by the creditor, as against subsequent judgment-creditors. *Supreme Ct.*, 1859, *Johnston v. McAusland*, 9 *Abbotts' Pr.*, 214.

71. What facts will amount to ratification of the act of an agent of a joint association, in drawing a bill of exchange upon them. *Shiras v. Morris*, 8 *Cow.*, 60.

72. **Ratification by silence.** If the agent reports what he has done—though in excess of his instructions—to his principal, by letter, and the principal does not within a reasonable time notify his disapproval, he will be deemed to have ratified the agent's act. *Ct. of Appeals*, 1849, *Gage v. Sherman*, 2 *N. Y. (2 Comst.)*, 417. *Supreme Ct.*, 1815, *Cairnes v. Bleecker*, 12 *Johns.*, 800; 1824, *Vianna v. Barclay*, 3 *Cow.*, 281; 1848, *Johnson v. Jones*, 4 *Barb.*, 369. *Ct. of Errors*, 1800, *Armstrong v. Gilchrist*, 2 *Johns. Cas.*, 424.

73. Three months,—*Held*, more than a reasonable time, where the parties lived in New York and Albany. *Cairnes v. Bleecker*, 12 *Johns.*, 800.

74. Where one buys land in the double capacity of principal and agent, for others jointly interested with him, and receives and retains the deed under circumstances from which a communication of the facts to his associates may reasonably be presumed, and they do not object that he has exceeded his authority, they will be deemed to have waived any objection that may exist. *Ct. of Appeals*, 1849, *Gage v. Sherman*, 2 *N. Y. (2 Comst.)*, 417.

75. **Knowledge of facts requisite.** To make an unauthorized act of an agent binding on the principal, on the ground of a subsequent ratification, such ratification must have

been made by the principal with a full knowledge of the facts affecting his rights. *Ct. of Appeals*, 1851, *Seymour v. Wyckoff*, 10 *N. Y. (6 Seld.)*, 218; 1858, *Nixon v. Palmer*, 8 *N. Y. (4 Seld.)*, 898. *Supreme Ct.*, 1827, *Gorham v. Gale*, 7 *Cow.*, 739; 1843, *Davenport v. Buckland*, *Hill & D. Supp.*, 75.

76. To hold a principal to a contract made by an agent without authority, on the ground of a ratification by acts of the principal, it should be shown satisfactorily that at the time of doing the acts relied on, the principal had a full knowledge of what the contract was, and intended his acts to relate to the performance of it. Receiving money, generally, and without knowledge it is paid upon the contract, is no ratification. *N. Y. Com. Pl.*, 1851, *Roach v. Coe*, 1 *E. D. Smith*, 175.

77. The party claiming the ratification must show knowledge on the part of the principal. *Ct. of Appeals*, 1858, *Nixon v. Palmer*, 8 *N. Y. (4 Seld.)*, 898.

78. **Effect of ratification.** The ratification by a principal of the act previously unauthorized of one assuming to be his agent, operates as an adoption of the act, and not merely as presumptive evidence that it was previously done by authority. *Ct. of Appeals*, 1849, *Brisbane v. Adams*, 8 *N. Y. (8 Comst.)*, 129; 1857, *Commercial Bank of Buffalo v. Warren*, 15 *N. Y. (1 Smith)*, 577; but compare *Gorham v. Gale*, 7 *Cow.*, 739.

79. A wife may act as the agent of her husband, and a subsequent acknowledgment or ratification by the husband, of acts of the wife, is, in this, as in other cases of agency, equivalent to an original authority. *Supreme Ct.*, 1830, *Hopkins v. Mollinieux*, 4 *Wend.*, 465.

80. A ratification, being equivalent to an original authority, is available to a person who had notice, at the time of his dealing with the agent, of the want of such authority. *Ct. of Appeals*, 1857, *Commercial Bank of Buffalo v. Warren*, 15 *N. Y. (1 Smith)*, 577.

81. **Partial ratification.** The law does not permit a principal to adopt an unauthorized act of an agent so far as it is beneficial and reject the residue. By adopting a part of the act he becomes bound by the whole. *Ct. of Appeals*, 1848, *Farmers' Loan & Trust Co. v. Walworth*, 1 *N. Y. (1 Comst.)*, 433; reversing *S. C.*, 4 *Sandf. Ch.*, 51; *Dexter v. Adams*, 1 *How. App. Cas.*, 771, 793; 1852, *Cobb v. Dows*, 10 *N. Y. (6 Seld.)*, 335.

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82. Act of public officer. The fact that the individual assuming to act for another is a public officer,—*e. g.*, clerk of court,—and acts under a supposed authority of law, does not prevent acts of the principal adopting the unauthorized acts of such officer from operating as a ratification. *Ct. of Appeals*, 1848, *Farmers' Loan & Trust Co. v. Walworth*, 1 *N. Y. (1 Comst.)*, 438; reversing *S. C.*, 4 *Sandf. Ch.*, 51.

83. A clerk in chancery loaned on bond and mortgage a sum which had been paid into court. Afterwards the borrowers executed to the clerk another bond for the same sum, and another mortgage upon different property. These securities were intended as a substitute for the first bond and mortgage, and were so received by the clerk, who, without any direction of the court, executed a satisfaction of the first mortgage, which was recorded. The owners of the fund, with notice of all the circumstances, foreclosed the second mortgage in the name of the clerk, and had the property sold. *Held*, that although the discharge of the first mortgage was void, and might have been treated as a nullity, yet the election of the owners of the fund to proceed upon the substituted security was a ratification of the acts of the clerk, and precluded them from foreclosing the first mortgage for the purpose of collecting a deficiency arising upon sale under the second. *Id.*

84. Contracts made by special agents of a State, acting under a statute, in excess of the power conferred by it, cannot be ratified by the executive officers of the State, but only by the Legislature; and the doctrine that acquiescence is evidence of ratification is not to be rigorously applied to the acquiescence of a State. Time must be allowed for public acts. *Ct. of Errors*, 1841, *Delafield v. State of Illinois*, 26 *Wend.*, 192, and 2 *Hill*, 159; affirming *S. C.*, 8 *Paige*, 527.

IV. LIABILITY OF PRINCIPAL TO THIRD PERSONS.

85. General rule. In general, where the agent has acted within the scope of his employment, the principal must suffer the loss, rather than a third party who has dealt with the agent in good faith—upon the ground that of two innocent persons, he shall suffer who has put in the power of another to do an injury. *Supreme Ct.*, 1848, *Johnson v. Jones*,

4 *Barb.*, 369; 1858, *Exchange Bank v. Monteath*, 17 *Id.*, 171; 1855, *Hunter v. Hudson River Iron & Machine Co.*, 20 *Id.*, 498; 1857, *Smith v. Empire Ins. Co.*, 25 *Id.*, 497; 1858, *Medbury v. N. Y. & Erie R. R. Co.*, 26 *Id.*, 564.

86. In many cases a principal is responsible for the act of his agent which, although in excess of the authority of the agent, was within the general scope of his employment. But this is only true between the principal and a third person, who, having rightfully believed that the agent was acting within his authority, would sustain a loss if the act were not considered as the act of the principal. It is only true where the question is by which of two innocent parties a loss resulting from the misconduct of the agent ought to be borne. *N. Y. Superior Ct.*, 1854, *Clark v. Metropolitan Bank*, 3 *Duer*, 241.

87. The declarations of an agent, if not expressly authorized by the principal, must, in order to bind the latter, be within the scope of the agency. *Ct. of Appeals*, 1852, *N. Y. Life Ins. & Trust Co. v. Beebe*, 7 *N. Y. (3 Seld.)*, 364.

88. An agent authorized to borrow money for his principal, upon a bond and mortgage by the latter, stated, falsely, to the plaintiffs that he, the agent, was the owner of it, and that it was given upon a previous indebtedness to him. On this representation the plaintiffs were induced to advance their money. *Held*, that the defendants were not estopped from denying the false representation. *Id.*

89. Instruments required by the Statute of Frauds to be in writing, may be subscribed by an authorized agent of the party to be charged. 2 *Rev. Stat.*, 135, § 9; *Id.*, 136, § 8; *Id.*, 137, § 2.

90. Note made or acceptance signed by authorized agent, binding on his principal. 1 *Rev. Stat.*, 768, §§ 2, 6.

91. Apparent authority. Where the very act of the agent is authorized by the terms of the power, such act is binding on the principal as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority. *Supreme Ct.*, 1842, *North River Bank v. Aymar*,* 3 *Hill*, 262. Followed,

* The decision of the Supreme Court is said to have been reversed in the Court of Errors; but the reversal was not reported, and the ruling of the Supreme Court has been since approved by the Court of Appeals. See *Mechanics' Bank v. N. Y. & New Haven R. R. Co.*, 18 *N. Y. (3 Kern.)*, 599;

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1858, *Exchange Bank v. Monteath*, 17 *Barb.*, * 171.

92. Where, under a written power to make and indorse notes, the agent applies to a third person, professedly for the benefit of the principal, to discount notes made by him in the name of the principal, the application is equivalent to a declaration that the notes were made in the business of the principal; and the latter cannot defend a suit on the notes by proof that the agent intended the avails and employed them for an unauthorized purpose. *Supreme Ct.*, 1842, *North River Bank v. Aymar*, 3 *Hill*, 262.

93. But if the lender has notice that the note is made, not for the principal's benefit, but for some improper purpose, he cannot recover on it. He is not a *bona-fide* holder. *Supreme Ct.*, 1842, *Stainer v. Tysen*, 3 *Hill*, 279.

94. In trover for certain checks, it appeared that the plaintiff was in the habit of sending checks to his agent in New York to be converted into cash, for the purpose of buying Eastern money. He indorsed the checks in question to his agent, and sent them to him for that purpose. The agent indorsed them to the defendants, who received them without notice of the agency, and paid value by passing the amount to the credit of the agent, and certifying checks on their bank for the amount of the credit. The agent misapplied the funds and failed. *Held*, that the title to the checks passed to the defendants, and that the action would not lie. In negotiating the checks to the bank, the agent acted within his authority; and the fact that he afterwards misapplied the funds did not affect the title of the bank. *Ct. of Appeals*, 1850, *Case v. Mechanics' Banking Association*, 4 *N. Y.* (4 *Comst.*), 166.

688; *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 *N. Y.* (2 *Smith*), 125, 128, 143.

* In a later decision, in *Exchange Bank v. Monteath*, reported 24 *Barb.*, 871, the Supreme Court felt constrained to reconsider the view expressed in 17 *Barb.*, 171, on the authority of Judge Comstock's statement (18 *N. Y.*, 638), that the decision of the Supreme Court in *North River Bank v. Aymar* had been reversed in the Court of Errors. As, however, the Court of Appeals have since approved the reported decision of the Supreme Court in that case, disregarding the traditional reversal by the Court of Errors (16 *N. Y.*, 128, 143), we consider the later decision of the Supreme Court, in *Exchange Bank v. Monteath*, in effect overruled, and the earlier one reinstated.

95. **Acceptance.** Where a bill is, on its face, accepted by an agent, the person receiving it is bound to ascertain that the agent acts within his powers. *Ct. of Appeals*, 1858, *Nixon v. Palmer*, 8 *N. Y.* (4 *Seld.*), 398. *S. P.*, *N. Y. Superior Ct.*, 1848, *Beach v. Vandewater*, 1 *Sandf.*, 265.

96. **Agent's want of skill.** The advice or judgment of an incompetent agent no justification to the principal, when sought to be charged with the damages caused by the agent's want of skill. *Rochester White Lead Co. v. City of Rochester*, 8 *N. Y.* (8 *Comst.*), 468.

97. — **wrongful act.** The principal is liable for damages occasioned by a wrongful act of his agent, notwithstanding it was *wilful*, if the act was within the scope of his authority. *Ct. of Appeals*, 1858, *Weed v. Panama R. R. Co.*, 17 *N. Y.* (8 *Smith*), 862.

98. Thus, where a railroad conductor designedly and wilfully detained a train overnight, whereby a passenger was exposed, and her health seriously injured,—*Held*, that the company were liable for damages. *Id.*

99. **Goods bought by agent.** Although the agent does not disclose, in buying for the principal, the name of the latter, yet if he use the style of agent in the transaction, and credit is not given to him exclusively, the principal is liable for the goods. *Supreme Ct.*, 1838, *Pentz v. Stanton*, 10 *Wend.*, 271. *S. P.*, *N. Y. Com. Pl.*, 1855, *Fish v. Wood*, 4 *E. D. Smith*, 327.

100. Goods were purchased of the plaintiffs, by an agent for the defendants. The agent informed the plaintiffs of his agency at the time, and offered them the liability of the defendants; but the plaintiffs preferred to take the agent's own note, and agreed that he should be the purchaser. The agent gave his note accordingly, and the goods were charged to him on the books of the plaintiffs. *Held*, that the defendants were not liable for the value of the goods. *Supreme Ct.*, 1854, *Ranken v. Deforest*, 18 *Barb.*, 143.

101. If the principal, without notice of any claim, pays the agent for goods bought by the latter on his own credit, the principal is no longer liable for them to the seller. *N. Y. Com. Pl.*, 1855, *Fish v. Wood*, 4 *E. D. Smith*, 327.

102. **Giving receipt to agent.** If a man deals with another's agent, and gives him a receipt for money which the agent had author-

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ity to pay, and on the faith of that receipt, the principal settles with his agent, and repays him, the party giving the receipt cannot afterwards recover the amount from the principal, on the ground of a mistake, unless he gave notice to him of the mistake in the first instance, and before the settlement between principal and agent. *Supreme Ct.*, 1818, *Cheever v. Smith*, 15 *Johns.*, 276. Compare *Davis v. Allen*, 8 *N. Y.* (8 *Comst.*), 168.

103. A loan is not rendered usurious by an agreement between the borrower and the agent of the lender, to make the loan, that the agent shall have a commission for making the loan, provided such agreement is unknown to the lender, and in no respect for his advantage. *Supreme Ct.*, 1855, *Oondit v. Baldwin*, 21 *Barb.*, 181.*

104. Where an agent, intrusted with a negotiable note, for the purpose of procuring it to be discounted, pledged it with a stranger for money loaned to him for his own use, at usurious interest,—*Held*, that the transaction being illegal, for usury, the lender could not retain the note against the true owner, on the ground that he had received the same in good faith, in the usual course of trade. *N. Y. Superior Ct.*, 1848, *Keutgen v. Parks*, 2 *Sandf.*, 60.

105. Insurance agent. An insurance company appointed H. their general agent, and placed in his hands a number of policies executed in blank, to be issued by him, but restricted him to effecting insurances within a particular limit. *Held*, they were liable on a policy issued by him upon property at a distant place; the insured having no reason to suspect the restriction. *Supreme Ct.*, 1840, *Lightbody v. North American Ins. Co.*, 28 *Wend.*, 18.

106. The delivery of a policy by an agent is good, and binding upon the principals, where the premium had been previously paid, although the insured had been informed by the principals that they intended to revoke the appointment of the agent, if such delivery takes place before revocation, or knowledge on the part of the agent, of the intent to revoke. *Id.*

107. Agent to receive stock. The parties to a controversy agreed that certain stock should be delivered by one to B. for the other,

in satisfaction of his demand, and this was done. *Held*, that B. was to be regarded as the agent of the claimant, and his receipt of the stock was a receipt by the claimant, and constituted a good satisfaction. *Supreme Ct.*, 1819, *Anderson v. Highland Turnpike Co.*, 16 *Johns.*, 86.

108. Exchange. The plaintiff's agent exchanged the plaintiff's horse for defendant's, upon terms which the defendant knew the plaintiff had previously refused. The plaintiff did not know the terms of the exchange, until after the horse he received was dead; and he repudiated it as soon as he knew the terms. *Held*, that he was entitled to recover back his own horse. *Supreme Ct.*, 1851, *Robertson v. Ketchum*, 11 *Barb.*, 652.

109. A clerk in a store, employed with ordinary powers to sell goods at retail, but having no authority to deliver goods in payment of debts, agreed to give a creditor of his principal certain goods in payment of his demand; and the goods were levied on by the sheriff, under an execution against the principal, while they were on their way to the creditor. *Held*, that the act of the clerk was unauthorized, and no title had passed to the creditor. *Supreme Ct.*, 1820, *Beals v. Allen*, 18 *Johns.*, 368.

110. A sheriff or marshal, to whom process is delivered to be executed, does not become the agent of the party suing it out, in such sense as to render the party liable for acts or engagements entered into by the officer, for which no special directions have been given. Thus, one who publishes an advertisement by direction of the officer, cannot recover against the party, without showing that the latter authorized the publication. *N. Y. Superior Ct.*, 1850, *Raney v. Weed*, 8 *Sandf.*, 677; 8 *O.*, 8 *N. Y. Leg. Obs.*, 182.

111. Committee of managers. Certain associates appointed three managers of their enterprise. Two of the three managers sent an agent to buy property for the use of the associates. It did not appear that the third conferred and acted with them. *Held*, they were liable notwithstanding the duty being strictly ministerial, and it appearing that the association had acquiesced. *Supreme Ct.*, 1854, *Wells v. Gates*, 18 *Barb.*, 554.

As to when a Power vested in several persons may be exercised by a portion only, see **POWERS**.

* And see a further decision in this case, to the same effect, 21 *N. Y.* (7 *Smith*), 219.

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112. Agent of municipal corporation. A municipal corporation, having a claim against the defendant, appointed H. and R. its agents to settle it with the defendant. R., without the concurrence of H., effected an arrangement with the defendant, by which the latter turned out to R. certain real estate and securities in satisfaction of the claim. The plaintiff, on being informed of the arrangement, promptly repudiated it, and directed the securities to be returned to the defendant. *Held*, that the plaintiff was not bound by this settlement. *Supreme Ct.*, 1856, *Mayor, &c., of Auburn v. Draper*, 23 *Barb.*, 426.

113. Wife. Where a wife has been authorized by her husband to act as his agent in the management of leased property owned by him, repairs made by the tenant under authority from her, and for which she promised to pay, are chargeable to the husband. *N. Y. Com. Pl.*, 1864, *Rosenbaum v. Gunter*, 8 *E. D. Smith*, 208.

114. Departure from instructions in filling an order for the purchase of trees, under peculiar circumstances. *Davenport v. Buckland, Hill & D. Supp.*, 75.

115. Employment of sub-agent. A principal who has had the benefit of services of a third person employed by his agent, cannot resist such person's action for wages, on the ground he had instructed his agent to make no engagements except in writing, and the plaintiff was engaged only by parol. *So held*, where the fact of such instructions was not made known to the plaintiff. *N. Y. Com. Pl.*, 1855, *Rourke v. Story*, 4 *E. D. Smith*, 54.

116. Where an agent acting as such employs a sub-agent on the credit of the principal, the latter is liable directly to the subordinate for his compensation. It is no defence that he has settled with the immediate agent, and paid him the amount, unless the subordinate has agreed to discharge the principal, and look to the agent alone. *Supreme Ct.*, 1881, *Lincoln v. Battelle*, 6 *Wend.*, 475.

117. When acts of sub-agent bind the principal. Though an agent cannot delegate his discretionary power, he may direct mechanical acts to be performed by others. Thus, where he has determined to accept a bill, he may direct a clerk to sign the acceptance for the principal in the clerk's name. *Supreme Ct.*, 1841, *Com. Bank of Lake Erie v. Norton*, 1 *Hill*, 501.

118. Where the owner of a note employed a broker to sell it, and the broker employed a sub-agent, who disposed of it by means of a false representation,—*Held*, that the fraud of the sub-agent was a good defence to the principal's action for the price. He could not claim the benefit of the agent's act, and yet exempt himself from the fraud. *N. Y. Superior Ct.*, 1857, *Elwell v. Chamberlain*, 2 *Bow.*, 280. To nearly same effect is, *Supreme Ct.*, 1855, *Hunter v. Hudson River Iron & Machine Co.*, 20 *Barb.*, 498.

119. The distinction between the liability of the ultimate superior for an injury resulting from the work itself, however skillfully performed, and that of the immediate superior for the negligence of a servant while executing it,—considered. *Storrs v. City of Utica*, 17 *N. Y. (8 Smith)*, 104.

As to how far **Admissions or declarations** of the agent bind the principal, see **EVIDENCE**, 1258-1271.

For cases in which the principal has been held **Estopped** by acts of his agent, see **ESTOPPEL**, IV. *Equitable Estoppel*.

As to the liability of the principal for **Negligence** of the agent, see **NEGLIGENCE**.

V. LIABILITY OF AGENT TO THIRD PERSONS.

120. In general, a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred upon him. The acts of the agent are regarded as done by the principal. The agent is not liable to third persons for an omission or neglect of duty; but the principal is alone responsible. *Ct. of Appeals*, 1848, *Colvin v. Holbrook*, 2 *N. Y. (2 Comst.)*, 126.

121. Instances. An agent bought goods avowedly for the S. Company; and gave a note for the price signed "for the S. Company, S. B., agent." It appeared that he had power to buy goods and make notes for the company. *Held*, he was not personally liable on the note. An agent is not liable to be sued upon contracts made by him on behalf of his principal, if the name of his principal is disclosed at the time of entering into the contract. *Supreme Ct.*, 1818, *Rathbun v. Budlong*, 15 *Johns.*, 1.

122. Where a broker, who procures an insurance, knows that his employer was acting as agent for a third person in obtaining the

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insurance, and not on his own account, he cannot retain money received from the insurer for a loss, for a debt due from his employer to himself. *Supreme Ct.*, 1801, *Foster v. Hoyt*, 2 *Johns. Cas.*, 827.

123. An agent who received goods upon condition that he would not deliver them up until a certain sum out of the proceeds was paid to the plaintiff,—*Held*, liable, under the circumstances to pay the amount to plaintiff, notwithstanding the goods had been previously assigned by his principal. *Neilson v. Blight*, 1 *Johns. Cas.*, 205. Compare *Seaman v. Whitney*, 24 *Wend.*, 260, and *Murdock v. Aikin*, 29 *Barb.*, 59.

124. Where a person knowingly engages in an unlawful course, whether for his immediate benefit or not, he cannot escape liability by showing that he acted as an agent. *Supreme Ct.*, *Sp. T.*, 1857, *Hecker v. De Groot*, 15 *How. Pr.*, 814.

125. Agent empowered to appoint sub-agents, not responsible for non-performance by the principal of a contract made by a sub-agent. *Thanoery*, 1846, *Boyd v. Vanderkemp*, 1 *Barb. Ch.*, 273.

126. Auctioneers gave a purchaser an order on the owners for the goods sold; and the purchaser made a new arrangement with the owners for the delivery of the goods. *Held*, that the auctioneers were discharged from liability to the plaintiff. *N. Y. Superior Ct.*, 1858, *Simpson v. Gerard*, 2 *Bow.*, 607.

127. For default of agent. Where an agent fails to perform a duty which his principal owes to a third person, the remedy of such third person is by action against the principal. He cannot sue the agent. *Ct. of Errors*, 1846, *Denny v. Manhattan Co.*, 5 *Den.*, 689; affirming *S. C.*, 2 *Id.*, 115; *Sp. T.*, 1859, *Phinney v. Phinney*, 17 *How. Pr.*, 197.

128. This rule applied where the transfer agent of a foreign bank refused to transfer on the books stock which had been assigned to the plaintiff. *Ct. of Errors*, 1846, *Denny v. Manhattan Co.*, 5 *Den.*, 689; affirming *S. C.*, 2 *Id.*, 115.

129. Agent contracting without authority. In general, one who assumes to contract in the capacity of agent without having a competent authority to do so, becomes himself personally bound. *Supreme Ct.*, 1831, *Meech v. Smith*, 7 *Wend.*, 815; 1845, *Bank of Rochester v. Monteath*, 1 *Den.*, 402; 1858,

Episcopal Church of St. Peter v. Varian, 28 *Barb.*, 644.

130. Sealed instrument. A person who executes a sealed instrument as attorney for another, without having an authority so to do, is personally bound upon the instrument in the same manner as if it ran in his own name. *Supreme Ct.*, 1816, *White v. Skinner*, 13 *Johns.*, 807.

131. An attorney, acting in good faith, and disclosing his authority, which was insufficient, executed a lease in the name of his constituents. *Held*, that he was not personally bound by the deed. The rule applies where the attorney professes to have a power which he has not; but not where he has a power and only errs in its execution. *Ct. of Errors*, 1826, *Sinclair v. Jackson*, 8 *Cow.*, 548.

132. Note. One who, without authority, makes a note as attorney for another, is bound as maker of the note to the person who has accepted it, relying on the supposed authority. *Supreme Ct.*, 1802, *Dusenbury v. Ellis*, 3 *Johns. Cas.*, 70; *S. P.*, *Cottrell v. Thorn*, *Id.*, 3 ed., 544; 1845, *Palmer v. Stephens*, 1 *Den.*, 471.

133. Distinction between note and draft. Where one signs a draft as "agent," and his principal is known to the drawee, the latter cannot recover against the agent, even though the name of the principal does not appear on the draft. The drawer of a bill stands in the light of an indorser, and may add restrictive words showing he does not intend to be personally liable. Adding the word "agent" shows this. *Supreme Ct.*, *Circuit*, 1850, *Hicks v. Hinde*, 6 *How. Pr.*, 1.

134. Mode of execution. An agreement in writing, purporting by its recitals to be made "by and between the N. Y. Central R. R. Co. by their agent L.," but executed on the part of the corporation only by the signature and seal of L., is void. It is not binding on the agent, because he does not profess to contract for himself, and is not binding on the corporation because it is not executed in their name. *Supreme Ct.*, 1856, *Sherinan v. N. Y. Central R. R. Co.*, 22 *Barb.*, 289.

135. Though the power authorizes the attorney to convey either in his own name or in that of his principal, the attorney must use the name and affix the seal of his principal. If he conveys in his own name, the deed cannot operate as against his principal. *Supreme Ct.*, 1840, *Thurman v. Cameron*, 24 *Wend.*, 87. *S.*

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P., *N. Y. Com. Pl.*, 1857, *Dean v. Roesler*, 1 *Hill.*, 420.

As to signing and indorsing **Negotiable paper** by agents, see **BILLS, NOTES, AND CHECKS**, 47-72.

As to **Execution** of other kinds of contracts by agents, see **ADVERSE POSSESSION**, 92; **CONTRACTS**, 10-16, 21, 184-198; **DEED**, 39.

136. Employment of services. In an action for services, the defendant cannot set up that he acted only as agent, &c., unless he disclosed the fact of the agency at the time of making the contract. By contracting in his own name, he made himself personally liable. *N. Y. Com. Pl.*, 1856, *Cabre v. Sturges*, 1 *Hill.*, 160.

137. Warranty. So one sued for breach of warranty, cannot set up that he acted as agent in making the sale and warranty, unless he disclosed the agency at the time of the transaction. *N. Y. Com. Pl.*, 1856, *Blakeman v. Mackay*, 1 *Hill.*, 266.

138. Extent of the rule. The rule that an agent who contracts without authority makes himself liable on the contract as his own, applies, notwithstanding the principal may be liable to the agent for a part of the amount; *e. g.*, where the agent was authorized to buy for a limited price, and he buys at a higher price. *Ct. of Errors*, 1833, *Feeter v. Heath*, 11 *Wend.*, 477.

139. Ratification. One sued as maker of a note, made by him as agent, upon the ground that he had no authority, cannot set up a subsequent ratification, but must show that he had authority at the time of making. *Supreme Ct.*, 1832, *Rossiter v. Rossiter*, 8 *Wend.*, 494; 1845, *Palmer v. Stephens*, 1 *Den.*, 471.

140. Omission to disclose principal. A vendor or purchaser, dealing in his own name, without disclosing the name of his principal, is personally bound by his contract; and it makes no difference that he is known to the other party to be an auctioneer or broker who is usually employed in selling or buying property as an agent. [1 *Nev. & P.*, 677; 2 *Meek. & W.*, 440.] *Ct. of Errors*, 1838, *Mills v. Hunt*, 20 *Wend.*, 481.

141. Defendant was employed as agent to buy at an auction; but he did not disclose his agency either at the time of bidding nor when paying the deposit. *Held*, he was individually liable on his bid, and could not shelter himself by proving he acted as agent. *Chancery*, 1820, *McComb v. Wright*, 4 *Johns. Ch.*, 659.

142. What will discharge agent. Where a person sells property, stating that he acts for another, but does not disclose the name of his principal, he makes himself responsible to the purchaser in any way in which the actual principal would be liable. But he may exonerate himself from such liability by showing a payment over to his principal, or other special circumstances attending the transaction rendering it inequitable, as between the parties, to hold him responsible. [Reviewing many cases.] *N. Y. Superior Ct.*, 1854, *Morrison v. Currie*, 4 *Duer*, 79.

143. An agent who has purchased goods without disclosing the name of his principal, is not discharged from the liability he thereby incurs by the fact that the vendee, having subsequently discovered the principal, enters into an agreement with him to submit to arbitration a dispute relative to the price and quality of the goods. *N. Y. Superior Ct.*, 1854, *Nason v. Cockcroft*, 8 *Duer*, 366.

144. Money collected for third person. A known agent, receiving money for his principal, in pursuance of a valid authority, without fraud, duress, or mistake, is not liable to an action on behalf of a third person who is ultimately entitled to the money, for neglecting to pay the same upon request, although the agent has not paid it over to his principal. It is the duty of the agent to pay over to his principal, and the latter alone is liable to the ultimate owner. *Ct. of Appeals*, 1848, *Colvin v. Holbrook*, 2 *N. Y. (2 Comst.)*, 126. *Supreme Ct.*, 1852, *Costigan v. Newland*, 12 *Barb.*, 456. Compare **MONEY RECEIVED**, 28.

145. Thus the party for whom moneys have been collected by a deputy sheriff, cannot sue the deputy directly for the amount, but must seek his remedy against the sheriff. *Ct. of Appeals*, 1848, *Colvin v. Holbrook*, 2 *N. Y. (2 Comst.)*, 126.

146. On a statute-foreclosure, the attorney who made the sale, received the money, and the owner of the oldest lien after the mortgage, gave him notice of his claim to the surplus. The attorney declined to pay it to him, but paid it to a third person;—*Held*, that the attorney being agent of the mortgagee, owed the claimant no duty in the premises, and that the remedy of the latter was against the principal, and not the attorney. *Supreme Ct.*, 1852, *Costigan v. Newland*, 12 *Barb.*, 456.

147. Recovering back money paid to

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agent. Where money has been paid to an agent, expressly for the use of his principal, though erroneously, and the agent has paid it over, he is no longer liable to an action to recover it back, by the party making the payment. *Supreme Ct.*, 1828, *Mowatt v. McLellan*, 1 *Wend.*, 178. S. P., *Chancery*, 1829, *Duffy v. Buchanan*, 1 *Paige*, 458.

148. Where an agent collects a draft on the strength of a forged indorsement of the payee's name, without disclosing his agency, he is liable to repay the amount to the payee, as a principal; notwithstanding he acted in good faith, and has paid over the amount collected to his principal. *Supreme Ct.*, 1841, *Canal Bank v. Bank of Albany*, 1 *Hill*, 287.

149. One who held money which was the subject of a suit, as a mere stakeholder or agent,—*Held*, not liable to the plaintiff after paying over to his principal, under the circumstances. *Carew v. Otis*, 1 *Johns.*, 418.

150. Notice not to pay over. Where an agent receives money for his principal to which the latter has no right, under notice not to pay it over to the principal, the action to recover it back may be brought against the agent. *Supreme Ct.*, 1810, *Hearsey v. Pruyn*, 7 *Johns.*, 179.

151. Notice to a collector of customs not to pay over moneys exacted by him, to the government, is not necessary to sustain an action against him individually; the payment being compulsory, and there being no one but the collector against whom the action can be brought. *Supreme Ct.*, 1812, *Ripley v. Gelston*, 9 *Johns.*, 201.

See, also, MONEY RECEIVED, 85-88.

152. Effect of paying over. The general rule is, that an agent who discloses his principal, and so contracts as to give a remedy against the principal, is not liable personally, unless it was clearly his intention to assume personal responsibility: But where money has been paid to an agent for his principal under such circumstances that it may be recovered back from the latter, then it may be recovered from the agent, provided he has not paid it to his principal, nor altered his situation in relation to him; for instance, by giving fresh credit. *Supreme Ct.*, 1827, *La Farge v. Kneeland*, 7 *Cow.*, 456.

153. An agent who receives money belonging to a third person, as his principal's, is liable until he pays it over to his principal, or

does something equivalent to payment, without notice of the title of such third person. *N. Y. Superior Ct.*, 1848, *Langley v. Warner*, 1 *Sandf.*, 209.*

154. What is equivalent to payment. An agent received money from plaintiff for his principals, B. & A., a partnership, and credited it to them, and by their direction, transferred the credit to A., who had an individual account with him;—*Held*, that there was an appropriation, equivalent to a payment which excused the agent from liability. *Supreme Ct.*, 1827, *La Farge v. Kneeland*, 7 *Cow.*, 456.

As to what Settlement between principal and agent is equivalent to paying over by the latter, see MONEY RECEIVED, 92; also, PAYMENT.

155. Where the owner of a note, due at a distance, deposits it for collection with a broker, and the broker sends it to his correspondent, who collects the amount and gives credit for it to the broker, the owner can maintain an action against the correspondent for the amount; merely giving credit to the agent does not prevent the principal from asserting his right to the fund. *N. Y. Superior Ct.*, 1848, *Arnold v. Clark*, 1 *Sandf.*, 491. Compare *Clark v. Merchants' Bank*, 2 *N. Y. (2 Comst.)*, 380; BILLS, NOTES, AND CHECKS, 185.

156. Act after death of principal. A power to collect money and pay it over to a third person, given to one who is merely an agent, and has no interest in the fund, is revoked by death of the principal; and a subsequent payment will not protect the agent. *Supreme Ct.*, 1849, *Houghtaling v. Marvin*, 7 *Barb.*, 412.

157. A wife, after her husband's death, but before news of it had reached her, acting as her husband's agent and in good faith, collected money due him, and expended it for the support of the family. *Held*, that she was not liable to creditors of the deceased for the amount. If she had not authority to expend, she had none to collect; and the party who alone could maintain an action was the debtor from whom she had collected it. *N. Y. Surr. Ct.*, 1855, *Ginochio v. Panella*, 3 *Bradf.*, 277.

158. Liability of public agents. An agent

* Reversed, 3 *N. Y.*, 327, on ground the settlement proven between the agent and his principal amounted to a payment.

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of government is personally liable on a contract made by him on account of the government, unless it appears that he contracted in his official capacity, and that the other party gave credit and intended to look to the government. *So held*, notwithstanding the defendant's official character was known to plaintiff, and the services sued for were rendered towards the construction of a public vessel of war. *Supreme Ct.*, 1805, *Sheffield v. Watson*, 3 *Cai.*, 69.

159. Where a public officer makes an express promise to pay for services rendered to government, and it appears that the credit was given to him rather than to government, he is individually liable. *Supreme Ct.*, 1815, *Gill v. Brown*, 12 *Johns.*, 385.

160. This rule applied in a peculiar case. *Ib.*

161. Their contracts presumed public. In general, a public agent, who, in his known official capacity, employs a person to work on account of the government, is not personally liable for the wages. *Supreme Ct.*, 1815, *Walker v. Swartwout*, 12 *Johns.*, 444.

162. When a public officer acting in the line of his official duty, contracts for goods, services, &c., his contract is to be deemed public rather than personal. Even language used by him importing a promise to pay, will not necessarily make him individually liable. The question is—In what character did he contract: as a public agent, or private person? *Supreme Ct.*, 1820, *Olney v. Wickes*, 18 *Johns.*, 122; S. P., 1825, *People v. Van Wyck*, 4 *Cow.*, 260; 1834, *Osborne v. Kerr*, 12 *Wend.*, 179. Compare *Swift v. Hopkins*, 18 *Johns.*, 818.

163. A public agent acting in the line of his duty, is not personally liable upon contracts made by him on behalf of the government; unless it appears that the credit was given to, or the labor performed for, the agent himself, and on his agreement and promise to pay; or that the fact of his being a public agent was unknown, and not disclosed at the time of making the contract. *Supreme Ct.*, 1856, *Nichols v. Moody*, 22 *Barb.*, 611.

164. Where an overseer of the poor engages support for paupers, it is not necessary he should say, in order to screen himself from liability, that he acts as overseer. If the attendant circumstances show that he intended to act on public account, and the other contracting party is aware of his official character, he cannot be held personally liable. *Supreme*

Ct., 1852, *Holmes v. Brown*, 18 *Barb.*, 599; S. P., 1820, *Olney v. Wickes*, 18 *Johns.*, 122.

165. The plaintiff's vessel was employed in time of war by the defendant, a captain in the United States navy, in transporting ordnance. By direction of the defendant she was sunk in harbor to prevent the ordnance, &c., from falling into the hands of the enemy. The enemy captured the port, raised the vessel, and carried her off. *Held*, that the defendant was not liable to the owner for the value of the vessel so lost, although it appeared that she might have been sunk so as to have escaped capture. *Supreme Ct.*, 1819, *Bronson v. Woolsey*, 17 *Johns.*, 46.

166. A district-attorney is not personally liable for clerks' fees, accruing in suits to collect fines and forfeited recognizances, brought under the act of 1818 (Sess. 41, ch. 283, § 7), unless he has collected such fees from the persons prosecuted. *Supreme Ct.*, 1825, *People v. Van Wyck*, 4 *Cow.*, 260.

167. Agents employed to build a public work,—e. g., commissioners to build a courthouse,—are not personally liable upon their promise to pay for labor upon it, unless it clearly appears that they intended to be personally bound, or that they had in their hands money applicable to the payment. That they have received funds which they have applied to subsequent contracts, will not make them liable. *Supreme Ct.*, 1828, *Fox v. Drake*, 8 *Cow.*, 191.

168. An officer of the army, acting only on behalf of government, is not individually liable on his promise to pay for the apprehension of a deserter. *Supreme Ct.*, 1829, *Balknap v. Reinhart*, 2 *Wend.*, 375.

169. Thus, a U. S. collector of customs is not, in the absence of proof of reliance on his express promise to pay, personally liable for wages of a person employed by him as a night-watch and oarsman. *Supreme Ct.*, 1856, *Nichols v. Moody*, 22 *Barb.*, 611.

VI. LIABILITY OF THIRD PERSONS TO THE PRINCIPAL.

170. Principal may sue. Where an agent, in dealing for his principal, acquires rights for him, the principal may sue in his own name, to enforce them, notwithstanding he was a resident abroad, and notwithstanding the agency was concealed from defendant. But such action will be subject to equities which

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defendant may have against the agent. *Supreme Ct.*, 1842, *Taintor v. Prendergast*, 3 *Hill*, 72.

171. The owner of goods, sold by an agent, may recover the price from the vendee, notwithstanding the latter has given the agent credit for it on an antecedent indebtedness. Giving credit thus is not a payment to the agent, which protects the buyer. *N. Y. Com. Pl.*, 1854, *Henry v. Marvin*, 3 *E. D. Smith*, 71.

172. An undisclosed principal may always sue to enforce rights acquired on his behalf by his agent, though he does so subject to any equities which the defendant may have against the agent. *N. Y. Com. Pl.*, 1856, *Van Lien v. Byrnes*, 1 *Hill*, 183.

173. Price of property sold. The owner of property, sold at auction by direction of an agent, may sue for the price, though the name of the agent, and not his own, appears in the auctioneer's entry of sale. *Supreme Ct.*, 1884, *Hicks v. Wetmore*, 12 *Wend.*, 545.

174. Where goods are purchased from one who is known to be an agent, with intent by the purchaser to set off against the purchase a demand which he may have against the agent individually, the principal may, as on a sale made immediately by himself, have a suit against the purchaser at any time before payment to the factor. *Supreme Ct.* (1805?), *Browne v. Robinson*, 2 *Cai. Cas.*, 841.

175. Possession of goods bought. A mere agent to purchase goods,—*s. g.*, where a consignor buys and ships goods on account and at risk of the consignee, taking the bill of lading in the consignee's name,—cannot sue the carrier for failure to deliver them. The property is vested in the principal from the time of delivery to the carrier. *Supreme Ct.*, 1806, *Potter v. Lansing*, 1 *Johns.*, 215.

176. Liability on contract for conveyance. A contract by an agent that his principal shall convey his land, is not void, but furnishes a good consideration for the agreement of the other party to pay the purchase-money. Otherwise, of a contract by the agent to convey. *Supreme Ct.*, 1833, *Spencer v. Field*, 10 *Wend.*, 87.

177. Delivery of an order to an agent is a delivery to the principal, within the rule that an order or proposal need not be addressed in terms to any person, to make it valid within the Statute of Frauds, but it is enough that it has been delivered to the party claiming under

it. *N. Y. Superior Ct.*, 1853, *Darby v. Pet-tee*, 2 *Duer*, 189.

178. Money collected by a sub-agent, and paid over to the administrator of the intermediate agent, and by him deposited,—*Held*, under the circumstances, the specific property of the principal. *Hutchinson v. Reed*, *Hoffm.*, 316.

VII. QUESTIONS BETWEEN PRINCIPAL AND AGENT.

179. Agent cannot act for both parties. The same person cannot act as agent for both parties in making a contract,—*s. g.*, a contract of insurance. A contract so made will not be enforced. *Ct. of Appeals*, 1856, *N. Y. Central Ins. Co. v. National Protection Ins. Co.*, 14 *N. Y.* (4 *Kern.*), 85. *Supreme Ct.*, 1858, *Utica Ins. Co. v. Toledo Ins. Co.*, 17 *Barb.*, 132.

180. Thus a sub-agent of an insurance company cannot issue a policy, or make any agreement on the part of the company, to issue a policy to himself. *Ct. of Appeals*, 1858, *Bentley v. Columbia Ins. Co.*, 17 *N. Y.* (8 *Smith*), 421; affirming *S. C.*, 19 *Barb.*, 595.

181. — cannot act for himself. An agent or trustee, undertaking a special business for another, cannot, on the subject of that trust, act for his own benefit to the injury of his principal. If the agent undertakes to judge that he may innocently depart from his instructions, for the sake of his own interest, and that the variation cannot be material, he does it at his peril. If it turns out that the departure will essentially affect the rights of the principal, the agent cannot establish any conflicting interest of his own upon such departure. *Chancery*, 1815, *Parkist v. Alexander*, 1 *Johns. Ch.*, 394; *S. P.*, 1836, *Reed v. Warner*, 5 *Paige*, 650.

182. A principal employed an agent to procure a lease in the name of M. Instead, he purchased M.'s equitable title and took the lease in his own name;—*Held*, this could not be permitted; the consequence being that a prior mortgage from M. to the principal would be superseded. The consent of M. was not enough to authorize the agent to depart from his instructions. *Chancery*, 1815, *Parkist v. Alexander*, 1 *Johns. Ch.*, 394.

183. Purchasing on his own account. It is a settled principle of equity that no person who is placed in a situation of trust in reference to a sale, can be a purchaser on his

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own account. The rule is not confined to guardians, trustees, &c., but is of universal application to all persons having a duty to perform in reference to the sale which is inconsistent with the character of purchaser. *Chancery*, 1842, *Torrey v. Bank of Orleans*, 9 *Paige*, 649; affirmed, 7 *Hill*, 260. *A. V. Chan. Ct.*, 1845, *Dobson v. Racey*, 8 *Sandf. Ch.*, 60.

184. Where a bank has become bound to pay off and discharge a mortgage, so as to relieve the property of a third person from a sale under foreclosure, and such a sale is had, one who is cashier and agent of such bank cannot bid off the property on his own account, thereby rendering the bank liable to indemnify the owner for the loss of it. *Chancery*, 1842, *Torrey v. Bank of Orleans*, 9 *Paige*, 649; affirmed, 7 *Hill*, 260.

185. It makes no difference that the agent committed no actual fraud; the purchase is a constructive fraud. Nor that no injury resulted to any of the parties in interest; the law avoids the sale on grounds of public policy, irrespective of injury. Nor that the agent paid the full value of the property; if he desired to purchase, he should first have resigned his trust. *A. V. Chan. Ct.*, 1845, *Dobson v. Racey*, 8 *Sandf. Ch.*, 60.

186. An agent employed to collect a mortgage belonging to his principal cannot purchase the property at the foreclosure-sale, either directly or through the agency of a third person. The rule that an agent employed to sell cannot buy in for himself, applies to a judicial sale where the agent controls it and the officer acts under his instructions, as well as to private sales. *Ct. of Appeals*, 1851, *Moore v. Moore*, 5 *N. Y.* (1 *Seld.*), 256; affirming *S. C.*, 4 *Sandf. Ch.*, 87.

187. It makes no difference in respect to the validity of a purchase by the agent in such a case that his principal instructed him not to bid beyond a certain sum on account of the principal, and that the biddings went above that sum, and the agent bought it in on his own account at a higher price. The purchase will notwithstanding be deemed to be for the benefit of the principal if he elects to take it. *Id.*

188. — without leave. An agent to sell may, however, purchase for his own account by the express assent of his principal. *Ct. of Appeals*, 1853, *Dobson v. Racey*, 8 *N. Y.* (4 *Seld.*), 216.

189. Selling goods consigned. The plaintiffs abroad, consigned goods to a firm here, not knowing that it had been dissolved. One member of the firm, however, received the bill of lading and transferred the goods to a creditor of his own, in payment of his own debt. *Held*, that this partner received the goods as a naked agent or trustee for the plaintiffs. He had no interest in the goods in his individual character. His sale of them was fraudulent and void. *Chancery*, 1823, *Stirnermaun v. Cowing*, 7 *Johns. Ch.*, 275.

190. Buying notes of principal. R. employed W. to compromise with his creditors, and authorized him to offer fifty cents on the dollar. W., while acting as such agent, purchased several notes of R. at that rate, upon his own account, and afterwards sold such notes to J. for the whole nominal amount, after they became due;—*Held*, that J. could not be permitted to recover more than fifty per cent. upon the amount of such notes. *Chancery*, 1836, *Reed v. Warner*, 5 *Paige*, 650.

191. Correspondence on behalf of principal. An agent employed to obtain orders for the construction of machinery by his principal, had been engaged in a negotiation for such an order, which had been broken off, and he had no reason to suppose it would be renewed. He received the order after terminating his agency, in a letter written before that event. *Held*, in his action for his salary, that it was his duty to communicate the letter to his former principal, and his failure to do so was not excused by his supposing, in good faith, that he had ascertained that the principal would be unable to comply with the order. *Ct. of Appeals*, 1859, *Edmonstone v. Hartshorn*, 19 *N. Y.* (5 *Smith*), 9.

192. Mail contract. Masters of steamboats, with whom the post-office department had contracted for carrying the mails,—*Held* to be, under the circumstances, merely agents for the owners of the boats, and bound to account to them for profits of the contracts. *Chancery*, 1822, *Roorback v. North River Steamboat Co.*, 6 *Johns. Ch.*, 469.

193. A settlement of accounts between a merchant and his clerk, embracing a long series of usurious loans by the clerk to his employer,—ordered to be opened, on the ground, in part, that the clerk had taken undue advantage of the confidential relation. *Chancery*, 1815, *Barrow v. Rhineland*, 1

Questions between Principal and Agent.

Johns. Ch., 550; 3 *Id.*, 614;* and see *Phillips v. Belden*, 2 *Edu.*, 1; *ACCOUNT STATED*, 4.

194. Paramount title. An agent, sued for converting goods intrusted to him by his principal, cannot defend by setting up a superior title in a third person. *N. Y. Superior Ct.*, *N. P.*, 1845, *Hirschfeldt v. Fanton*, *Anth. N. P.*, 861.

195. Notice of order received. In general, an agent to buy goods, is not bound to notify his principal that he has received an order, and is engaged in filling it. Advice, in due time, of the execution of an order, is all that can be reasonably required. *Supreme Ct.*, 1886, *Parkhill v. Imlay*, 15 *Wend.*, 481.

196. What is compliance with instructions. Where an agent, employed to purchase and forward goods, executes the order with reasonable dispatch, and according to the usual course of trade in the article, it is sufficient that there is a substantial, though not a literal, compliance with its terms;—e. g., where the order was to purchase wheat at R., and ship it to H., and in the usual course of such purchases, the agent bought the wheat at a place nearer H. *Id.*

197. A consignee, intrusted with sale of goods on particular terms,—Held, not liable, under the circumstances. Compliance with his instructions having proved impracticable, and he having made the most advantageous disposal of the goods in his power. *Drummond v. Wood*, 2 *Cai.*, 810.

198. Freight. One who receives goods on freight, under a usage to sell when the owner directs, and account for proceeds, is not liable, without proof that he has disposed of the goods, and has been called on for payment. *Supreme Ct.*, 1854, *Outwater v. Nelson*, 20 *Barb.*, 29.

199. Effect of departure. An agent, employed to sell upon stated terms, and at a particular rate of compensation, cannot recover the agreed compensation, unless he negotiates a sale upon the terms laid down. If his principal accepts a sale on different terms, this may entitle the agent to a reasonable reward; but he cannot claim the promised compensation, unless he has rendered the precise service employed. *Supreme Ct.*, 1842, *Gregory v. Mack*, 8 *Hill*, 380.

200. Liability for consequent loss. An agent of a party insured was directed by his principal to settle with the insurers for a total loss. Through mistake or negligence, he adjusted the loss as an average loss, and cancelled the policy. *Held*, that he had substituted himself in the place of the insurer, and was liable to his principal for the whole amount of the loss. *Supreme Ct.*, 1802, *Rundle v. Moore*, 3 *Johns. Cas.*, 86.

201. One who undertook to and did effect an insurance on his principal's life, but who afterwards, without his principal's knowledge, cancelled the policy, and took out a smaller one, receiving a return of part-premium,—*Held*, liable, under the circumstances, on his principal's death, to the amount of the original policy. *Chancery*, 1817, *Gray v. Murray*, 3 *Johns. Ch.*, 167.

202. Conversion of goods. That an agent to sell, who converts the goods to his own use, may be treated as a purchaser, and sued for goods sold. *Supreme Ct.*, *N. P.*, 1825, *Dunlop v. Whitlock*, *Anth. N. P.*, 274.

As to what acts of an agent amount to a **Conversion** of property of the principal, see **CONVERSION**.

As to **Who** is a clerk or servant, within the statute of embezzlement, see **EMBEZZLEMENT**.

203. If an agent, instructed to sell for cash, takes part-payment in property, the principal can elect either to take what the agent received, or what it was worth in cash. *Supreme Ct.*, 1856, *Mains v. Haight*, 14 *Barb.*, 76.

For other cases of **Election of remedies** against agents, see **CAUSE OF ACTION**, 27, 45-49.

204. The principal instructed his agent to buy goods, and draw upon W., his banker, having funds, at 80 and 60 days, for the price. The agent drew at 4 months, and about three weeks before the bill fell due, the banker failed. *Held*, the principal was not bound to take up the bill, as against the agent. *N. Y. Superior Ct.*, 1829, *Potter v. Everett*, 2 *Hall*, 252.

205. An agent, having received money of the principal, was directed to remit it, by purchasing a bill of exchange. He purchased the bill upon his own credit, using the funds of his principal as his own. *Held*, that such a purchase was not authorized; that the agent remained liable for the money. *Ct. of Errors*, 1846, *Stone v. Hayes*, 3 *Den.*, 575.

* Reversed as to other parts of decree, 17 *Johns.*, 588.

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206. Sub-agent. Although a substitute appointed by an agent is, for some purposes, the agent of the principal, yet where the agent gives the substitute directions which are opposed to those given by the principal, he makes the substitute his own agent, and is liable to the principal for any loss which results. *Supreme Ct.*, 1828, *Foster v. Preston*, 8 *Cow.*, 198.

207. Subsequent acquiescence by principal. Although an agent has, by departing from his instructions, rendered himself liable to his principal, yet if the latter acquiesces in and assumes his account, he is exonerated. *Supreme Ct.*, 1799, *Towle v. Stevenson*, 1 *Johns. Cas.*, 110; 1804, *Codwise v. Hacker*, 1 *Cai.*, 526; 1815, *Cairnes v. Bleecker*, 12 *Johns.*, 300.

208. Thus, where an agent received a bill of exchange to collect for his principal, and in order to enable the indorser to secure himself, surrendered it up to him without receiving the money, and the principal, with a knowledge of the facts, undertook himself to obtain payment from the indorser;—*Held*, that the agent was exonerated. *Supreme Ct.*, 1799, *Towle v. Stevenson*, 1 *Johns. Cas.*, 110.

209. If an agent compromises a debt due to his principal with the knowledge of his principal, who makes no objection, the agent will be only responsible for the sum he receives; the silence of the principal amounts to a ratification of the act of his agent. *Supreme Ct.*, 1800, *Armstrong v. Gilchrist*, 2 *Johns. Cas.*, 424.

210. Thus, a master of a vessel who had been guilty of a breach of orders, in pursuing voyages contrary to his instructions, was held to be exonerated from liability by his principal's making insurance and taking to his own use the proceeds of freight earned during those voyages, without disavowing or disapproving the conduct of the master. *Supreme Ct.*, 1804, *Codwise v. Hacker*, 1 *Cai.*, 526.

211. Loss by sale on credit. The plaintiffs, at Albany, sent wheat to New York by a vessel of which defendants were part-owners, to be sold by the master; and it was agreed that the master might use the proceeds in New York for the benefit of defendants, and they should pay to plaintiffs, in Albany, the same amount, and on the same credit as the master realized. He sold the wheat for notes which he used for defendants, and defendants gave like notes to plaintiffs. Before the term of

credit expired, the purchaser failed. *Held*, that defendants were not liable on their notes. They had not taken any agency in the sale. The master had acted as agent for the plaintiffs. *Supreme Ct.*, 1810, *Herring v. Marvin*, 5 *Johns.*, 898.

212. A., at request of F., sent goods of F. to B., who was the general agent of A., for sale. B. sold the goods upon the usual credit to a person in good credit at the time, but who afterwards became insolvent. *Held*, that A. was not liable for the loss. *Supreme Ct.*, 1815, *Alexander v. Fink*, 12 *Johns.*, 218.

213. Reimbursement of agent's loss. Defendant applied to plaintiff to know how he should draw money from Scotland. Plaintiff advised him to draw a bill and send it to plaintiff, to be forwarded. Defendant did so, and plaintiff indorsed and negotiated the bill; which, however, was returned protested, and plaintiff had to pay twenty per cent. damages. *Held*, that plaintiff having acted as the agent of defendant in good faith, and without expectation of profit, was entitled to recover back this loss from defendant. *Supreme Ct.*, 1814, *Ramsay v. Gardner*, 11 *Johns.*, 489.

214. — of agent's expenses. When an agent—*e. g.*, trustees of a village—is put to expense—*e. g.*, by being subjected to costs, not taxable, in defending a suit—by reason of what he has done while acting in good faith, and without fault, in the service of his principal, the law implies a promise on the part of the principal to reimburse him. [11 *Johns.*, 439; 8 *T. R.*, 308, 610; 5 *Binn.*, 441; 1 *Day*, 522.] *Supreme Ct.*, 1822, *Powell v. Trustees of Newburgh*, 19 *Johns.*, 284.

215. An agent receiving a bill on time for collection, is bound without any special request of the holder, to present it for acceptance immediately; and he is answerable in damages if he fails so to do. *Ct. of Errors*, 1888, *Allen v. Suydam*, 20 *Wend.*, 321. See, also, *Kobbe v. Kerr*, 4 *N. Y. Leg. Obs.*, 348.

216. Where the holder of a bill of exchange transmits it to his agent for presentment to the drawee, such agent has no right to receive any thing short of an explicit and unequivocal acceptance without giving notice to the holder as in case of non-acceptance; and he will be liable for any loss the holder may sustain in consequence of his neglect to do so. *Ct. of Appeals*, 1854, *Walker v. Bank of N. Y.*, 9 *N. Y. (5 Seld.)*, 582.

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217. Duty of collecting agent. The defendant, residing abroad, ordered goods from the plaintiff, and sent him, for the amount, a bill on time, drawn by a third person to plaintiff's order, which was not indorsed by defendant. Plaintiff lodged it with his bankers for collection. Acceptance was refused, but the bankers neglected to give plaintiff notice, and he therefore gave none to defendant. On the bill being protested for non-payment, plaintiff returned it to defendant, requesting payment, which defendant refused for the omission to give him notice of non-acceptance. *Held*, that the bill not having been received in absolute payment, plaintiff stood in the character of agent for defendant, and having sent it forward for collection in the usual manner, and given notice of dishonor as early as he received it himself, he was entitled to recover. *Supreme Ct.*, 1828, *Van Wart v. Smith*, 1 *Wend.*, 219.

218. A mere collecting agent, who receives money on account of his principal, is bound to pay it over within a reasonable time; and on his failure to do so, his principal may maintain an action against him without showing a previous demand. The rule requiring a demand before suit, is confined to professional attorneys and factors. [Reviewing many cases.] *Supreme Ct.*, 1848, *Lillie v. Hoyt*, 5 *Hill*, 895. See **ATTORNEY AND CLIENT**, 174, 175; **CONSIGNOR AND CONSIGNEE**, 23; **LIMITATION OF ACTIONS**, 168-172; **MONEY RECEIVED**, 47-49.

As to agents employed in the collection of **NEGOTIABLE PAPER**, see **BILLS, NOTES, AND CHECKS**, 298-315; **BANKING**, 86-90.

219. Collateral note. Where an usurious loan has been effected through an agent, and the money equitably due has been paid by the principal, equity will decree the delivery and cancellation of a collateral note, retained by the agent as security for his commissions and usurious interest paid by him. *A. V. Chan. Ct.*, 1839, *Cowman v. Sedgwick*, *Hoffm.*, 60.

For rules relative to the **MEASURE OF DAMAGES** in cases between principal and agent, see **DAMAGES**.

As to when persons standing in the light of agents are chargeable with **INTEREST**, see **INTEREST**, 70-96.

For cases relating to the powers, duties, &c., of **PARTICULAR KINDS OF AGENTS**, see **ATTORNEY AND CLIENT**; **AUCTION AND AUCTION-**

ER; **BANKING**; **BROKER**; **CARRIER**; **CONSIGNOR AND CONSIGNEE**; **FACTOR**; **MASTER AND SERVANT**; **OFFICER**.

As to **DIRECTORS**, trustees, transfer agents, and agents generally of corporations, see **BANKING**; **CORPORATIONS**; **EXPRESS COMPANIES**; **INSURANCE**, tit. V. *Insurance Companies*; **JOINT-STOCK COMPANIES**; **MANUFACTURING COMPANIES**; **MONEYED CORPORATIONS**; **MUNICIPAL CORPORATIONS**; **RAILROAD COMPANIES**.

As to who are proper **Parties** to suits in cases involving agency, see **PARTIES**, 6-19; 215-218; 447-470.

For **Presumptions** relative to agency, see **EVIDENCE**, 54-65.

As to **Burden of Proof** in cases involving agency, see **EVIDENCE**, 491-495.

For rules of **Evidence** in cases of agency, see **EVIDENCE**, 1802-1804; 1869-1874; 1911, 1912; 1956-1970; 1976; 2174; 2821-2832.

PRINCIPAL AND SURETY.

[Under this title we present the cases relating to the general principles of suretyship and applications thereof, not falling peculiarly under any other title. Matters incident to the form of the contract, as **BOND, GUARANTEE, INDEMNITY**, and **MORTGAGE**, and the general relation of **DEBTOR AND CREDITOR** are further treated under those several titles. The rights of **SUBROGATION** and of **CONTRIBUTION** are the subject of separate articles.]

I. OF THE CONTRACT OF SURETYSHIP.

II. THE RIGHTS OF THE PARTIES.

1. *General rights of the surety.*
2. *Of co-sureties.*
3. *Of the principal.*
4. *Of the creditor.*
5. *Of payment, and its effect.*
6. *What exonerates the surety.*
 - A. In general.
 - B. Enlarging the time.
 - C. Taking security.
 - D. Delaying to proceed against the principal.
7. *Effect of judgment against the surety.*

I. OF THE CONTRACT OF SURETYSHIP.

1. If, on dissolving partnership, one partner takes the property and agrees to pay and to indemnify the other against the debts, the latter becomes a surety, merely, for their payment, as between them. *Supreme Ct.*, 1801, *Waddington v. Vredenberg*, 2 *Johns. Cas.*, 227; and see *Kinney v. McCullough*, 1 *Sandf. Ch.*, 870.

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2. **Ball are sureties**, and are discharged by the creditor's stipulation with the debtor to their prejudice. *Ct. of Errors*, 1813, Rathbone v. Warren, 10 *Johns.*, 587.

3. **Agent**. Defendant wrote to plaintiff to provide a cargo and to reimburse himself by drawing on defendant or on T. Some time afterwards, but before the cargo was bought, he informed plaintiff that he was merely the agent of T. in the transaction, and in the subsequent dealings, plaintiff acknowledged T. as principal, and corresponded with him as such; and after drawing several times on defendant, and notifying T. as principal, he drew two bills on T. without advising defendant, and these were protested. *Held*, that defendant was a mere surety; and that after delaying nearly two years from the time of the protest, plaintiff had no right to resort to defendant. *Supreme Ct.*, 1813, Lanuse v. Barker,* 10 *Johns.*, 312.

4. **Bond of one partner for firm debt**. A copartnership being indebted to the United States for duties, one of the partners gave his bond to pay them, in which bond plaintiff was surety. *Held*, that the debt was extinguished as to the other partners by the giving of the bond; and that plaintiff was surety for the obligor alone. *Supreme Ct.*, 1807, Tom v. Goodrich, 2 *Johns.*, 213. Followed, 1809, Sluby v. Champlin, 4 *Id.*, 461; and see Elmendorph v. Tappen, 5 *Id.*, 176.

5. **Several signatures**. A. made his note, with three sureties, for discount, but further names being required, B. signed it, adding "surety," he knowing at the time that the note was for A.'s benefit;—*Held*, that he was presumptively co-surety with the others for A., and not surety for them and A. *Supreme Ct.*, 1829, Warner v. Price, 8 *Wend.*, 397. Compare Harris v. Warner, 18 *Id.*, 400.

6. If there be two names preceding that of one who signs as surety, and the first is proven to be that of the principal debtor, the addition of surety to the last signature does not of itself prove that he was surety for both the others. *Ct. of Appeals*, 1849, Sisson v. Barrett, 2 *N. Y. (2 Comst.)*, 406; affirming *S. C.*, 6 *Barb.*, 199.

* On error to the Supreme Court of the United States, the judgment was reversed on the ground that the defendant, having originally recommended himself as paymaster, was not a mere surety. *Lanuse v. Barker*, 8 *Wheat.*, 101.

7. **Omission of name**. One executing an instrument in which he is not named, may be held bound as surety for a party who is named. *Supreme Ct.*, 1827, *Exp.* Fulton, 7 *Cow.*, 484; 1846, Clark v. Rawson, 2 *Den.*, 185.

8. **Erasing name**. A., with others as his sureties, made a note to B., who afterwards, with A.'s assent, erased the signature of a surety;—*Held*, that the note remained binding as against A., and was the subject of larceny. *Supreme Ct.*, 1845, People v. Call, 1 *Den.*, 120.

9. **Proof of suretyship**. The fact that the apparent principal was in reality the surety for the one who was the apparent surety, may as between them, be proved by parol. *A. V. Chan. Ct.*, 1845, Mohawk & Hudson R. R. Co., v. Costigan, 2 *Sandf. Ch.*, 306.

10. The obligors in a bond of indemnity may prove, at law, that they executed it as sureties for one who was not a party thereto, in order to let in a defence founded on their character as sureties for him,—*e. g.*, that he had since been released by the obligee. *Supreme Ct.*, 1848, Archer v. Douglass, 5 *Den.*, 509.

11. **Joint principals**. The surety in a joint and several bond of two principal debtors, may recover against both, though, in the condition, the principals provided for contribution to the obligee's demand, in unequal proportions as between themselves. *Supreme Ct.*, *Sp. T.*, 1852, Westcott v. King, 14 *Barb.*, 32.

12. **Parol agreement between co-sureties**. An agreement made between sureties prior to or contemporaneously with executing their obligation as sureties, by which one promises to indemnify the other from loss, does not contradict or vary the terms or legal effect of the written obligation; and it may be proved by parol evidence. And such promise, although not in writing, is a bar to an action by the party making it, against his co-surety for contribution. *Ct. of Appeals*, 1855, Barry v. Ransom, 12 *N. Y. (2 Kern.)*, 462.

13. **Subsequent agreement**. Where two persons give their joint obligation upon a consideration received by them jointly, each stands in the relation of surety for the other in respect to one half the debt. And if an agreement is afterwards made between them, by which one of them assumes the entire obligation, the other from thenceforth becomes his surety in respect to the whole, and as such

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may prove his claim under the bankruptcy of his principal, although he has paid nothing on the joint obligation, and the same is not yet due. *Ot. of Appeals*, 1851, *Crafts v. Mott*, 4 *N. Y. (4 Comst.)*, 604; *S. P., BANKRUPTCY*, 4.

14. Bond given by attorneys. The plaintiff was indebted to A. on a promissory note, and being sued by him upon it, and creditors of A. also claiming it under an attachment against A., he paid to the attorneys the amount due, on receiving their bond of indemnity against the claim of creditors. *Held*, that the attorneys, as obligors, were in no sense sureties, but were principal debtors. *Ot. of Appeals*, 1853, *Lyon v. Clark*, 8 *N. Y. (4 Seld.)*, 148; affirming *S. C.*, 1 *E. D. Smith*, 250.

15. The indorser of a negotiable note for value, for his own benefit, in the ordinary course of business, though often spoken of as being a surety for the maker, is not in fact a surety. *Ot. of Appeals*, 1849, *Pitts v. Congdon*, 2 *N. Y. (2 Comst.)*, 352.

16. Accommodation paper. The doctrine that when an individual becomes party to a note or bill, at the request or for the benefit of another, the relation of principal and surety exists, is not to be extended. *Id.*

17. N. indorsed a note for L.'s accommodation, and L. lent it to M. who had it discounted at a bank for his own use, and N. paid it;—*Held*, that N. was entitled to recover the money from M. *Supreme Ct.*, 1853, *Nease v. Mercer*, 15 *Barb.*, 818.

18. Promise to become surety. A promise, founded upon a good consideration, to execute a written agreement to be security to a certain extent for the performance of the contract of another, is not discharged by the creditor's requiring a larger security, if on objection he modifies the requirement so as to conform to the promise. *N. Y. Superior Ct.*, 1850, *Waterbury v. Graham*, 4 *Sandf.*, 215.

19. Agreement for act of stranger. I. covenanted with T. that R. should pay up and discharge a bond and mortgage upon certain lands. There was no evidence to show that T. had any interest in the lands, or in the discharge of the bond and mortgage, or was in any manner liable upon the same. *Held*, nevertheless, that he was entitled to recover the full amount of the bond. *Supreme Ct.*, 1839, *Tyler v. Ives*, cited in *Gilbert v. Wiman*, 1 *N. Y. (1 Comst.)*, 550, 554.

20. Implied promise. In order to prevent

injustice, the law will imply a promise to indemnify, in favor of a surety, against a principal, if none is expressed. *Supreme Ct.*, 1854, *Holmes v. Weed*, 19 *Barb.*, 128. To the same effect, *Vartie v. Underwood*, 18 *Id.*, 561.

21. Limit of liability. Both at law and in equity a surety is not to be held beyond the precise terms of his contract, and except in certain cases of accident, mistake, or fraud, a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to, at law. *Ot. of Errors*, 1805, *Ludlow v. Simond*, 2 *Cai. Cas.*, 1. To similar effect, *Supreme Ct.*, 1813, *Walsh v. Bailie*, 10 *Johns.*, 180; 1819, *Penoyer v. Watson*, 16 *Id.*, 100.

22. Interpretation of contract. Though the surety is not to be held beyond the very precise stipulations of his contract; yet where the question is as to the meaning of the written language in which he has contracted, there is no difference, in the mode of interpretation, between the contract of a surety and that of any other party. *Ot. of Appeals*, 1855, *Gates v. McKee*, 18 *N. Y. (8 Kern.)*, 282.

23. Where a party enters into a special covenant with a creditor upon a valid consideration, as surety for his debtor, such covenant is to be construed like all other contracts, and the intention of the parties is to be gathered. Thus, where a surety covenanted that, if the tenant made any default in the payment of rent, he would make up the deficiency, and fully satisfy the condition of the tenant's agreement, without requiring any notice of non-payment, or proof of demand;—*Held*, an absolute undertaking, and that he could not call upon the landlord to distrain the tenant's goods. *Supreme Ct.*, 1829, *Ruggles v. Holden*, 8 *Wend.*, 216.

24. Bond. A surety in a bond is not liable beyond the penalty. *Supreme Ct.*, 1826, *Fairlie v. Lawson*, 5 *Cow.*, 424; and see *BOND*, 38-41.

25. Release of one co-principal. Where several guardians united in a joint bond with a common surety, and the ward, after coming of age, gave to one of the guardians, who had delivered her property in his hands to a co-guardian, a full release as to himself, saving her rights against the other;—*Held*, that the release inured to the benefit of the surety, only so far as the acts and defaults of the one to whom it was given were concerned, and did not discharge the surety from liability

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arising from acts and defaults on the part of the other guardians. *Chancery*, 1825, Kirby v. Turner, *Hopk.*, 309.

26. Bond to abide judgment or order of court. The bond of sureties of an administrator conditioned that their principal "shall obey all orders of the surrogate touching the administration of the estate," is equivalent to a covenant to pay all judgments that may be recovered against the administrator. The making of an order by the surrogate for payment of a certain sum, and refusal to pay, or the recovery of a judgment and non-payment, give an immediate right of action, and the order or judgment concludes the surety, until impeached and avoided for fraud. [8 *Wend.*, 452; 8 *Cow.*, 628; 4 *Hill*, 582; 2 *Sandf.*, 81.] *N. Y. Superior Ct.*, 1858, *Baggott v. Boulger*, 2 *Duer*, 160.

27. Unauthorized official bond. Where a board of officers without authority of law, but not in violation of any positive law, appointed a treasurer, and authorized him to borrow money to a certain amount,—*Held*, that sureties in a bond given by such officer for his faithful accounting, though they would be liable for him in respect to an amount borrowed within the limit of his instructions, were not liable for his failure to account for an amount in excess of that limit, and which was obtained by him by fraud. *Ct. of appeals*, 1858, *Supervisors of Rensselaer v. Bates*, 17 *N. Y.* (8 *Smith*), 242.

28. Reservation of right to proceed against principal. Where A. and B., who had been partners, were sued jointly for a debt which A. on dissolution had assumed, and B. paid the amount of the judgment, and agreed with the plaintiff to be allowed to have the benefit of the judgment to recover the amount out of the property of A. in the name of the plaintiff,—*Held*, that A. or his assignees should not be relieved against execution. *Supreme Ct.*, 1801, *Waddington v. Vredenberg*, 2 *Johns. Cas.*, 227.

29. Discharging the surety on a part-payment, does not affect the liability of the principal for the residue. *Supreme Ct.*, 1881, *Tombeckbee Bank v. Stratton*, 7 *Wend.*, 429.

30. No notice is necessary to be given to sureties of an administrator, of proceedings before the surrogate to compel such administrator to pay a debt of the intestate. They are concluded by whatever concluded him.

Supreme Ct., Sp. T., 1856, *People v. Laws*,* 8 *Abbotts' Pr.*, 450. See, also, *Baggott v. Boulger*, 2 *Duer*, 160.

As to the liability of sureties on bonds of *Executors, &c.*, and *Guardians*, see those titles.

II. RIGHTS OF THE PARTIES.

1. General Rights of the Surety.

31. Indulgence. Sureties always regarded with great indulgence in every thing depending upon the discretion of a court. *Supreme Ct.*, 1845, *Supervisors of Albany v. Dorr*, 1 *Den.*, 268.

32. Law and equity. If the fact of being a surety is ascertainable at law, whatever will exonerate him in equity, ought to at law. [2 *Ves., Jr.*, 542.] *Supreme Ct.*, 1811, *People v. Jansep*, 7 *Johns.*, 382. *Chancery*, 1817, *King v. Baldwin*, 2 *Johns. Ch.*, 554.

33. The same principles which in equity are sufficient to discharge a surety, may be pleaded by him as a defence to an action, on simple contract, in a court of law. *Chancery*, 1881, *Sailly v. Elmore*, 2 *Paige*, 497.

34. Under the Code of Procedure the fact that the surety has been discharged by the principal's agreement with the debtor, is available as a defence in an action against the surety. *Supreme Ct.*, 1852, *Wagman v. Hoag*, 14 *Barb.*, 232.

35. Subrogation. A surety entitled to every remedy of the creditor. *Chancery*, 1819, *Hayes v. Ward*, 4 *Johns. Ch.*, 128. *A. V. Chan. Ct.*, 1839, *Bullock v. Boyd*, *Hoffm.*, 294. *Supreme Ct.*, 1830, *N. Y. State Bank v. Fletcher*, 5 *Wend.*, 85; 1852, *Van Horne v. Everson*, 18 *Barb.*, 526; and see *Edson v. Dillaye*, 17 *N. Y.* (8 *Smith*), 158.

36. Mortgagor. It is the right of a surety who has pledged his property with the property of the principal, to have the property of the principal first sold, and applied to the payment of the debt. *Supreme Ct.*, 1854, *Vartie v. Underwood*, 18 *Barb.*, 561.

For Other illustrations of these principles, see *DEBTOR AND CREDITOR*; and *SUBROGATION*.

37. The surety of a surety, and the assignee of a surety, are entitled to all the rights and all the remedies of the surety. [1 *Johns. Ch.*, 412; 3 *Paige*, 814; 6 *Id.*, 82, 521; 2 *Johns. Ch.*, 554; 4 *Id.*, 128; 10 *Johns.*, 525;

* Affirmed, *Supreme Ct.*, 1857, 4 *Abbotts' Pr.*, 292.

Rights of the Parties;—General Rights of the Surety.

Stor. Eq. Jur., § 499.] *Supreme Ct., Sp. T.*, 1848, *Elwood v. Deifendorf*, 5 *Barb.*, 398; but compare *N. Y. State Bank v. Fletcher*, 5 *Wend.*, 85.

38. Usury. The surety in a joint note may set up the defence of usury, and file a bill, if necessary, to establish the defence, although the principal maker refuse to join. *Chancery*, 1841, *Morse v. Hovey*, 9 *Paige*, 197.

39. Compelling suit against principal. A surety, when the debt becomes due, may come into chancery to compel the creditor to sue for and collect the debt of the principal. *Chancery*, 1817, *King v. Baldwin*,* 2 *Johns. Ch.*, 554.

40. Where the surety apprehends danger from the delay of the creditor, he may compel him to proceed against the principal debtor; at least, on indemnifying the creditor for the consequences of risk, delay, or expense. *Chancery*, 1819, *Hayes v. Ward*, 4 *Johns. Ch.*, 128; and see, also, *King v. Baldwin*, 2 *Id.*, 554 (*q. v.*, *infra*, 181); and compare CREDITOR'S SUIT, 169.

41. Right to bring error. Where judgment has been obtained against the sheriff for the escape of a prisoner on execution, who had given a bond for the jail liberties, the sureties are entitled to prosecute a writ of error in the name of the sheriff, to reverse the judgment against him; and if the sheriff release errors in the judgment, without their assent, it will be set aside in equity. *Ch. of Errors*, 1817, *Lyon v. Tallmadge*, 14 *Johns.*, 501.

42. A surety has no right to make use of a cause of action existing in his principal, as a defence for himself; but if compelled to pay the debt guaranteed, he must seek reimbursement from his principal, and leave the principal to seek recourse against the creditor. *N. Y. Superior Ct.*, 1857, *La Farge v. Halsey*, 1 *Boon.*, 171; *S. C.*, 4 *Abbotts' Pr.*, 397.

43. Bill of review. A surety cannot have a bill of review, on a defence of the co-defendant, his principal, which the latter has, by silence waived. *Chancery*, 1817, *Wiser v. Blachly*, 2 *Johns. Ch.*, 488.

44. Surety for mortgage. One who has given a bond and mortgage, and subsequently conveyed the equity of redemption, upon his grantee's agreement to pay the mortgage, may take up the mortgage and be subrogated. Al-

though he cannot, by bill, compel the mortgagee to file a bill of foreclosure, when there is no good reason why he should not take up his own bond, yet he stands in the situation of a mere surety, as respects his grantee, or his assigns who have assumed the debt, and may proceed, in equity, by bill against them and the mortgagee, to compel payment by them, or by a sale of the land. [8 *Wend.*, 199; *Mose*, 818; 1 *Vern.*, 180.] *Chancery*, 1844, *Marsh v. Pike*, 10 *Paige*, 595; affirming *S. C.*, 1 *Sandf. Ch.*, 210. Compare FORECLOSURE, 167.

45. Costs. Where a surety to a note is subjected to costs in consequence of its non-payment by the principal, and there is an agreement in writing to save him harmless, he is entitled to recover the costs so paid by him in an action against the principal. *Supreme Ct.*, 1829, *Bonney v. Seely*, 2 *Wend.*, 451.

As to the liability of an underwriter to Reimburse costs and expenses, see INDEMNITY.

46. A surety is entitled to recover from his principal the costs of a suit for the collection of the debt, which he has been compelled to pay. *Supreme Ct., Sp. T.*, 1848, *Elwood v. Deifendorf*,* 5 *Barb.*, 398. To the same effect, *Gen. T.* [citing 16 *Johns.*, 70; 4 *Taunt.*, 464; *Chitt. on Bills*, 320; 1 *Greenl. Ev.*, § 401; 7 *Bingh.*, 217; 15 *Johns.*, 278], *Baker v. Martin*,* 8 *Barb.*, 684.

47. A surety cannot recover his costs if he puts the party to a useless expense by defending an action which he ought not to have defended. [Burge on Suretyship, 363; 7 *Bingh.*, 246; *Mood. & M.*, 487; 5 *Esp.*, 171; 11 *Adolph. & E.*, 23.] He should only be allowed the costs of a judgment by default. *Supreme Ct.*, 1857, *Holmes v. Weed*, 24 *Barb.*, 546.

48. Surety may recover back costs paid by him in good faith. *Laws of 1858*, 506, ch. 314, § 8.

49. Expenses. Where the committee of a lunatic obtained a feigned issue from the Supreme Court to inquire whether a bond the lunatic had given to his surety, was valid,—*Held*, that as the surety was entitled to full indemnity, the committee should be ordered to pay the expenses in addition to taxable costs.

* The reversal of the decree, 17 *Johns.*, 384, is agreeable to this point.

* In the case of *Holmes v. Weed* (24 *Barb.*, 546), it was said that these cases were rightly decided, on the assumption that no defence was interposed by the surety, and the costs recovered were the mere ordinary costs of a suit not litigated.

Rights of the Parties;—Of Co-sureties;—Of the Principal;—Of the Creditor.

Supreme Ct., 1831; *Hart v. Deamer*, 6 *Wend.*, 537.

50. Rescission after payment. The surety having paid the money in pursuance of the contract, upon failure of his principal, cannot avoid the contract in the name of the person to whom he has paid the money, on the ground of fraud. *N. Y. Com. Pl.*, 1848, *Manning v. Dayton*, 7 *N. Y. Leg. Obs.*, 21.

51. A surety on an administration bond does not, before an accounting is had, stand in a fiduciary relation to the creditors of the intestate, and is not chargeable with any primary responsibility as to the management of the estate. *N. Y. Surr. Ct.*, 1855, *Halsted v. Hyman*, 3 *Bradf.*, 426.

52. As to the right to receive Commissions for becoming security, see *Dunham v. Dey*, 18 *Johns.*, 40; affirmed, *sub nom.* *Dunham v. Gould*, 16 *Id.*, 367.

2. Of Co-sureties.

53. A second surety may qualify his engagement by signing as surety for those who have preceded him, and upon such a signature he cannot be charged for contribution as co-surety, unless it be affirmatively shown that he actually was co-surety. *Supreme Ct.*, 1835, *Harris v. Warner*, 18 *Wend.*, 400; *S. P.*, 1846, *Norton v. Coons*, 6 *Den.*, 180.

54. Several sureties, who sign a note of the principal, at his request, at different times, without communication with each other, are bound to contribute equally to the payment of the note in case of the failure of the principal. Where the first of the sureties pays the whole note, he may recover from the last his portion of the amount so paid; and it is no defence to such action that, by the understanding between him and the principal, he signed as surety for all the previous signers. *Ct. of Appeals*, 1851, *Norton v. Coons*, 6 *N. Y. (2 Seld.)*, 33.

55. Creditor's bill. Where a judgment is obtained against joint sureties and is paid by some of them, those paying it have a right to control the judgment, and they may file a creditor's bill against the others for contribution. *Chancery*, 1836, *Cuyler v. Ensworth*, 6 *Paige*, 32.

56. It is no objection that execution had not been issued and returned before such payment, for in equity the sureties making the payment will be allowed to issue execution. [1 *Des. R.*, 409; 6 *Louis. R.*, 59.] *Id.*

8. Of the Principal.

57. Waiver of right to rescind. The reception, by the seller, of money, from a surety, on account, after knowledge of fraud, and especially after giving notice of intention to rescind, is a waiver of the right to rescind. *N. Y. Com. Pl.*, 1848, *Manning v. Dayton*, 7 *N. Y. Leg. Obs.*, 21.

58. Principal cannot buy in surety's property. Where the principal neglected to pay, and the land of his sureties was sold for the debt, and he purchased it,—*Held*, that he acquired no title as against his sureties. His neglect was a fraud by which he ought not to be benefited. *Supreme Ct.*, 1852, *Van Horne v. Everson*, 18 *Barb.*, 526.

4. Of the Creditor.

59. Right to surety's security. Where a person, standing in the situation of indorser or surety, is provided, by the principal debtor, with a fund, or with collateral security, for the debt, the creditor is in equity entitled to have it applied, in satisfaction of the debt. [1 *Eq. Cas. Abr.*, 98; 11 *Ves.*, 22; *Mont.*, 25; 3 *Dea. & Chitt.*, 227; 2 *Glyn & Jam.*, 404; *Buck*, 196; 1 *Johns. Ch.*, 129; 18 *Johns.*, 505; 1 *Paige*, 299; 2 *Id.*, 311.] *Chancery*, 1839, *Pratt v. Adams*, 7 *Paige*, 615.

60. The surety in a note took from his principal a confession of judgment as security, and sold his property thereunder, and took the notes of the purchasers for the price. *Held*, that he was a trustee of the notes for the holder of the first note [18 *Johns.*, 505; 1 *Paige*, 298; 9 *Id.*, 439]; and that such holder could pursue them, though negotiable, in the hands of one who received them from the surety, in good faith, but for a precedent debt, and without parting with value. *A. V. Chan. Ct.*, 1844, *Clark v. Ely*, 2 *Sandf. Ch.*, 166.

61. Where a surety obtains from his principal a mortgage, to secure him against his liability, the creditor is entitled to the benefit of such security. And if the surety include in such mortgage a debt due to himself, as well as the indemnity against the principal's debt, for which he is surety, as between himself or his voluntary assignees and the creditor, the latter is entitled to be first paid, out of the proceeds of the mortgage. *A. V. Chan. Ct.*, 1846, *Ten Eyck v. Holmes*, 3 *Sandf. Ch.*, 428.

62. Creditor's collateral security. De-

Rights of the Parties;—Of Payment, and its Effect.

fendant indorsed notes, by way of security, for the purchase-money of land, and the vendor retained the legal title in himself, as a further security. *Held*, that the vendor was not bound to resort to the land before proceeding against the surety. *V. Chan. Ct.*, 1881, *Loud v. Sergeant*, 1 *Edw.*, 164.

63. Note payable to bank who refuse to discount. Where a note is made by a debtor, payable to a bank by its corporate name, for the purpose of raising money on it at such bank, to satisfy a particular debt, and the debtor procures a third person to become a joint maker of the note, who signs the same "A. B., surety," and the bank refuse to discount the note, the creditor for whose benefit the note was made, may, with the assent of the bank, maintain an action upon it, in the name of the bank, against both the makers, although the note was not discounted at the bank, in pursuance of the original intention. *Supreme Ct.*, 1883, *Utica Bank v. Ganson*, 10 *Wend.*, 815.

64. Incidental remedy. A creditor, who has pursued the principal debtor to judgment and execution, without effect, is not bound, before resorting to the surety, to prosecute the officer who had charge of the execution, merely because he may have rendered himself liable for the debt. *Supreme Ct.*, 1812, *Leonard v. Giddings*, 9 *Johns.*, 855.

65. Qualified part-payment. Acceptance on the surety, of payment of the principal and interest of a protested foreign bill may be coupled with a reservation of a right to sue the other parties for the damages. The principals' liability is independent of that of the surety, and they have no right to inquire into the arrangement between the creditor and the surety, any further than to see that any payment which he may have made upon the debt has been allowed to them. *Supreme Ct.*, 1831, *Tombeckbee Bank v. Stratton*, 7 *Wend.*, 429.

66. Surety's general assignees. The surety took notes as security against his liability as surety, and afterwards assigned them and his own property in trust for his creditors, and the assignees collected the notes and distributed the money in good faith,—*Held*, that they could not be compelled to account for it to the original creditor. [6 *Johns. Ch.*, 488.] *V. Chan. Ct.*, 1889, *Weed v. Darley*, 3 *Edw.*, 277.

67. Loss by fault of creditor. The equity

of a surety will be extended to relieve him from his suretyship, without payment of the money, when the creditor has, by his own act, destroyed the pledge or rendered the collateral security, which he had taken, of no avail, or has put it out of his power to give the surety the benefit of the substitution. [4 *Johns. Ch.*, 128.] Thus, where the pledgee of stock which was equal in value to the debt, refused to receive the debt when tendered, but retained the stock, and it became worthless,—*Held*, that the surety for the debt was discharged. *V. Chan. Ct.*, 1886, *Griswold v. Jackson*, 2 *Edw.*, 461. To the same effect, *Chancery*, 1881, *Sailly v. Elmore*, 2 *Paige*, 497.

68. Motion to open judgment. In an action against principal and sureties, the former had judgment on a special plea, but the latter suffered default. Judgment was entered for all the defendants, and was affirmed, in error, with a reservation of leave to apply to the court below to open the judgment. *Held*, that such application should be denied, with costs. *Supreme Ct.*, 1845, *Supervisors of Albany v. Dorr*, 1 *Den.*, 268.

5. Of Payment, and its Effect.

69. Money paid. That where one is a mere surety for another, whether he became so by actual contract, or by operation of law, if he is compelled to pay the debt, he may recover it as money paid. [8 *T. R.*, 308.] *Ch. of Errors*, 1842, *Hunt v. Amidon*, 4 *Hill*, 845.

70. Who liable to the surety. If the surety pays the debt, he can maintain an action only against the person whose legal liability is discharged. The law does not imply a promise from other persons who may be benefited by the payment. *Supreme Ct.*, 1807, *Tom v. Goodrich*, 2 *Johns.*, 218.

71. If a person becomes surety for another, as importer of goods, in a bond to the United States, for duties, and pays the bond, he may maintain assumpsit against his co-obligor, although not the latter, but a third party, was in fact the owner of the goods. *Supreme Ct.*, 1809, *Sluby v. Champlin*, 4 *Johns.*, 461.

72. Voluntary payment. Where the contract has been broken, and the surety has become liable, he may pay the money without suit, and recover it from the principal. *Supreme Ct.*, 1816, *Mauri v. Heffernan*, 18 *Johns.*, 58. Compare *Stone v. Hooker*, 9 *Cow.*, 154.

73. The assignee of a lease, who is indemni-

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ried by the assignor against arrears admitted to be due, may pay, on default of the assignor, and resort to his indemnity, without waiting for a distress upon his property. *Chancery*, 1840, *Vechte v. Brownell*, 8 *Paige*, 212.

74. Actual payment necessary. A surety, *qua* surety, cannot call on his principal at law, until he has actually paid the money. If judgment be obtained against the surety, and he is taken in execution, and afterwards discharged as insolvent, he cannot maintain an action against his principal, without showing payment, or a promise to indemnify him from all damages and costs. Charging the surety in execution, is not a satisfaction of the debt, so as to discharge the principal debtor. *Supreme Ct.*, 1811, *Powell v. Smith*, 8 *Johns.*, 249.

75. Giving negotiable note in payment. The surety on a note on which judgment had been recovered against both principal and surety, gave the creditor his own negotiable note, expressly as satisfaction of the judgment, and it was received as such. *Held*, that the note was equivalent to payment, and that he could recover as for money paid, although the note remained unpaid, and the judgment had not been satisfied of record. *Supreme Ct.*, 1814, *Witherby v. Mann*, 11 *Johns.*, 518. Followed [citing, also, 10 *Wend.*, 501], *Sp. T.*, 1848, *Elwood v. Deifendorf*, 5 *Barb.*, 398.

76. Discharge of principal. A bankrupt's certificate merely discharges him from the debt, and does not affect a collateral covenant of his surety. *N. Y. Superior Ct.*, 1848, *Bowery Savings Bank v. Clinton*, 2 *Sandf.*, 118. *S. P.*, *A. V. Chan. Ct.*, 1845, *Storm v. Waddell*, 2 *Sandf. Ct.*, 494.

77. Payment of the debt by a third party at request of the principal, discharges the surety; and the principal's request, and promise to repay, does not inure as the surety's request. *Supreme Ct.*, 1809, *Elmendorph v. Tappen*, 5 *Johns.*, 176.

78. Money paid by a tenant for repairs which the landlord or his agent agreed to pay by deduction from the rent, is in effect payment on account of the rent, and as such may be allowed to the surety. *N. Y. Com. Pl.*, 1854, *Rosenbaum v. Gunter*, 8 *E. D. Smith*, 208.

79. Compromise. A surety satisfying the debt by paying less than its amount is entitled to recover the amount paid, not the amount extinguished by that payment. *Su-*

preme Ct., 1829, *Bonney v. Seely*, 2 *Wend.*, 481.

80. By the mere payment of the debt, and without any actual assignment from the creditor, the surety is, in equity, subrogated to all the rights and remedies of the creditor, for the recovery of his debt against the principal debtor or his property, or against the co-sureties or their property, to the extent of what they are equitably bound to contribute. [*Nap. Code*, art. 1251, 1252; *Bell's Dict.*, art. *Beneficium*; *Civ. Code of Louis.*, art. 2157, 2158; 2 *Rob. Pr.*, 186; 1 *Johns. Ch.*, 409; 2 *Call*, 125, 189; 2 *Rand.*, 514.] *Chancery*, 1836, *Ouyler v. Ensworth*, 6 *Paige*, 32.

81. Sureties who pay a judgment-debt of the principal, though it be thereby extinguished at law, are entitled to the benefit of it in equity, except as against bona-fide purchasers or mortgagees. [8 *Leigh*, 272.] *Chancery*, 1837, *Eddy v. Traver*, 6 *Paige*, 521.

82. A surety paid a judgment against the principal and himself, and when he paid it took an assignment. Held, that the judgment was not, *in equity*, to be treated as extinguished, and that the surrogate should allow it priority of payment. *Supreme Ct.*, 1851, *Goodyear v. Watson*, 14 *Barb.*, 481.

Otherwise at law.* *Supreme Ct.*, 1841, *Ontario Bank v. Walker*, 1 *Hill*, 652; 1846, *Bank of Salina v. Abbot*, 3 *Den.*, 181.

83. If the mortgagee purchases the equity of redemption from the mortgagor, the mortgage is merged, as respects a surety for the debt, and the surety is discharged, or at least he must account as between himself and the surety, for the value of the equity of redemption, and at the price which he paid for it. *A. V. Chan. Ct.*, 1845, *Loomer v. Wheelwright*, 3 *Sandf. Ct.*, 135.

6. What Exonerates the Surety.

A. In General.

84. An alteration of the agreement discharges the surety. *Ct. of Errors*, 1805, *Lud-*

* But see *Corey v. White*, 3 *Barb.*, 12, where this rule is questioned, and the contrary is held of a judgment against maker and indorser; which case, and *Goodyear v. Watson*, *supra*, were followed in a case of a legal nature, where a surety who had paid a judgment, applied for leave to issue execution on it. *Supreme Ct.*, 1855, *Alden v. Clark*, 11 *Bow. Pr.*, 209.

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low v. Simond, 2 *Cal. Cas.*, 1; 1838, Gahn v. Niemcewicz, 11 *Wend.*, 312; affirming S. C., 3 *Paige*, 614. *Supreme Ct.*, 1836, Coleman v. Lamb, 15 *Wend.*, 329.

85. Agreement to accept less sum. An agreement on the part of a creditor to accept, from the principal debtor, a sum less than the stipulated amount, without any other change in the agreement between them, will not discharge a surety for the debt. *N. Y. Com. Pl.*, 1857, Ellis v. McCormick, 1 *Hill.*, 313.

86. Departure from the contract. A., by an agreement with B., was to ship goods belonging to B., and on his account, to C., at Hamburg, for the amount of which shipment A. was to give his notes to B., which were to be reimbursed out of the proceeds; and, in case they fell short of the amount of A.'s advance, B. was to give his note, which D. agreed to indorse, for the balance. Part of the goods, on their arrival at Hamburg, which was a neutral port, were sent by C., the consignee, to Rotterdam, which was a belligerent port, where they were sold, and A. accepted the proceeds under the agreement. *Held*, that sending the goods to Rotterdam was a departure from the terms of the agreement, and A. having virtually ratified the departure, D., who was to be deemed a surety, was discharged from his liability. *Ct. of Errors*, 1805, Ludlow v. Simond, 2 *Cal. Cas.*, 1.

87. In order to discharge a surety in consequence of a variation of the contract, or by a deprivation of his equitable rights and remedies, not only the fact of suretyship must exist, but it must be known to the creditors at the time of the act complained of. If the fact appears on the face of the security, that is enough; if not, the knowledge of it must be clearly brought home to the creditors by the surety. *Ct. of Errors*, 1833, Gahn v. Niemcewicz, 11 *Wend.*, 312; affirming S. C., 3 *Paige*, 614.

88. The mere fact that, at the time of making a loan secured by a mortgage executed by husband and wife, the lender knew that it was made to the husband, and that the mortgage was upon the wife's estate, does not make out that he knew that the wife was only a surety. *Id.*

89. Building contract. A. gave his note, with sureties, to B., payable in labor and materials with reasonable diligence after certain notice to be given by November 1, and B.

transferred the note to C., who, in May preceding that date, made a contract with A. for a building, A. to be paid as the work progressed, and the note to be applied to the last payments. *Held*, that the sureties were not thereby discharged. *V. Chan. Ct.*, 1840, Blossom v. Farnham, *Clarke*, 158.

90. Indemnified surety. The principle that dealing with the debtor so as to alter the contract or remedy discharges the surety, does not apply where the surety had previously received from the debtor the amount of the debt as indemnity. *Supreme Ct.*, 1834, Moore v. Paine, 12 *Wend.*, 123.

91. Diversion of note. Where a person becomes surety for another in a note, to be used for a particular purpose, neither the principal nor his representative can divert it or the proceeds to another purpose, without the surety's assent. And if he do so divert it, neither he, nor any one with notice of the diversion, can maintain any action upon it, or set up any right by virtue of the transaction. [10 *Johns.*, 198; 4 *Beav.*, 379, 384; S. C., 5 *Lond. Jur.*, 164.] *A. V. Chan. Ct.*, 1845, Lee v. Highland Bank, 2 *Sandf. Ch.*, 311.

92. Where the maker of a note made an assignment to the holder, for the benefit of creditors, preferring an indorser as a creditor, to the amount of the note, and also preferring the holder on another account and without any mention of the note; and the holder and others subsequently released the debtor from all claims and demands;—*Held*, that the release did not discharge the indorser's claim, nor affect his liability to the holder. *Ct. of Appeals*, 1848, Coddington v. Davis, 1 *N. Y. (1 Comst.)*, 186; affirming S. C., 3 *Den.*, 16.

93. Mode of paying rent. Where rent is payable quarterly, the landlord's acceptance of the rent monthly, by the tenant's request, does not change the written lease, nor discharge a surety. *N. Y. Com. Pl.*, 1854, Ogden v. Rowe, 3 *E. D. Smith*, 312.

94. Exchange of premises. The tenant, by a parol agreement, relinquished to the landlord a part of the demised premises, accepting another part instead. *Held*, that this was not an alteration of the original lease which would discharge the sureties from their liability. *N. Y. Com. Pl.*, 1858, Shufeldt v. Gustin, 2 *E. D. Smith*, 57.

95. The temporary occupation of the demised premises by a third person under the

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debt is legally demandable, is a sufficient consideration for an agreement that the time for the payment of the balance should be extended until it should be convenient for the debtor to pay it; and this extension, made without the consent or knowledge of a surety, will discharge him. *Supreme Ct.*, 1857, *Newsam v. Finch*, 25 *Barb.*, 175. Compare *Draper v. Romeyn*, 18 *Id.*, 166.

108. Fact of suretyship must be known. To discharge a surety by giving time, the fact of suretyship must be known to the creditor at the time of the extension. *Supreme Ct.*, *Sp. T.*, 1848, *Elwood v. Deifendorf*, 5 *Barb.*, 398.

109. Insolvency of principal. If the creditor, for a valuable consideration, agrees with the principal to extend the time of payment, the surety is discharged, whether the principal was or was not insolvent, at the time of the agreement for extension. *Supreme Ct.*, 1835, *Huffman v. Hulbert*, 18 *Wend.*, 375.

110. Injury to surety immaterial. An extension, though there be no proof that it has worked injury to the surety, discharges him. *Chancery*, 1839, *Miller v. McCan*, 7 *Paige*, 451; and see *Rathbone v. Warren*, 10 *Johns.*, 587.

111. Length of time immaterial. Where time is given to the principal debtor, by a valid agreement, which ties up the hands of the creditor, the surety is discharged. The principle is the same whether the time be long or short. The creditor must be in such a situation that when the surety comes to be substituted in his place by paying the debt, he may have an immediate right of action against the principal. *Ct. of Errors*, 1848, *Bangs v. Strong*, 7 *Hill*, 250; affirming *S. C.*, 10 *Paige*, 11.

112. Fraud. If the agreement to delay be made by the creditor, on the faith of a false assurance of the debtor that the surety has consented, and the creditor repudiates the agreement on discovering the fraud, the surety will not be discharged. *Chancery*, 1842, *Bangs v. Strong*,* 10 *Paige*, 11.

113. Usurious agreement. An agreement with the principal debtor, to extend the time of payment, cannot discharge the sureties, unless it be such a one as the debtor has the

right to enforce. agreement of the (equally, if founded on it does not discharge *peals*, 1848, *Vilas v. 274*; affirming *S. C. Conover v. Mutual I 290*; *Miller v. McCan*

114. Staying ex a confession of judgment on a debt to which creditor stays execution he could have obtained brought suit, and no posed, the surety is discharged, *Bower v. Tiern*

115. Where the creditor's assent, agrees to payment, in part-payment to stay proceedings on praisal and conveyance surety is discharged. *Bangs v. Strong*, 7 *H 10 Paige*, 11. Follow *Wagman v. Hoag*, 14

116. Modification of creditors. The fact made by one only of the creditors will not preclude discharge. *Chancery*, 10 *Paige*, 11.

C. Taking

117. Accepting of creditor, by bond and non-negotiable note at of interest,—*Held*, the surety. The note did give time. Even if it offered security, and did not the bond and mortgage agreement that it should 1838, *Gahn v. Niemo* affirming *S. C.*, 8 *Paig*

118. Taking the pr upon the expiration of elated for by the guar but one day from date, charges the guarantor. *Fellows v. Prentiss*, 8

119. — draft or oh

* Affirmed on other grounds, *Ct. of Errors*, 1848, 7 *Hill*, 250.

* Affirmed, without discussion of *Errors*, 1848, 7 *Hill*, 25



under sixteen years of age, may be sent to House of Refuge, instead of to prison. 2 *Rev. Stat.*, 701, § 17; amended, *Laws of 1840*, 73, ch. 100; *Laws of 1846*, 154, ch. 148, § 16; amended, *Laws of 1850*, 670, ch. 804; and see *Laws of 1850*, ch. 24, § 1; and *Laws of 1858*, 1189, ch. 608.

3. When convicts, under seventeen years, may be removed from prison, by order of inspectors, to House of Refuge. *Laws of 1847*, 617, ch. 460, § 91; *Laws of 1850*, 29, ch. 24, § 2.

4. When convicts, between sixteen and twenty-one years of age, may be sentenced to imprisonment in penitentiary instead of in state-prison. *Laws of 1856*, 251, ch. 158.

As to Prisoners, see ARREST; COMMITMENT; EXECUTION; HABEAS CORPUS; IMPRISONMENT; SHERIFF.

PRIVATE PROPERTY.

COMPENSATION; CONSTITUTIONAL LAW.

PRIVATE WAYS.

I. IN GENERAL.

II. UNDER THE STATUTE.

I. IN GENERAL.

1. Of the origin and nature of rights of private way. *Boyce v. Brown*, 7 *Barb.*, 80; *Williams v. Safford*, *Id.*, 309; *Miller v. Garlock*, 8 *Id.*, 158; *Hamilton v. White*, 5 *N. Y. (1 Seld.)*, 9; affirming *S. O.*, 4 *Barb.*, 60.

2. Presuming grant. If a way has been used continuously and adversely for twenty years, a grant may be presumed. [Citing many authorities.] *Supreme Ct.*, 1887, *Corning v. Gould*, 16 *Wend.*, 581; *Sp. T.*, 1850, *Miller v. Garlock*, 8 *Barb.*, 158.

3. This presumption is not rebutted by a previous proceeding under the statute, laying out the road as a private way, although that proceeding were to be regarded as absolutely void. *Supreme Ct.*, *Sp. T.*, 1850, *Miller v. Garlock*, 8 *Barb.*, 158.

4. Track. That to establish a private way by user, the prescription must be confined to one certain track. *Supreme Ct.*, 1888, *Holmes v. Seely*, 19 *Wend.*, 507.

5. License. That the enjoyment of a way, though for more than thirty years, by license of the owner, confers no right. *Supreme Ct.*, 1849, *Boyce v. Brown*, 7 *Barb.*, 80.

6. Reservation in a deed. - *Held*, to estab-

lish a right of way. *Smiles v. Hastings*.

7. Way by n land without acc right of way by n remaining land t Saund., 323, n. 6 898; *Oro. Jac.*, 1' 311; *Woolr. on V* may designate the and if he neglect choose for himself right to several wa carried beyond th *Supreme Ct.*, 1888, 507. To similar e *Life Ins. & Trust* 858; 1857, *Smiles*

8. Where a lot front bounding on does not take "a through an alley l although there be house, and the gr used the alley as a for his tenant in st said to have an eas no right of way o as the title to the lots, was vested in *N. Y. Superior Ct.*, 2 *Bow.*, 546.

9. Change. One way without desig precise location, can been long fixed by cence, change it, to grantee. But cha grantee is valid. *koop v. Burger*, 12

10. Defendant cl had used a right of Plaintiff fenced up t new one, which def stead. Less than t forbade defendant down a bridge whic way. In trespass b ant for passing and it,—*Held*, that the by the plaintiff, the acquired as to the c as to the new; and pass by the old w

Prize.

Prize-fighting.

25. A road recorded as a highway for A.,—*Held*, to be a private way. *Supreme Ct.*, 1842, *Drake v. Rogers*, 8 *Hill*, 604.

26. A Virginia, or zig-zag, fence, projecting alternately over the way and the occupant's land,—not proper. *Herrick v. Stover*, 5 *Wend.*, 580.

27. How laid out, &c. Application for private roads, how made: proceedings thereon. *Laws of 1858*, 808, ch. 174; 1 *Rev. Stat.*, 517, §§ 79, 80; same statutes, 2 *Id.*, 5 ed., 400–408; and see *Const. of 1846*, art. 8, § 7.

28. There is no appeal to the County Court from the verdict of a jury given upon the laying out of a private road. The commissioners of highways must lay it out on receiving the verdict of the jury [*Laws of 1858*, 809, § 10]; and proceedings entertained by the County Court on an appeal, are void for want of jurisdiction. *Supreme Ct.*, 1858, *People v. Robinson*, 17 *How. Pr.*, 584; S. C., 29 *Barb.*, 77.

PRIZE

1. Capture. A mere capture in battle, followed by an immediate recapture, does not divest the property of the original owner. Thus, where government property was captured, and during the continuance of the battle the plaintiff retook it,—*Held*, that it did not become his. Even if the capture vests the title, property taken from the enemy belongs to the sovereign of the captor. *Supreme Ct.*, 1816, *Cook v. Howard*, 18 *Johns.*, 276.

2. Although the decision of a prize court of competent jurisdiction is conclusive as to the ownership of the property, and a court of common law has no jurisdiction of a question of prize, yet a court of common law may inquire whether a condemnation for prize which is set up as a source of title, was pronounced by a court of competent authority. *Supreme Ct.*, 1806, *Wheelwright v. De Peyster*, 1 *Johns.*, 471; and see *Page v. Lenox*, 15 *Id.*, 172.

As to Jurisdiction of Prize Courts, see JURISDICTION, 94–97.

PRIZE-FIGHTING.

Proceedings to prevent and punish prize-fighting. *Laws of 1856*, 181, ch. 98; 1859, 63, ch. 87. The latter act amended as to competency of witnesses. *Laws of 1860*, 225, ch. 141.

P.

1. General prov 1847, 835, ch. 280, same stat., 8 *Rev. St.*

2. Indorsement Stat., 481, § 7, requiring actions for penalties indorsed with a receipt not apply to declarations commenced by 1847, *Thayer v. Le*

3. The object of the defendant notice he is prosecuted.

“Of the internal police a considerable portion and imposes a great vague. *Supreme Ct. Wend.*, 85.

4. An indorsement according to the concerning the incop plank road companies penalties for demanding than lawful toll in on such roads”—1856, *Marselis v. Se*

5. Sheriff receiptment of fee. On request. 2 *Rev. Stat.*

6. Officers receive and return the 7. Mode of return sheriffs and deputy ch. 225, § 8.

8. Obstructing an action for obstruct process, must aver cause of action against whom the writ Campbell v. Neely,

9. Process. Even upon property under incapable of execution for a trespasser, then not authorized to use necessary violence in the process. *Supr Gulick, Hill & D. &*

10. Proceedings process. 2 *Rev. Stat.* 1845, 55, ch. 69, §§ 18 5 ed., 741.

As to Process SERVICE; WARRANT

Profane Swearing.

Prohibition (Writ of).

Promise of Marriage.

PROFANE SWEARING.

Forbidden. 1 *Rev. Stat.*, 678, §§ 61, 68.

PROHIBITION (Writ of).

1. **Want of jurisdiction.** Prohibition and not mandamus is the remedy to prohibit the general sessions from entertaining an appeal of which they had no jurisdiction. *Supreme Ct.*, 1888, *People v. Tompkins General Sessions*, 19 *Wend.*, 154.

2. The office of a prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial, and not of ministerial power. Issuing an execution is not judicial power. [1 *Hill*, 201; 2 *Chitt. Gen. Pr.*, 355; *Dudl. L. R.*, 101.] *Supreme Ct.*, 1842, *Exp. Brandlaucht*, 2 *Hill*, 367.

3. **Where a judge has erred** in the decision of a matter within his jurisdiction, the remedy is certiorari, and not prohibition. *Supreme Ct.*, 1882, *People v. Seward*, 7 *Wend.*, 518. To the same effect, 1842, *Exp. Gordon*, 2 *Hill*, 368.

4. **Other remedy.** The writ of prohibition ought not to issue where there are other perfectly adequate remedies; and the court has a discretion to grant or deny it. [2 *Nott & McC.*, 419.] *Supreme Ct.*, 1842, *Exp. Brandlaucht*, 2 *Hill*, 367.

5. **Ministerial officer.** The writ of prohibition does not lie to a ministerial officer, to stay the execution of process in his hands. Its office is to control courts and parties. *Supreme Ct.*, 1841, *People v. Supervisors of Queens*, 1 *Hill*, 195; explaining *People v. Works*, 7 *Wend.*, 486.

6. **Cases and mode in which a writ of prohibition may be applied for.** *People v. Works*, 7 *Wend.*, 486.

7. **To be issued only by Supreme Court.** How obtained and served. Proceedings thereon. 2 *Rev. Stat.*, 587, §§ 61, 65.

8. **Writ of consultation issued.** *People v. General Sessions of N. Y.*, 3 *Barb.*, 144.

9. **The party making return to prohibition, may require relator to demur or plead in twenty days.** Proceedings thereon. *Rule 51 of 1858.*

PROMISE OF MARRIAGE

1. **Conditional promise.** *It seems* that a promise by A. to B., to marry B. if he ever married, is void, as being in restraint of marriage. *Conrad v. Williams*, 6 *Hill*, 444.

2. **Promise of married man.** The defendant was married at the time of the promise, and deceived the plaintiff by representing that he was unmarried. *Held*, that the agreement was not illegal on her part, and the defendant's disqualification to perform such a promise, was no defence. *Supreme Ct.*, 1858, *Blattmacher v. Saal*, 7 *Abbotts' Pr.*, 409; *S. C.*, 29 *Barb.*, 22.

3. **Defences.** The fact that defendant, after breaking his engagement, offers to renew his addresses, and that plaintiff refuses to receive them, is not, without an offer to consummate the engagement, any defence to the action. *Supreme Ct.*, 1826, *Southard v. Rexford*, 6 *Cow.*, 254. Compare *Liefmann v. Solomon*, 7 *Abbotts' Pr.*, 409, *note*.

4. **Where the parties had cohabited**, as man and wife, under a promise of a future marriage, which had been accepted by plaintiff, after a breach of the defendant's original promise;—*Held*, that the female could not recover for a subsequent breach of the promise; but might recover back money she had paid defendant in expectation of the marriage on an appointed day. *Gen. Sess.*, 1819, *McDonald v. McOann*, 4 *City H. Rec.*, 68.

5. **Effect of bad character of plaintiff, unknown to the defendant; or of subsequent indecent conduct.** *Palmer v. Andrews*, 7 *Wend.*, 142.

6. **Enforcing.** That a promise to marry cannot be specifically enforced. *Ct. of Appeals*, 1857, *Cheney v. Arnold*, 15 *N. Y.* (1 *Smith*), 345.

7. **Writing.** Mutual promises to marry need not be in writing. 2 *Rev. Stat.*, 135, § 2, subd. 3.

8. **An ante-nuptial agreement**, by the husband, to support the daughter of the wife, is within the Statute of Frauds [2 *Rev. Stat.*, 135, § 2, subd. 3], and is void if not in writing. *Chancery*, 1844, *Matter of Willoughby*, 11 *Paige*, 257.

As to the **Measure of damages**, see **DAMAGES**.

As to the **Evidence** appropriate to actions for breach of promise, see **EVIDENCE**, 2340-2349.

Public Administrators.

As to what promise Constitutes a marriage, see **MARRIAGE**.

PUBLIC ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS, 774 785.

PUBLIC LANDS.

Regulations concerning. 1 *Rev. Stat.*, 5 ed., 541-555.

Consult, also, **INTRUSION**; **PATENTS FOR LANDS**.

PUBLIC MONEYS.

Proceedings against persons accountable for. 1 *Rev. Stat.*, 172-174.

PUNISHMENTS.

[This title contains only principles and enactments regarding the nature, manner, and measure of punishments in general. For the measure of punishment prescribed for the various crimes, the titles of the crimes, respectively, should be consulted.]*

1. **Constitution.** Excessive fines not to be imposed, nor cruel and unnatural punishments inflicted. *Const. of 1846*, art. 1, § 5.

2. The nature and extent of the powers possessed by the Legislature under the State and Federal Constitutions, in respect to prescribing the punishment of crimes,—considered. *Barker v. People*, 8 *Cow.*, 686. See **CONSTITUTIONAL LAW**, 117; 229-232.

3. **Death.** How inflicted. 2 *Rev. Stat.*, 659, § 25; *Laws of 1835*, 299, ch. 258; 1846, 131, ch. 118. Compare statutes cited, **HOMICIDE**, 22, 23; and *Laws of 1862*, 368, ch. 197.

4. **Civil death.** Persons attainted under act of 1779, deemed civilly dead. *Jackson v. Catlin*, 2 *Johns.*, 248; affirmed on other points, 8 *Id.*, 520.

5. Person sentenced to imprisonment for life for felony committed prior to act of March 29, 1799, not civilly dead, and his estate not

devested. *Chancellor Wood*, 6 *Johns. Ch.*, Wood, 4 *Id.*, 228.

6. History of the *Id.*

7. A person sentenced state-prison for life, civilly dead. 2 *Rev.*

8. A sentence of prison for any term all the civil rights of forfeits all public office authority, or power, & imprisonment. 2 *Rev. Stat.*, 659, § 25, and **REVIVAL**, 11

9. **Imprisonment** convicted of two or more shall have been pronounced offence, the imprisonment sentenced upon the conviction, shall count of the first term of he shall be adjudged the second term of it may be. 2 *Rev. Stat.*, 659, § 25.

10. Offender declaration for a term not less than two years—no limit to declared—may be sentenced life or for any number such as are prescribed.

11. **Term.** No sentence-prison to be for *Rev. Stat.*, 700, § 12.*

12. Where convicts imprisoned in the state than two years, the count of the sentence that it and November, unless sentence may be fixed ch. 171, § 6.

13. **Rights of convict** sentenced to imprisonment under the protection to his person, not available in the same manner sentenced or convicted.

14. **Fines.** Upon a punishable by imprisonment in relation to which the court may impose exceeding \$200. 2 *Rev.*

15. When a fine against a corporation, the same may be assessed against their person 2 *Rev. Stat.*, 747, § 87.

16. Nominal fine in circumstances are shown determining the punishment, 2 *Johns. Cas.*, 7 *Vermilyea*, 7 *Cow.*, 10

* The statutes define numerous offences, as to which no adjudications are to be found in the reports. For the punishments prescribed for either of these, the provisions of the Revised Statutes, or Session Laws, relating to the offence in question, and its penalty, should be examined.

* Section 1 of Laws of 1846, intended as an amendment substituting one year for reference is made to section

Quarantine.

Questions of Law and Fact

17. Forfeitures. No conviction except upon an outlawry for treason, shall work a forfeiture of chattels, lands, &c. All forfeitures to the People, in the nature of deodands, or in cases of suicide, or where any person shall flee from justice, are abolished. 2 *Rev. Stat.*, 701, § 22.

18. Common-law punishments of offences provided for by Revised Statutes,—prohibited. 2 *Rev. Stat.*, 701, § 16.

19. Attempts. The measure of punishment for attempts to commit crimes, regulated. 2 *Rev. Stat.*, 698, § 3.

20. The power to punish by imprisonment in a state-prison, upon a conviction for an attempt to commit a crime, is not limited to those cases where the imprisonment in the state-prison, if the crime attempted had been consummated, *must* be for four years or more; but in all cases where the crime attempted

may be punished four years or more in a state-prison, the court may sentence the convict to imprisonment in a state-prison for a time not exceeding one half of the longest time of imprisonment prescribed for a conviction of the offence attempted. *Supreme Ct.*, 1854, *Mackay v. People*, 1 *Park. Cr.*, 459.

21. Thus, as grand larceny is punishable for a term of not more than five and not less than two years, a person convicted of an attempt to commit grand larceny, may be sentenced to imprisonment in the state-prison for two years and six months. *Id.*

For the construction of Constitutional provisions relative to punishment of crimes, see CONSTITUTIONAL LAW, 117, 145 149, 229-232.

Q.

QUARANTINE.

1. The widow's right to tarry in the chief house of her husband, determines on the expiration of forty days, whether her dower has been assigned to her or not. After the expiration of that time, the heir may expel her, and put her to her suit; and she is not thereafter protected from an action of ejectment by the heir, or by any person deriving the title from him. *Supreme Ct.*, 1810, *Jackson v. O'Donaghy*, 7 *Johns.*, 247; 1833, *Siglar v. Van Riper*, 10 *Wend.*, 414.

2. A widow may tarry in the chief house of her husband forty days after his death, whether her dower be sooner assigned to her or not,* without being liable to any rent for the same, and in the mean time she shall have her reasonable sustenance out of the estate of her husband. 1 *Rev. Stat.*, 742, § 17.

3. Insolvent estate. Children. The provision of 1 *Rev. Stat.*, 742, § 17,—which gives a widow her reasonable sustenance, out of the estate of her husband, during her quarantine,—applies to insolvent estates; but contemplates only the sustenance of the widow herself. *Chancery*, 1844, *Johnson v. Corbett*, 11 *Paige*, 265.

4. This statute has no application to leasehold property. It relates only to lands of

which the widow is dowerable. *N. Y. Superior Ct.*, 1848, *Voelckner v. Hudson*, 1 *Sandf.*, 215.

As to Health laws, see HEALTH.

QUESTIONS OF LAW AND FACT.

1. Abandonment. Whether an abandonment was accepted or not, is a question of fact for the jury. *Supreme Ct.*, 1806, *Bell v. Smith*, 2 *Johns.*, 98.

2. Account stated. Whether a given transaction amounts to an account stated is a question of law, and not of fact. *Ct. of Appeals*, 1854, *Lockwood v. Thorne*, 11 *N. Y. (1 Kern.)*, 170.

3. Adverse possession. Where there is no dispute as to the facts, the question whether there has been an adverse possession is a question of law. *N. Y. Superior Ct.*, 1854, *Bowie v. Brahe*, 8 *Duer*, 35. *Supreme Ct.*, 1858, *Munro v. Merchant*, 26 *Barb.*, 383.

4. The practice of submitting a case to the jury upon the presumption of a conveyance for the purpose of upholding the possession, after a great lapse of time, does not apply to a case where the question is purely one of constructive adverse possession, founded upon an instrument in writing, and an actual possession of a small portion of land conveyed. *Supreme Ct.*, 1858, *Munro v. Merchant*, 26 *Barb.*, 383.

* That this clause is a qualification of the former rule, see *Jackson v. O'Donaghy*, 7 *Johns.*, 247.

Agent's Authority.

Delivery.

5. Agent's authority. In an action to charge a principal—*e. g.*, a carrier—for an act of the agent, the authority of the agent is a question for the jury. *Supreme Ct.*, 1854, *Thurman v. Wells*, 18 *Barb.*, 500. Compare *infra*, 45.

6. Whether an agent had exceeded his instructions in a peculiar case.—*Held*, a question of fact for the jury. *McMorris v. Simpson*, 21 *Wend.*, 610.

7. Alteration of instrument. Whether an alteration appearing upon the face of an agreement *inter partes*, was made before or after its execution, is a question of fact for the jury to determine, in view of all the circumstances. *Supreme Ct.*, 1854, *Pringle v. Chambers*, 1 *Abbotts' Pr.*, 58. S. P., *N. Y. Com. Pl.*, 1851, *Maybee v. Sniffen*, 2 *E. D. Smith*, 1; S. C., more fully reported, 10 *N. Y. Leg. Obs.*, 18.

8. Where the alteration is suspicious on its face, it is a question for the court whether the evidence offered in explanation of the alteration is sufficient to entitle the instrument to be read. Whether a paper is proper to be read, is always a question for the court. *Supreme Ct.*, 1850, *Tillon v. Clinton & Essex Mutual Ins. Co.*, 7 *Barb.*, 564.

9. Assent. As mere omission to object to the manner in which a sheriff performs his official duty, is no evidence of assent to his course, it should not be left to the jury to say whether a party has assented to the acts of a sheriff, unless there is other evidence than that he failed to object. *N. Y. Superior Ct.*, 1853, *Moore v. Westervelt*, 2 *Duer*, 59.*

10. Auction. Where an auction sale is objected to on the ground that the owner bid at the sale, it is a question of fact for the jury, on all the circumstances, whether the sale was fair. *N. Y. Superior Ct.*, 1849, *Minturn v. Allen*, 8 *Sandf.*, 50; affirmed, 7 *N. Y.* (8 *Seld.*), 220.

11. Bound to know. Whether a carrier is "bound to know" the character of the contents of packages intrusted to him, is a question of law upon the facts; not a question of fact for a jury to find. *Supreme Ct.*, 1855, *Berley v. Newton*, 10 *How. Pr.*, 490.

12. Buildings. In a suit for penalties, for erecting buildings prohibited by fire laws, whether a certain erection is to be deemed

several distinct buildings, or only one, is a question for the jury. *Supreme Ct.*, 1837, *Langdon v. Fire Department of N. Y.*, 17 *Wend.*, 234.

13. Compensation. The plaintiff rendered services to a corporation, under a formal appointment, but with no arrangement for compensation; and there was evidence tending to show that he expected compensation only from the incidental advantages of his connection as a partner with another officer of the company. *Held*, a proper question for the jury, whether the services were intended to be gratuitous as respected the company. *Ct. of Appeals*, 1859, *Pendleton v. Empire Stone Dressing Co.*, 19 *N. Y.* (5 *Smith*), 13.

14. Contract. Whether a contract was made, is a question of fact; what the contract means, is a question of law. *Supreme Ct.*, 1857, *Latham v. Westervelt*, 26 *Barb.*, 256.

15. That it is the duty of the court—not of the jury—to determine the validity and effect of a contract, whether written or parol, the terms of which are not disputed. *Chapin v. Potter*, 1 *Hill.*, 366.

As to Contracts, see *supra*, 7–10, 18; *infra*, 16, 23, 35–37, 58, 77–80, 83–85, 87, 89.

16. Date of instrument. It is a question of fact when an instrument bearing no date was made. *Ct. of Appeals*, 1854, *Coons v. Chambers*, 1 *Abbotts' Pr.*, 165.

17. — of conversion. Time of the conversion, being material, in trover, was *Held*, a question of fact for the jury. *Supreme Ct.*, 1828, *Hyde v. Stone*, 9 *Cow.*, 230.

18. Deceit. In action for inducing plaintiff to sell goods by false representations, the question whether the representations used were sufficient to mislead the plaintiff, is a question of fact for the jury. *Ct. of Appeals*, 1853, *Moore v. Meacham*, 10 *N. Y.* (6 *Seld.*), 207. *Gen. Sess.*, 1823, *People v. Dalton*, 2 *Wheel. Cr.*, 161.

19. In actions for goods alleged to have been obtained by fraud or deception, whether the circumstances shown are sufficient to make out the fraud or deception, is a question for the jury. *Supreme Ct.*, 1818, *Woodworth v. Kissam*, 15 *Johns.*, 186; S. P., 1854, *Buckley v. Artcher*, 21 *Barb.*, 585.

20. Delivery. Whether delivery of goods sold for cash on delivery, was absolute or conditional, is a question for the jury. *Supreme Ct.*, 1857, *Fleeman v. McKean*, 25 *Barb.*, 474.

* See further decisions in this case, 1 *Bow.*, 357; 21 *N. Y.* (7 *Smith*), 103.

Deviation.

21. Defendant ordered 250 barrels of cement; and plaintiff sent 260 by a carrier. *Held*, in plaintiff's action for the price of 250 barrels, that he was improperly nonsuited on the ground of the excess. It should have been left to the jury to say whether the 260 barrels were sent as a compliance with the order, or with intent to charge defendant with the excess. *Ot. of Errors*, 1843, *Downer v. Thompson*, 6 *Hill*, 208.

22. **Deviation.** Where a question of deviation depends on circumstances peculiar to the pursuit in which the vessel was engaged, and the evidence is not decisive, the question belongs to the jury. *N. Y. Superior Ct.*, 1849, *Child v. Sun Mutual Ins. Co.*, 3 *Sandf.*, 26.

23. **Due course of law.** Upon a guaranty to pay a debt, "if not collected in due course of law," the question whether the proceedings were in due course of law, is a mixed question of law and fact, which should be submitted to the jury. *Supreme Ct.*, 1884, *Backus v. Shipherd*, 11 *Wend.*, 629; 1853, *Penniman v. Hudson*, 14 *Barb.*, 579. Compare *Thomas v. Woods*, 4 *Cow.*, 173; *Oumpston v. McNair*, 1 *Wend.*, 457.

24. **Exemption.** Whether, under a statute exempting "necessary" furniture, tools, &c., from execution, given articles, claimed as exempt, are *necessary*, is a question of fact for the jury. *Supreme Ct.*, 1845, *Willson v. Ellis*, 1 *Den.*, 462; 1849, *Whitmarsh v. Angle*, 3 *Code R.*, 53; S. C., 3 *Am. Law R.*, N. S., 595.

25. **Foreign law.** The question, what is the law of a foreign country, a question of fact. *Western v. Genesee Mutual Ins. Co.*, 12 *N. Y.* (2 *Kern.*), 258.

26. **Fraud** is a question of law; especially where there is no dispute about facts. It is the judgment of law on facts and intents. *Supreme Ct.*, 1812, *Sturtevant v. Ballard*, 9 *Johns.*, 387; 1829, *Jennings v. Carter*, 2 *Wend.*, 446.

27. Although fraud is a question of fact, yet it is a question of law whether the evidence offered tends in any respect to make out fraud. *Supreme Ct.*, 1857, *Gage v. Parker*, 25 *Barb.*, 141; *Erwin v. Voorhees*, 26 *Id.*, 127.

28. Question of "fraudulent intent" in cases under provisions of Revised Statutes relative to fraudulent conveyances—declared a question of fact and not of law. 2 *Rev. Stat.*, 187, § 4.

29. It is the province of the court and not

Fraud.

of the jury to pass upon the legal effect of an assignment, where the question is whether the provisions of the instrument are such as render it void for fraud against creditors (under 2 *Rev. Stat.*, 185, § 1); it is error to submit to the jury the question what was the intent of the parties in making it. *Supreme Ct.*, 1841, *Goodrich v. Downs*, 6 *Hill*, 438; 1847, *Sheldon & Dodge*, 4 *Den.*, 217. To nearly same effect is *Ot. of Errors*, 1833, *Cunningham v. Freeborn*, 11 *Wend.*, 240.

30. *So held*, of a chattel mortgage where the question was whether it was not void on its face as creating a trust for the use of the mortgagor, within the prohibition of 2 *Rev. Stat.*, 185, § 1. *N. Y. Com. Pl.*, 1852, *Spies v. Boyd*, 1 *E. D. Smith*, 445; S. C., 11 *N. Y. Leg. Obs.*, 54. S. P., *Ot. of Appeals*, 1853, *Edgell v. Hart*, 9 *N. Y.* (5 *Seld.*), 218.

31. The question whether the omission to change the possession under a sale or mortgage of chattels, was with an intent to defraud creditors, is a question of fact to be submitted to the jury. *Ot. of Errors*, 1840, *Smith v. Acker*, 23 *Wend.*, 653; 1841, *Cole v. White*, 26 *Id.*, 511; 1842, *Hanford v. Archer*, 4 *Hill*, 271. *Ot. of Appeals*, 1848, *Butler v. Miller*, 1 *N. Y.* (1 *Comst.*), 496; 1850, *Thompson v. Blanchard*, 4 *N. Y.* (4 *Comst.*), 308; 1859, *Gardner v. McEwen*, 19 *N. Y.* (5 *Smith*), 123. *Supreme Ct.*, 1850, *Bishop v. Cook*, 18 *Barb.*, 326; 1854, *Groat v. Rees*, 20 *Id.*, 26. *N. Y. Superior Ct.*, 1856, *Stewart v. Slater*, 6 *Duer*, 83. Compare *Edgell v. Hart*, 9 *N. Y.* (5 *Seld.*), 218. See, also, *CHATEL MORTGAGE*, 102-128.

32. If no evidence is offered of the consideration paid for the sale, there is nothing to be left to the jury. The law declares the sale void. It is only on proof of a good consideration that the cause goes to the jury on the question of fraud in fact. *Supreme Ct.*, 1858, *Allen v. Cowan*, 28 *Barb.*, 99.

33. That in an action to obtain chattels purchased at a sale on execution the question whether there was an intent to defraud creditors;—whether the property was in view of the bidders;—whether it was offered in judicious lots, &c.—are questions of fact for the jury. *Bruce v. Westervelt*, 2 *E. D. Smith*, 440, 460.

34. In an action by a judgment and execution creditor of one of two partners, to set aside a transfer of his interest in the property of the firm of his copartner, as being a fraud

Grant.

Malice.

upon the individual creditors of the transferring partner, the question, whether such transfer is made with intent to defraud, is one of fact, and not of law. *N. Y. Superior Ct.*, 1857, *Griffin v. Cranston*, 1 *Bow.*, 281.

As to *Fraud*, compare, also, *supra*, 7, 10, 18, 19.

35. Grant. The construction of the terms of a grant, is matter of law, but the question what premises are embraced by it, depending on evidence outside the grant itself,—*e. g.*, proof relative to identity of landmarks referred to,—is for the jury. *Supreme Ct.*, 1811, *Frier v. Jackson*, 8 *Johns.*, 495, 508.

36. If there is no dispute about facts, the question, what premises are embraced by the terms of the instrument, is for the court. *Supreme Ct.*, 1852, *St. John v. Bumpstead*, 17 *Barb.*, 100.

37. Identity of instrument. Question of identity of written instrument,—*Held*, under the circumstances, question of fact for the jury. *Jackson v. Betts*, 6 *Cow.*, 877; *Bank of Cape Fear v. Gomez*, *Id.*, 435.

38. Insurance. Whether circumstances not communicated to the insurer, by an applicant for insurance, when applying for the policy, were material to the risk, and therefore necessary to be communicated, is a question of fact for the jury. [Doughl., 260, 396, n.; 4 *Bos. & P.*, 14, 151; 1 *Cai.*, 229; 8 *Dall.*, 491; 1 *Cond. Marsh.*, 473, 6, n.; 6 *Cr.*, 274, 388.] *Ct. of Errors*, 1815, *Fireman's Ins. Co. v. Walden*, 12 *Johns.*, 513. *Supreme Ct.*, 1806, *Livingston v. Delafield*, 1 *Id.*, 522; 1843, *Burritt v. Saratoga County Mutual Ins. Co.*, 5 *Hill*, 188. *Ct. of Appeals*, 1848, *Gates v. Madison County Mutual Ins. Co.*, 2 *N. Y. (2 Comst.)*, 43. Compare *infra*, 88.

39. What length of time is within the usual time for a vessel to perform a voyage, is a question of fact for the jury. *Supreme Ct.*, 1800, *Mackay v. Rhinelander*, 1 *Johns. Cas.*, 408. Compare *infra*, 81, 82.

40. Whether a vessel insured for a limited time, and unheard from, was lost within the time fixed in the policy, or afterwards, is a question of fact for the jury. *So held*, though there had been two violent storms, one during the policy and one after its expiration, and the owners had insured again after knowledge of the second storm. *Supreme Ct.*, 1804, *Brown v. Neilson*, 1 *Cai.*, 525.

41. Whether preliminary proofs of loss fur-

nished are sufficient to satisfy the requirements of the policy, and whether facts shown will amount to a waiver of defects in the proofs, are questions of law for the court. But whether the proofs were furnished, or the acts done which are relied on as constituting a waiver, are questions properly left to the jury. *N. Y. Com. Pl.*, 1854, *Miller v. Eagle Life & Health Ins. Co.*, 2 *E. D. Smith*, 268.

42. Whether erecting additional buildings to those covered by a policy, increases the risk, is a question of fact for the jury. *Supreme Ct.*, 1848, *Grant v. Howard Ins. Co.*, 5 *Hill*, 10.

43. Whether keeping a small quantity of tow in a building amounts to "using it for storing flax," within a prohibitory condition in a policy,—*Held*, a question of fact for the jury. *Supreme Ct.*, 1852, *Hynds v. Schenectady County Mutual Ins. Co.*, 16 *Barb.*, 119; affirmed, 11 *N. Y. (1 Kern.)*, 554.

As to *Insurance*, compare, also, *supra*, 1, 12, 22; *infra*, 72, 82, 86.

44. Interest. The right to interest, a question of law, depending on the facts of the case. *Liotard v. Graves*, 8 *Cai.*, 226.

45. Instructions. Whether instructions given by a justice to another person, deputizing him to fill up a summons, are complete, so as to enable the latter to fill up the instrument as a mere ministerial act,—is a question for the jury. *Supreme Ct.*, 1850, *Borrodale v. Leek*, 9 *Barb.*, 611. Compare *supra*, 5.

46. Libel. In an action for a libel, the question whether the article is libellous on its face, independent of extrinsic facts, is a question of law for the court. *N. Y. Superior Ct.*, 1851, *Matthews v. Beach*, 5 *Sandf.*, 256.

47. The disclosure by a public minister of his instructions, is not *per se* traitorous. Whether it was so or not in a given case, is a question which should be submitted to the jury. *So held*, in an action for libel for charging a public minister with having traitorously betrayed the secrets of his government. *Supreme Ct.*, 1810, *Genet v. Mitchell*, 7 *Johns.*, 120.

48. If the article is libellous, it is for the jury, and not for the court to say whether it is applicable to the plaintiff. *So held*, where the article did not in terms apply to plaintiff. *Supreme Ct.*, 1854, *Green v. Telfair*, 20 *Barb.*, 11.

49. Malice. In an action for malicious prosecution, the question whether there was *actual malice*, is a question of fact for the jury.

Negligence.

Notice

N. Y. Superior Ct., 1858, *Bulkeley v. Smith*, 2 *Duer*, 261; S. C., 11 *N. Y. Leg. Obs.*, 800.

50. Negligence. In an action for damages for negligence, where the facts are disputed, the question whether there was negligence must be submitted to the jury (unless there is a demurrer to evidence). When the facts are ascertained, whether they will amount to negligence is a question of law. But the facts are for the jury. *Supreme Ct.*, 1817, *Foot v. Wiswall*, 14 *Johns.*, 804.

51. Where, on the other hand, the facts are clearly ascertained, the question whether the party is chargeable with negligence is a question of law. *N. Y. Superior Ct.*, 1858, *Moore v. Westervelt*, 2 *Duer*, 59; S. C. again, 1 *Bow.*, 857.*

52. Where the facts upon which the charge of negligence depends are disputed, there arises what is improperly termed a mixed question of law and fact; that is, the jury are to ascertain the facts, and the court must instruct them as to the rule of law to apply to the facts as they shall find them. *N. Y. Superior Ct.*, 1857, *Purvis v. Coleman*, 1 *Bow.*, 821.

53. It is a question for the jury whether, under the peculiar circumstances of the case, a child permitted to go through the streets, at an age of six or seven years, was or was not possessed of sufficient discretion to avoid ordinary accidents; so that in case of injury to it by negligence of third parties, the permitting it to be unattended is negligence on its part, which would bar an action. *Ct. of Appeals*, 1856, *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 *N. Y. (4 Kern.)*, 810; affirming S. C., 8 *E. D. Smith*, 108.

54. In an action against a railroad company for running over the plaintiff, it appeared that the plaintiff, who lived in the immediate vicinity of the track, drove on a trot across the track of the road, without taking the slightest precaution to ascertain the proximity of the locomotive. *Held*, negligence as a matter of law, and the judge at the circuit should have nonsuited the plaintiff. Negligence is undoubtedly often a mixed question of law and fact; and when so, it should be submitted to a jury. When the negligence is sought to be

proved by other facts, the question is for the jury. They are to say whether the facts justify, by fair reasoning, the finding of the main fact in issue. But when the direct fact in issue is established by undisputed evidence, and such fact is decisive of the cause, a question of law is raised which the court should decide. *Supreme Ct.*, 1858, *Dascomb v. Buffalo & State Line R. R. Co.*, 27 *Barb.*, 221. To the same effect are *Stevens v. Oswego & Syracuse R. R. Co.*, 18 *N. Y. (4 Smith)*, 422; *Mackey v. N. Y. Central R. R. Co.*, 27 *Barb.*, 528. See, also, *Brooks v. Buffalo & Niagara R. R. Co. (Ct. of Appeals)*, 27 *Barb.*, 582, *note*; and *Brendell v. Buffalo & State Line R. R. Co. (Circuit)*, *Id.*, 584, *note*.

55. Whether proper care has been used in the construction of a public work,—e. g., a railroad,—or in making an excavation, fencing a railway, &c., is a question of fact for the jury. *Ct. of Errors*, 1842, *Brown v. Mohawk & Hudson R. R. Co.*, *How. App. Cas.*, 52, 66. *Ct. of Appeals*, 1857, *Poler v. N. Y. Central R. R. Co.*, 16 *N. Y. (3 Smith)*, 476. *N. Y. Superior Ct.* (1842?), *Hart v. Baldwin*, 1 *N. Y. Leg. Obs.*, 189.

56. In an action against a municipal corporation for obstructing access to plaintiff's lot by erecting or repairing a public building,—e. g., a market,—the question whether the obstruction was carried to an unnecessary or unreasonable degree, or was continued for an unreasonable length of time, is a question for the jury. *N. Y. Superior Ct.*, 1857, *St. John v. Mayor, &c., of N. Y.*, 6 *Duer*, 815; S. C., 13 *How. Pr.*, 527. Compare *Vermilya v. Austin*, 2 *E. D. Smith*, 208; *Brown v. Mohawk & Hudson R. R. Co.*, *How. App. Cas.*, 52, 66.

57. Whether the master of a vessel has used ordinary care in transportation of goods, a question of fact. *Aymar v. Astor*, 6 *Cow.*, 267.

58. New promise. Where there is dispute as to the facts which go to prove the making of a new promise, whether a sufficient promise has been made to take the case out of the statute, is a mixed question of law and fact for the jury. But when the facts are undisputed, it is for the court to determine whether they take the case out of the statute or not. *Supreme Ct.*, 1824, *Clarke v. Dutcher*, 9 *Cow.*, 674.

59. Notice. Whether a notice has been served or not, is a question of fact. *Supreme Ct.*, 1808, *Jackson v. Livingston*, 8 *Johns.*, 455.

60. Notice of protest. Whether the hold-

* Reversed, 21 *N. Y. (1 Smith)*, 108. The Court of Appeals put their reversal upon another point; but intimate an opinion that on the facts of the case the question of negligence should have been left to the jury.

Notice of Protest.

Private Way.

er of a bill or note has used due diligence in giving notice of protest, to charge a drawer or indorser is (if there are acts to be determined) a mixed question of law and fact, proper to be submitted to the jury. *Supreme Ct.*, 1811, *Taylor v. Bryden*, 8 *Johns.*, 173. *Ct. of Appeals*, 1850, *Carroll v. Upton*, 3 *N. Y.* (3 *Comst.*), 272; affirming *S. C.*, 2 *Sandf.*, 171.

61. If the facts are undisputed, the question whether the notice was given within a reasonable time, is a question of law for the court. *Supreme Ct.*, 1818, *Bryden v. Bryden*, 11 *Johns.*, 187.

62. So, when the facts are undisputed, the question whether the holder used due diligence to find the drawer or indorser, is a question of law for the court. *Supreme Ct.*, 1839, *Bank of Utica v. Bender*, 21 *Wend.*, 643; 1842, *Spencer v. Bank of Salina*, 3 *Hill*, 520. *Ct. of Appeals*, 1850, *Carroll v. Upton*, 3 *N. Y.* (3 *Comst.*), 272; affirming *S. C.*, 2 *Sandf.*, 171; 1852, *Hunt v. Maybee*, 7 *N. Y.* (3 *Seld.*), 266.

63. If the notice of protest does not precisely correspond with the note,—*e. g.*, in stating the amount,—it is a question of fact for the jury, whether the notice referred to the same note and was so understood by the indorser. *Supreme Ct.*, 1801, *Reedy v. Seixas*, 2 *Johns. Cas.*, 387; 1830, *Ontario Bank v. Petrie*, 3 *Wend.*, 456; 1832, *Bank of Rochester v. Gould*, 9 *Id.*, 279.

64. When the notice is sufficient upon its face, the objection being that it misdescribes the note, the question whether the indorser was misled is a question of fact, and should be submitted to the jury. [Following 1 *N. Y.* (1 *Comst.*), 418; and distinguishing 5 *Barb.*, 490.] *Supreme Ct.*, 1849, *McKnight v. Lewis*, 5 *Barb.*, 681.

65. The question whether a written notice of protest is sufficient in terms to charge an indorser, &c.,—*e. g.*, where it grossly misdescribes the note, misstates the day of demand, does not state a demand, &c.,—is a question of law for the court, and should not be submitted to the jury. *Ct. of Errors*, 1840, *Remer v. Downer*, 23 *Wend.*, 620.* *Supreme Ct.*, 1842, *Ransom v. Mack*, 2 *Hill*, 587; 1849, *Dole v. Gold*, 5 *Barb.*, 490; *S. C.*, 7 *N. Y. Leg.*

* In citing the opinion of the chancellor in *Remer v. Downer*, 23 *Wend.*, 620, as probably the opinion of a majority of the court, and disregarding that of Senator Verplanck, 25 *Wend.*, 277, we follow the later cases.

Obs., 247. *Ct. of Appeals*, 1851, *Cayuga County Bank v. Warden*, 6 *N. Y.* (2 *Seld.*), 19; and see *Cook v. Litchfield*, 9 *N. Y.* (5 *Seld.*), 279. Compare *BILLS, NOTES, AND CHECKS*, tit. IV., *Notice of Protest*.

66. **Partnership.** Whether a partnership existed between persons whose names are subscribed to a note, what was the firm-name, and whether the note was given for partnership transactions,—*Held*, questions of fact for the jury. *Supreme Ct.*, 1803, *Drake v. Elwyn*, 1 *Cai.*, 184.

67. If the facts are undisputed, the question of partnership is for the court. *Supreme Ct.*, 1828, *Cumpston v. McNair*, 1 *Wend.*, 457.

68. **Payment.** Whether acceptance of a part-payment is intended by the creditor to be in full or not, is a question of fact for the jury. *Supreme Ct.*, 1857, *Pierce v. Pierce*, 25 *Barb.*, 243.

69. Where a party claims to be a *bona-fide* holder for value of a note taken by him for a debt, but there is no evidence that it was expressly received in absolute payment, it is erroneous to leave it to the jury to say whether it was received in payment or not. *Supreme Ct.*, 1845, *Small v. Smith*, 1 *Den.*, 583.

70. Where there was a conflict of evidence, the question whether a note was received in payment, or as collateral, was submitted to the jury, and their verdict was *Held*, conclusive. *N. Y. Superior Ct.*, 1857, *Atlantic Fire & Marine Ins. Co. v. Boies*, 6 *Duer*, 583. *S. P.*, *Supreme Ct.*, 1812, *Johnson v. Weed*, 9 *Johns.*, 310.

71. Whether money forwarded to the acceptor of a bill by an indorsee through the drawer, was intended as *payment* of the bill, so as to discharge the acceptor, or only to obtain a withdrawal of the bill for the purpose of pursuing it as a still-existing security, is a question of fact for the jury. *N. Y. Com. Pl., Sp. T.*, 1852, *Bean v. Canning*, 2 *E. D. Smith*, 419, *note*; *S. C.*, more fully reported, 10 *N. Y. Leg. Obs.*, 248. Compare *infra*, 83.

72. **Premium note.** Where a premium note in advance is taken after the company is organized, whether it was given under section 12, as a note for the security of dealers, or in the usual course of business, is a question of fact, to be determined by the note and the evidence. *N. Y. Superior Ct.*, 1847, *Merchants' Mutual Ins. Co. v. Rey*, 1 *Sandf.*, 184; 1848, *Brouwer v. Hill*, *Id.*, 629.

73. **Private way.** Where a private way

Probable Cause.

Signature

has been changed, it is for the jury to determine whether the change was by agreement; whether it was to be permanent, &c. *Supreme Ct.*, 1848, *Hamilton v. White*, 4 *Barb.*, 60; affirmed, 5 *N. Y.* (1 *Seld.*), 9.

74. Probable cause. In an action for malicious prosecution, the question of the want of probable cause is purely a question of law, unless there is conflicting testimony as to the facts. *N. Y. Superior Ct.*, 1851, *Carpenter v. Sheldon*, 5 *Sandf.*, 77. *N. Y. Com. Pl.*, 1855, *Gordon v. Upham*, 4 *E. D. Smith*, 9; 1856, *Waldheim v. Sichel*, 1 *Hill.*, 45.

75. Whether there was probable cause is in all cases a question of law which the court alone is competent to determine, and upon which it is bound to express a positive opinion. It is no more a mixed question of law and fact than any other question of law which a judge can be required to determine in the progress of a trial. If the facts are clearly established, and do not prove a want of probable cause, the judge must either nonsuit the plaintiff or instruct the jury to find for the defendant. If the facts are doubtful, he must instruct the jury that if the facts shall be found by them in a certain manner, they do or do not, as the case may be, amount to a want of probable cause. It is error to submit the question of probable cause to the jury even by implication. *N. Y. Superior Ct.*, 1853, *Bulkeley v. Smith*, 2 *Duer*, 261; *S. C.*, 11 *N. Y. Leg. Obs.*, 800.

76. In an action for malicious prosecution, if there is no dispute about the facts, the question of probable cause is for the court. If the facts are controverted or doubtful, whether they are proved or not is a question of fact; but whether they amount to probable cause, is for the court. [1 *T. R.*, 542; 1 *Gale & D.*, 504; 2 *Ad. & E.*, *N. S.*, 169.] In such case the judge should instruct the jury whether the facts alleged amounted to probable cause, or not, and leave it to them to find whether they are, or are not proved. *Ct. of Appeals*, 1852, *Bulkeley v. Keteltas*, 6 *N. Y.* (2 *Seld.*), 384; *S. P.*, 1851, *Besson v. Southard*, 10 *N. Y.* (6 *Seld.*), 286. *Supreme Ct.*, 1827, *McCormick v. Sisson*, 7 *Cow.*, 715; 1828, *Pangburn v. Bull*, 1 *Wend.*, 345; 1829, *Masten v. Deyo*, 2 *Id.*, 424; 1849, *Hall v. Suydam*, 6 *Barb.*, 88; 1850, *Stevens v. Lacour*, 10 *Id.*, 62.

77. Prohibited sale: loan. Whether a sale or a loan was made in good faith, or was

intended as an evasion of a prohibitive statute, is a question of fact properly submitted to the jury. *Supreme Ct.*, 1823, *Baker v. Richardson*, 1 *Cow.*, 77. *Ct. of Errors*, 1848, *Suydam v. Morris Canal & Banking Co.*, 6 *Hill*, 217.

78. If there is no evidence of usury, it is error to submit the question to the jury. *Supreme Ct.*, 1851, *Fay v. Grimsted*, 10 *Barb.*, 321.

79. The question whether a given transaction was a loan or a sale within the usury law, is a question of fact for the jury. *Supreme Ct.*, 1848, *American Life Ins. & Trust Co. v. Dobbin*, *Hill & D. Supp.*, 252; 1844, *Comstock v. Willoughby*, *Id.*, 271.

80. Reasonable time. What is a reasonable time for performance under a contract is a question of fact for the jury. *N. Y. Com. Pl.*, 1856, *Green v. Haines*, 1 *Hill.*, 254.

81. What is a reasonable time for a carrier to deliver goods, is a question depending on the circumstances of the particular case, the nature of any cause of delay occurring, &c., and should be submitted to the jury. *N. Y. Superior Ct.*, 1857, *Conger v. Hudson River R. R. Co.*, 6 *Duer*, 375. Compare *supra*, 89.

82. What is a reasonable time for a vessel insured to tarry at an intermediate port, is a question for the jury. *Supreme Ct.*, 1814, *Lawrence v. Ocean Ins. Co.*, 11 *Johns.*, 241.

83. Receipt. The mere question of the effect of a receipt, as establishing an accord and satisfaction, the facts being undisputed, and no fraud shown, is a question of law. *Supreme Ct.*, 1845, *Vedder v. Vedder*, 1 *Dem.*, 257.

84. So held, of the question whether a receipt imported a bailment or a sale. *Ct. of Appeals*, 1851, *Wadsworth v. Allcott*, 6 *N. Y.* (2 *Seld.*), 64.

85. Rescission. Whether undisputed acts of parties to a contract amount to a rescission or release of a contract, is a question of law. *Supreme Ct.*, 1823, *Healey v. Utly*, 1 *Cow.*, 845.

As to questions upon *Sales*, see *SALSA*.

86. Seaworthiness. Whether the vessel insured was seaworthy at the time of sailing, is a question of fact. *Supreme Ct.*, 1806, *Patrick v. Hallett*, 1 *Johns.*, 241. *N. Y. Superior Ct.*, 1848, *Sherwood v. Ruggles*, 2 *Sandf.*, 55.

87. Signature. Where three parties signed a promissory note, and the last signer added "surety" to his signature. *Held*, that the

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question whether he was a surety, or a principal debtor, and if a surety, whether he was such for one or both of the other parties, were questions of fact, which he must establish as such, and the court could not assume them in his favor. *Ct. of Appeals*, 1849, *Sisson v. Barrett*, 2 *N. Y. (2 Comst.)*, 406; affirming *S. C.*, 6 *Barb.*, 199.

88. Slander. In slander, for charging plaintiff with perjury, if there is no dispute as to the facts, the question, whether the testimony given by plaintiff was material to the point in issue in the proceedings, is a question of law for the court. *Ct. of Errors*, 1836, *Power v. Price*, 16 *Wend.*, 450. Compare *supra*, 88.

89. Warranty. The question whether words used by a seller of chattels, at the sale, amount to a warranty or not, is a question of fact for the jury. It is for them to determine how the words were understood and intended by the parties. *Supreme Ct.*, 1827, *Duffee v. Mason*, 8 *Cow.*, 25; 1833, *Whitney v. Sutton*, 10 *Wend.*, 412; 1835, *Cook v. Moseley*, 18 *Id.*, 277; 1836, *Stryker v. Bergen*, 15 *Id.*, 490; 1844, *Moses v. Mead*, 8 *N. Y. Leg. Obs.*, 69; affirmed, 1 *Den.*, 378; 5 *Id.*, 617; 1856, *Rogers v. Ackerman*, 22 *Barb.*, 184. *N. Y. Com. Pl.*, 1856, *Blakeman v. Mackay*, 1 *Hill.*, 266.

90. Waste. Whether the question, what amounts to waste, is a question of law or of fact. *Jackson v. Brownson*, 7 *Johns.*, 227; *Cooper v. Stower*, 9 *Id.*, 381; *Jackson v. Andrew*, 18 *Id.*, 481; *Jackson v. Tibbitts*, 8 *Wend.*, 341; *Kidd v. Dennison*, 6 *Barb.*, 9; *McGregor v. Brown*, 10 *N. Y. (6 Seld.)*, 114.

91. Witness: competency. Whether a witness is competent, is always a question for the court, and none the less so, because it involves the very question at issue, and on which the jury are to pass. *N. Y. Com. Pl.*, 1855, *Scherpf v. Szadeczyk*, 1 *Abbotts' Pr.*, 366. *N. Y. Superior Ct.*, 1857, *Prall v. Hinchman*, 6 *Duer*, 351.

92. Evidence that a suit is, in fact, prosecuted for the benefit of a person produced as a witness, offered to sustain an objection to his competency, should be addressed to the court; and the question is for the court to determine. *Ib.*

93. — credibility. The credibility of a witness, is a question for the jury. It is sometimes proper for the judge to lay down certain rules for the guidance of the jury, in passing

upon it; but not to tell them not to believe the witness. *Supreme Ct.*, 1844, *Conrad v. Williams*, 6 *Hill*, 444; *S. P.*, 1854, *Woodin v. People*, 1 *Park. Cr.*, 464.

QUIT-RENTS.

1. Redemption. The purchaser of occupied lands sold for quit-rents (*Act of* 1819, April 18), has not a complete title until he has given to the occupant the requisite notice. The comptroller is not bound to receive the redemption-moneys until such notice has been given. *Supreme Ct.*, 1828, *People v. Comptroller of N. Y.*, 1 *Wend.*, 301.

2. Cancelling invalid sales for. 1 *Rev. Stat.*, 185.

QUO WARRANTO.

I. THE WRIT OF QUO WARRANTO, AND PROCEEDINGS BY INFORMATION.

II. CIVIL ACTIONS IN PLACE OF QUO WARRANTO, ETC. (UNDER THE CODE OF PROCEDURE).

I. THE WRIT OF QUO WARRANTO, AND PROCEEDINGS BY INFORMATION.

1. Leave. Where the office will expire before an issue can possibly be tried, a motion for leave to file an information in the nature of a *quo warranto* will be refused.* *Supreme Ct.*, 1807, *People v. Sweeting*, 2 *Johns.*, 184; 1832, *People v. Loomis*, 8 *Wend.*, 396.

2. But it cannot be refused upon the mere chance that a trial may fail. *Supreme Ct.*, 1825, *People v. Tibbitts*, 4 *Cow.*, 358.

3. When it lies.—Trespass. Information in the nature of a *quo warranto* will not be granted against a corporation taking land, without making a compensation pursuant to the statute. The remedy is an action of trespass. *Supreme Ct.*, 1807, *People v. Hillsdale & Chatham Turnpike Co.*, 2 *Johns.*, 190.

4. Banking. An information in the nature of a *quo warranto*, lies against an incorporated company, for carrying on banking operations, without authority from the Legislature. This is a franchise within 1 *Rev. L. of* 1818, 108,

* Leave of the court is not now required in all cases. *Code of Pro.*, § 432; 2 *Rev. Stat.*, 531, § 28; and see ATTORNEY-GENERAL, 6.

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which gives the writ. *Supreme Ct.*, 1818, *People v. Utica Ins. Co.*, 15 *Johns.*, 358.

5. So is the possession of corporate powers. *Supreme Ct.*, 1825, *People v. Tibbets*, 4 *Cow.*, 384.

6. So is the appointment of professors by an incorporated college not authorized by its charter to make such appointment. [2 *Rev. Stat.*, 583, § 39.] *Supreme Ct.*, 1830, *People v. Trustees of Geneva College*, 5 *Wend.*, 211.

7. **Mere claim.** An information does not lie against persons for merely claiming a corporate franchise; and if the information charge them with claiming, without authority, and exercising the franchises of a corporation, &c., a plea denying the user is sufficient. [1 *Ves.*, 1; 5 *T. R.*, 86; *Bull. N. P.*, 211; 4 *East*, 337; 8 *Bac. Abr.*, 645; *Willc. on Corp.*, 462, pl. 254; *Ang. on Corp.*, 486.] *Supreme Ct.*, 1837, *People v. Thompson*, 16 *Wend.*, 655.

8. **Corporate office.** An information in the nature of a *quo warranto* lies in the case of an intrusion into a corporate office created by the charter of a corporation. *Supreme Ct.*, 1822, *People v. Kip*, 4 *Cow.*, 382, *note*; 1825, *People v. Tibbets*, *Id.*, 358.

9. **Forfeiture of incorporation.** A non-performance of the conditions of the act of incorporation is *per se* a misuser that will forfeit the grant as well at common law as under 2 *Rev. Stat.*, 483, § 89*—which gives proceedings against corporations by information. The same principles of forfeiture on failure to perform conditions, which are applicable to the case of grants to individuals, are to be applied to grants of corporate power by the act of incorporation. But substantial performance, according to the intent of the charter, is all that is required. *Supreme Ct.*, 1840, *People v. Kingston & Middletown Turnpike Co.*, 23 *Wend.*, 193; *People v. Bristol & Rensselaerville Turnpike Co.*, *Id.*, 222.

10. It is enough that the performance of the condition is neglected, or designedly omitted; the ingredient of a bad or corrupt motive is not necessary to work a forfeiture. *Supreme Ct.*, 1840, *People v. Kingston & Middletown Turnpike Co.*, 23 *Wend.*, 193.

11. That implied conditions are to be more indulgently considered than express conditions. *Id.*

* Similar provisions are contained in section 380 of the Code of Procedure, which substitutes an action for the remedy of *quo warranto*.

12. **Cases not specified in the statute.** An information in the nature of a *quo warranto* lies in cases not specified in 2 *Rev. Stat.*, 483, § 89. There are many non-feasances which do not amount to non-users, and yet are complete cause of forfeiture. *Supreme Ct.*, 1840, *People v. Bristol & Rensselaerville Turnpike Co.*, 23 *Wend.*, 222.

13. That it lies for any cause of seizure or dissolution, and may be filed against a corporation by its corporate name. *Id.* Compare *Thompson v. People*, 23 *Wend.*, 587; reversing *S. C.*, 21 *Id.*, 285.

14. **Other remedy.** It is no answer to a *quo warranto* against a corporation, that the company is liable to private action, or indictment, for the act or non-feasance complained of. [12 *Mod.*, 270.] *Supreme Ct.*, 1840, *People v. Bristol & Rensselaerville Turnpike Co.*, 23 *Wend.*, 222.

Nor is the fact that the charter also gives another remedy. *People v. Hillsdale & Chatham Turnpike Co.*, *Id.*, 254.

15. **Subsequent repair.** When a cause of forfeiture has once arisen, whether from non-feasance, or otherwise, it cannot be legally atoned for by subsequent good behavior. Thus, putting a turnpike into good repair prior to the filing of an information to declare a forfeiture for want of repair, is no bar to the writ. *Supreme Ct.*, 1840, *People v. Hillsdale & Chatham Turnpike Co.*, 23 *Wend.*, 254.

16. **Turnpike-road.** Since the statute, though it specifies the precise mode of constructing the roadway, does not require that it must be, by continual repairs, kept in precisely the same condition, an information on the ground of non-repair must show something more than a mere departure from the original method of structure. *Supreme Ct.*, 1840, *People v. Bristol & Rensselaerville Turnpike Co.*, 23 *Wend.*, 222.

17. A replication that the company never furnished the lower side of the road with a fender, where it was not of full width, is no good unless it also shows that the peculiar circumstances, under which alone the statute requires such fender, existed. *Id.*

18. **Writ: to whom addressed.** Information to oust defendants from acting as a corporation, and to test the fact of their incorporation, should be filed against individuals: if to effect the dissolution of a corporation which had had an actual existence, or to oust such

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corporation of some franchise, then the information should be filed against the corporation. [2 T. R., 522; 2 Rev. Stat., 585.] *Supreme Ct.*, 1836, *People v. Saratoga & Rensselaer R. R. Co.*, 15 *Wend.*, 113.

19. In an information to enforce a forfeiture of the franchises of a corporation, the defendants should be described by their corporate name. *Supreme Ct.*, 1826, *People v. Bank of Hudson*, 6 *Cow.*, 217.

20. **Ground of avoiding charter.** The People cannot set up, to invalidate a charter granted by the Legislature, that it confers a power in violation of the Constitution of the United States,—as a power to bridge a navigable stream. Such objection, if it were valid, can be taken only by those who have been impeded in lawful commerce. *Supreme Ct.*, 1836, *People v. Saratoga & Rensselaer R. R. Co.*, 15 *Wend.*, 113.

21. **An information, though on the relation of a private person,** lies to procure judgment of ouster against individuals holding a franchise,—*e. g.*, that of maintenance of a toll-bridge over a navigable stream,—which was lawfully acquired, but has been forfeited by non-compliance with the conditions of the grant. *Scire facias* is not the only remedy. The giving of security, in conformity with the act, for the fulfilment of the conditions, makes no difference, for it is but a cumulative remedy. *Ct. of Errors*, 1840, *Thompson v. People*, 28 *Wend.*, 587, 574; and S. C. below, 21 *Id.*, 285.

22. **Public office.** An information in the nature of a *quo warranto* lies to try the title of one who, it is alleged, has intruded into, and is unlawfully exercising public office,—*e. g.*, that of sheriff,—under color of an election. [3 *Johns. Cas.*, 79; 2 *Johns.*, 184.] *Supreme Ct.*, 1825, *People v. Van Slyck*, 4 *Cow.*, 297.

23. Where the office is for a certain term, and until successors are elected, &c., and the election of successors depends on notice to be given by the incumbents, it is no answer to a *quo warranto* for holding over, that there was no election by reason of the inadvertence of the incumbents to give the notice. *Supreme Ct.*, 1831, *People v. Bartlett*, 6 *Wend.*, 422.

24. Where the relator was elected, but the certificate of election was given to the former incumbent, who claimed to have been re-elected,—*Held*, that it was no objection to an information, that when it was filed, the defend-

ant, since the relator had no certificate of election, was directed by law to hold over. Information lies not only where the defendant has obtruded into the place without any color of right, but where he has entered under competent legal authority. *Supreme Ct.*, 1838, *People v. Vail*, 20 *Wend.*, 12.

25. **Official acts.** Under the Laws of 1822, ch. 250,—requiring the canvassers of an election to attend at the clerk's office and canvass the votes cast, and certify the result,—they do not act judicially but ministerially, and their certificate may be reviewed on the facts, on an information in the nature of a *quo warranto*. *Supreme Ct.*, 1825, *People v. Van Slyck*, 4 *Cow.*, 297.

26. **Forfeiture.** That where franchises are dependent, or where the forfeiture of one renders the others a mere burden, a misuser of one forfeits all. *Supreme Ct.*, 1840, *People v. Kingston & Middletown Turnpike Co.*, 28 *Wend.*, 198.

27. **Title.** An information in nature of a *quo warranto*, for usurping a franchise, need not show a title in the People to the franchise; but it lies on the defendant to show his warrant for exercising it. [2 *Kyd on Corp.*, 399; 4 *Burr.*, 2146.] *Supreme Ct.*, 1818, *People v. Utica Ins. Co.*, 15 *Johns.*, 358.

28. **Conditions.** After the defendant has shown the statute and the performance of its conditions precedent, it devolves upon the People to show a forfeiture by a breach of a condition subsequent. *Ct. of Errors*, 1840, *Thompson v. People*, 28 *Wend.*, 587, 588; reversing S. C., 21 *Id.*, 285.

29. **Excuse.** Where a non-feasance,—*e. g.*, bad repair of a road,—is made a cause of forfeiture by statute, if the default was occasioned by any irresistible cause, it lays with the defendants to show that fact. *Supreme Ct.*, 1840, *People v. Hillsdale & Otham Turnpike Co.*, 28 *Wend.*, 254.

30. **Plea of incorporation.** When an information is filed, under the Revised Statutes, against a corporation by its corporate name, the existence of the corporation is admitted, or rather that it once had legal existence. Hence it is in such case sufficient to aver in the plea, that by virtue of the act of incorporation setting out its title, it became a body corporate and politic in fact and in name. *Supreme Ct.*, 1836, *People v. Saratoga & Rensselaer R. R. Co.*, 15 *Wend.*, 113.

Civil Actions in place of Quo Warranto, &c. (under the Code of Procedure).

31. Plea of title to office. To an information in the nature of a *quo warranto*, a plea of a right to hold over after the expiration of the term of office in a corporation, must show clearly that no one has been chosen to succeed. *Supreme Ct.*, 1845, *People v. Phillips*, 1 *Den.*, 388.

32. Practice. The general rules of practice as to pleading, amending, &c., apply in *quo warranto*. *Supreme Ct.*, 1825, *People v. Clark*, 4 *Cow.*, 95.

33. The English practice, as to the writ, process, &c., to be followed under our statute. *People v. Richardson*, 4 *Cow.*, 97; overruling *S. C.*, 3 *Id.*, 357.

34. Double pleading. The provisions of the Revised Statutes, as to double pleading, are confined to actions, strictly so called, and do not apply to the pleading to an information in *quo warranto*. *Supreme Ct.*, 1836, *People v. Jones*, 18 *Wend.*, 601; *S. P.*, 1832, *People v. Manhattan Co.*, 9 *Id.*, 851.

35. Evidence of election. On an information, in the nature of a *quo warranto*, to try the right of office directly, it is competent to go behind the certificates to ascertain the real facts. *Supreme Ct.*, 1848, *People v. Seaman*, 5 *Den.*, 409. Consult, also, **ELECTION**.

36. So in the case of appointment founded on a neglect to elect, the court may, in such proceeding, go behind the record by which the failure to elect appears. *Id.* Limiting *Wood v. Peake*, 8 *Johns.*, 69, where certiorari was said to be the remedy.

37. — of completion of road. The license of the governor to erect gates and collect tolls, founded upon the report of inspectors (1 *Rev. Stat.*, 587, § 32), is not conclusive, upon a *quo warranto*, that the road has been made agreeably to the terms of the charter. *Supreme Ct.*, 1840, *People v. Kingston & Middletown Turnpike Co.*, 28 *Wend.*, 193; *People v. Bristol & Rensselaerville Turnpike Co.*, *Id.*, 222; *People v. Hillsdale & Chatham Turnpike Co.*, *Id.*, 254.

38. Verdict. A statute, granting to individuals the right to erect and maintain a toll-bridge over a navigable stream, required it to be built with a draw of a certain width. The defendant set up the act, averring that it was so built, and that the opening had ever since been continued; and the attorney-general replied, simply taking issue. *Held*, that a special verdict that such an opening had not been

preserved since a particular year, subsequent to the time of building, was too imperfect to sustain a judgment of ouster. The verdict must show an unlawful holding. *Ct. of Errors*, 1840, *Thompson v. People*, 28 *Wend.*, 587; reversing *S. C.*, 21 *Id.*, 235.

39. Judgment. Though the term of the office has expired, the court cannot suspend judgment, but must award costs to the prevailing party. [2 *Rev. Stat.*, 583, § 87; 585, § 48.] *Supreme Ct.*, 1832, *People v. Loomis*, 8 *Wend.*, 396.

40. On an information, in the nature of a *quo warranto*, the court is authorized to render judgment upon the relator's right, or to omit to do so, as justice may require (2 *Rev. Stat.*, 581, § 81); and where the facts upon which his right depended were obscurely stated, the court declined to render such judgment. *Supreme Ct.*, 1845, *People v. Phillips*, 1 *Den.*, 388.

II. CIVIL ACTIONS IN PLACE OF QUO WARRANTO, ETC. (UNDER THE CODE OF PROCEDURE).

41. General provisions regulating actions in the place of *scire facias*, *quo warranto*, and of informations in the nature of *quo warranto*, now abolished. *Code of Pro.*, §§ 428-447.

42. Now a civil action. An action in the nature of *quo warranto*, is a civil action, and the decisions of the Supreme Court in it are to be reviewed upon the principles applicable to such actions, instead of those which prevail in criminal proceedings. *Ct. of Appeals*, 1853, *People v. Cook*, 8 *N. Y.* (4 *Seld.*), 67; affirming *S. C.*, 14 *Barb.*, 259.

43. Usurpation of office. The only proper proceeding for trying the title to an office is the action in the nature of *quo warranto*, brought by the people of the State. *Supreme Ct.*, *Sp. T.*, 1857, *Mayor, &c., of N. Y. v. Conover*, 5 *Abbotts' Pr.*, 171.

44. An action in the nature of a *quo warranto*, is the proper remedy where an unauthorized person has usurped the office of alderman in a municipal corporation. *Brooklyn City Ct.*, 1857, *Lewis v. Oliver*, 4 *Abbotts' Pr.*, 121.

45. Military office. That under subdivision 1 of § 432 of the Code, title to a military office may be tried in an action in the nature of a *quo warranto*. *Supreme Ct.*, *Sp. T.*, 1857, *People v. Sampson*, 25 *Barb.*, 254.

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46. The former practice in proceedings in a *quo warranto*, and in an information in the nature of a *quo warranto*, are not guides in proceedings in the actions which the Code has substituted for those writs. *Supreme Ct.*,

Chambers, 1858, *People v. Conover*, 6 *Abbotts' Pr.*, 220.

As to Parties and Pleadings, see those titles.

R.

RACING.

1. Construction of former statute. Though section 1 of the act to prevent horse-racing (1 *Rev. L.*, 228), makes racing, running, pacing, and trotting horses for a bet, indictable,—section 2, which inflicts a penalty on the owner of a horse used in racing, with his privity, &c., is not to be extended to include the case of trotting or pacing. *Supreme Ct.*, 1827, *Van Valkenburgh v. Torrey*, 7 *Cow.*, 252.

2. Running, trotting, or pacing of horses or other animals, for bet or reward, except as authorized by special laws,—a misdemeanor, and punishable by fine. 1 *Rev. Stat.*, 672, § 55.

RAILROADS (and Railroad Companies).

I. MANAGEMENT OF RAILROADS, AND THE LIABILITIES OF COMPANIES IN RESPECT THERETO.

II. RAILROAD CORPORATIONS.

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2. Corporations under the General Statute.

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D. Acquiring lands.

a. General principles.

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3. Particular charters.

I. MANAGEMENT OF RAILROADS, AND THE LIABILITIES OF COMPANIES IN RESPECT THERETO.

1. Carriers. Railroad companies receiving freight, to be deemed common carriers. *Laws of 1847*, 299, ch. 270, § 9.

2. Connecting roads. Where three separate railroad companies owning distinct portions of a continuous railroad between two

termini, run their cars over the whole road, employing the same agents to sell passage-tickets, and receive luggage to be carried over the entire road, an action may be maintained against one of them, for the loss of the luggage of a passenger received at one terminus to be carried over the whole road. *Ct. of Appeals*, 1853, *Hart v. Rensselaer & Saratoga R. R. Co.*, 8 *N. Y.* (4 *Seld.*), 87.

S. P. declared in respect to freight, and an action for contribution allowed. *Laws of 1847*, 299, ch. 270, § 9. See, also, *CARRIERS*, 45.

3. If a railroad company receiving freight for transportation, intends to limit its liability to injuries occurring upon its own road, it should provide for such limitation, in its contract. *Supreme Ct.*, 1856, *Foy v. Troy & Boston R. R. Co.*, 24 *Barb.*, 882; and see *CARRIERS*.

4. A railroad company may contract to transport and deliver goods to a point beyond its own limits. *N. Y. Superior Ct.*, 1855, *Schroeder v. Hudson River R. R. Co.*, 5 *Duer*, 55.

5. Delay. The freight of the plaintiff was delivered to the company during a winter month, in which a larger amount of freight than usual had been received by them, and the amount so received accumulated beyond the then capacity of the defendants' road to transport without delay, although their road was in good condition, and they ran as many freight trains as could be run with safety; and in consequence of such accumulation, the transportation and delivery of the plaintiff's freight was delayed five days, but it was delivered as soon as other freight received at the same time.

Held, that there being no express contract as to time, and no culpable want of diligence on the part of the defendants, they were not liable in damages for the delay. [1 *Vent.*, 190, 238; 1 *Ld. Raym.*, 646, 652; *Stor.* on

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Bailm., § 508; 14 Wend., 215; 12 N. Y., 99.] *Ct. of Appeals*, 1855, *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. (2 *Kern.*), 245.

6. Duty to afford sufficient accommodation. The design of section 86 of the general railroad act is to bring the companies under the general principle of common-carriers, with such variations as the nature of the business requires,—e. g., as to regular times of starting, and taking all kinds of property. The act allows a company a reasonable time after property is offered for transportation, to set it in motion. What is a reasonable time must depend upon existing circumstances. In absence of any cause for delay it should be sent immediately forward. If on account of temporary unusual accumulation of business the goods are delayed several days to take their turn, the company are not liable, provided they maintain sufficient accommodation for the general traffic under ordinary circumstances. *Id.*

7. Wilful act of conductor. It is no defence to an action against a railroad corporation for its failure to transport a passenger with proper dispatch, that the detention was the wilful act of a conductor in charge of the train. An intentional default of a servant is not an excuse for delay in the performance of a duty the master has undertaken. *Ct. of Appeals*, 1858, *Weed v. Panama R. R. Co.*, 17 N. Y. (3 *Smith*), 362.

8. General agent of company authorized to purchase lands, may have implied authority to enter into arbitration as to price of lands. *Ct. of Appeals*, 1858, *Wood v. Auburn & Rochester R. R. Co.*, 8 N. Y. (4 *Seld.*), 160.

9. — physician. A "railroad superintendent" vested with control over every thing connected with the running of the road, but having no control over the treasury, nor any share in the direction, has no implied authority to bind the company by engaging a physician to attend a person run over by one of the company's trains. *N. Y. Superior Ct.*, 1858, *Stephenson v. N. Y. & Harlem R. R. Co.*, 2 *Duer*, 341.

10. A by-law of a railroad company empowering the general freight agent to negotiate contracts for the transportation of freight, with the approval of the president,—*Held*, not to require an express approval of every contract, but merely to authorize the president to interpose. *Supreme Ct.*, 1858, *Medbury v. N. Y. & Erie R. R. Co.*, 26 *Barb.*, 564.

11. Unclaimed goods. Every railroad company having unclaimed baggage or freight, authorized to sell at auction, in certain mode.* *Laws of 1854*, 612, ch. 282, §§ 10, 12; 1 *Laws of 1857*, 872, ch. 444, §§ 3, 4.

12. Intersecting railroad companies to afford accommodation to each other. *Laws of 1847*, 299, ch. 270.

13. Safety of cars. Although carriers of passengers are not insurers, the law yet requires that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the utmost care and skill in its preparation. They may construct it themselves, or avail themselves of the services of others; but in either case, they engage that all that well-directed skill can do has been done for the accomplishment of this object. Thus they are liable for injuries sustained by a passenger, in consequence of the breaking of an axle by reason of a latent defect which could not be discovered by the most vigilant external examination, if it could have been discovered in the process of manufacturing, by the application of any test known to men skilled in such business. *Ct. of Appeals*, 1855, *Hegeman v. Western R. R. Corporation*, 18 N. Y. (3 *Kern.*), 9.

14. So, also, it goes to show their negligence that the peril might have been avoided, if the defendants had used on their cars the safety beam, shown to have been, at the time, already in use on other roads for a considerable period. It is a question for the jury to determine whether they were not guilty of negligence in not ascertaining the utility of such an improvement, and adopting it to protect passengers from injuries by accidents to which cars are liable. *Id.*

15. A railroad company is liable in damages for an injury resulting to any person lawfully using its road, from its neglect to introduce any improvement in its apparatus which it knows to have been tested and found materially to contribute to safety, and the adoption of which is so within its power as to be reasonably practicable. *Ct. of Appeals*, 1859, *Smith v. N. Y. & Harlem R. R. Co.*, 19 N. Y. (5 *Smith*), 127.

16. Sleeping cars authorized and regulated. *Laws of 1858*, 234, ch. 125.

* As to whether this applies to all railroads, or only those of corporations formed under the act of 1850, compare the title of this act, and section 49 of the act of 1850.

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17. Jumping off. That when a railroad train is so carelessly and negligently run as to imperil the passengers, and one is compelled to jump out, to avoid the danger, and in so doing injures himself, the company is liable. *N. Y. Superior Ct.*, 1847, *Eldridge v. Long Island R. R. Co.*, 1 *Sandf.*, 89.

18. Collision. Where a passenger's elbow was shown to have been fractured, when the train was passing a car standing on an adjoining track of defendants' road, by coming in contact with some object projecting from such car;—*Held*, that enough had been shown to shift the burden of proof upon the defendants, to show that the injury was not attributable to their want of care. *Ct. of Appeals*, 1855, *Holbrook v. Utica & Schenectady R. R. Co.*, 12 *N. Y.* (2 *Kern.*), 286.

19. Passenger in baggage-car. A passenger in selecting his seat, if lawfully in the one selected, owes no duty to a railroad company to select one with a view to diminish the hazards that may attend an act of gross negligence on the part of their agents in the running of the trains; nor does any indiscretion in selecting it, exonerate the company from liability for injuries resulting from a collision caused by the gross negligence of their agents. If a collision thus occurs, a passenger who is injured by it may recover, if, as between him and the company, it was lawful for him to be where he was at the time of the collision, as his being there did not tend directly or remotely to produce the act or occurrence which caused the injury. *So held*, of a passenger, who with the assent of the conductor, took his seat in the baggage-car. *N. Y. Superior Ct.*, 1858, *Carroll v. N. Y. & New Haven R. R. Co.*, 1 *Duer*, 571; 8 *C.*, 11 *N. Y. Leg. Obs.*, 144.

20. — standing on platform. If the notices authorized by Laws of 1850, 284, ch. 140, § 46, relative to standing on platforms, were posted up, and there was at the time sufficient room inside of the passenger-cars for the proper accommodation of the passengers, the mere fact, that the conductor did not object to the plaintiff standing on the platform, would not justify the presumption that the company assented to waive a protection given to them by the statute, which these notices expressly declared they should claim, and on which they informed all passengers the company would insist. *N. Y. Superior Ct.*, 1857, *Higgins v. N. Y. & Harlem R. R. Co.*, 2 *Bow.*, 132.

21. — changing cars. When a railroad company gives such published notice of the running of its trains, and such special notice in the cars of the necessity of changing cars at any particular station, that every traveller of ordinary intelligence, by the use of reasonable care and caution, would obtain all requisite information as to the route to be travelled, and the cars to be taken at intermediate stations, it discharges its whole duty in this respect. If a passenger, merely by a failure of his own to use such care and caution, instead of changing cars at a particular station, and there taking cars which go to the place to which he has paid his fare, continues in the cars in which he started, and is carried in another direction, the result is to be attributed to his own negligence, and not to a breach of duty or of contract on the part of the company. *N. Y. Superior Ct.*, 1857, *Page v. N. Y. Central R. R. Co.*, 6 *Duer*, 528.

22. One who is a wrongdoer on the train cannot recover for injuries. Thus when the company by its printed rules prohibited its engineers from allowing any one, not in its employ, to ride upon the engines, and plaintiff, though informed of the rule, prevailed on the engineer to admit him, and he rode upon the engine without the knowledge of the conductor, and paying no fare;—*Held*, that the engineer's consent conferred no right, and that the plaintiff could not recover damages of the company for injuries sustained while riding in that place. *Supreme Ct.*, 1856, *Robertson v. N. Y. & Erie R. R. Co.*, 22 *Barb.*, 91.

23. Ejecting passenger. A conductor on a railroad has authority to eject a passenger from the car, not only for misconduct which is such as to disturb the peace and safety of the other passengers, but as well for noisy and disgraceful conduct, such as grossly profane or indecent language. So he may for refusal to comply with a reasonable requirement as to the collection of tickets. *Supreme Ct.*, 1857, *People v. Oaryl*, 8 *Park. Cr.*, 326. Compare, also, *Page v. N. Y. Central R. R. Co.*, 6 *Duer*, 528.

24. Tickets. The words "*good this trip only*," upon a passage-ticket, will not limit the undertaking of the company to any particular day, or any special train of cars. They do not relate to *time*, but to *journey*; and if the ticket has not been previously used it entitles the holder to a passage on a subsequent

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day, as well as on the day it bears date. *Supreme Ct.*, 1857, *Pier v. Finch*, 24 *Barb.*, 514; and see *Northern R. R. Co. v. Page*, 22 *Id.*, 180.

25. — *exhibiting*. A regulation made by a railroad corporation requiring passengers to exhibit their tickets whenever requested by the conductor, and directing the ejection from their cars of those who should refuse to do so, is a reasonable and proper one. The passenger is bound to conform to such regulation, and forfeits his right to be carried further by his refusal to comply with it. *Ct. of Appeals*, 1857, *Hibbard v. N. Y. & Erie R. R. Co.*, 15 *N. Y.* (1 *Smith*), 455.

26. As to when the conductor and not the corporation, is liable for ejecting. *Id.*

27. — *surrender*. A regulation adopted by a railroad company requiring passengers to surrender their tickets during the trip, is a reasonable regulation. [4 *Cush.*, 608; 8 *C.*, 1 *Law R.*, N. S., 461.] And where the defendant purchases his ticket with knowledge of this custom, he is bound to surrender it or pay his fare again; and if he refuses, the company having carried him may recover the fare from him again in an action for the purpose. *Supreme Ct.*, 1856, *Northern R. R. Co. v. Page*, 22 *Barb.*, 180.

28. — *indorsing*. It is a reasonable regulation that passengers choosing to stop and lie over must procure their tickets to be so indorsed as to make them a voucher to the conductor having charge of a subsequent train. *Supreme Ct.*, 1858, *Beabe v. Ayres*, 28 *Barb.*, 275.

29. Extorting greater fare than allowed by law, punished. 1 *Laws of 1857*, 482, ch. 185.

30. *Passers-by*. The liability for injuries to passers-by, occasioned by collision with a train at a crossing, is not so rigorous as that arising in the case of injuries to passengers; but is the same as that which arises in respect to a collision between carriages on a highway. Reasonable care, including the signals by bell, is all that can be exacted from the agents of a railroad corporation, lawfully crossing a street with a locomotive. *Supreme Ct.*, 1850, *Brand v. Schenectady & Troy R. R. Co.*, 8 *Barb.*, 868.

31. A passer-by cannot recover damages for a collision, in any degree produced by his own want of care. *Id.*

32. One who crosses a railroad without looking to see whether a train is coming, and

is injured by the train, is guilty of negligence, and cannot recover therefor. *Ct. of Appeals* (1858?), *Brooks v. Buffalo & Niagara Falls R. R. Co.*, 27 *Barb.*, 532, *note*; affirming 8 *C.*, 25 *Id.*, 600. Followed, *Buffalo Superior Ct.* (1858?), *Brandell v. Buffalo & State Line R. R. Co.*, 27 *Id.*, 532, *note*; and see *Mackey v. N. Y. Central R. R. Co.*, *Id.*, 528.

33. *Proof*. To recover for being injured by a railroad train while plaintiff was crossing the track, he must prove that the company's agents were guilty of negligence, and that himself was without negligence and without fault. [1 *Cow.*, 78; 6 *Id.*, 194, 191; 6 *Hill*, 592; 5 *Id.*, 282; 19 *Wend.*, 899.] *Supreme Ct.*, 1849, *Spencer v. Utica & Schenectady R. R. Co.*, 5 *Barb.*, 387. Compare, however, *Johnson v. Hudson River R. R. Co.*, 20 *N. Y.* (6 *Smith*), 65; affirming 8 *C.*, 6 *Duer*, 633, where the contrary was asserted as to plaintiff's freedom from negligence.

34. Although, as a general rule, "ordinary prudence" is all that can be exacted from a railroad company in respect to passers-by, yet the rule is not to be understood as meaning that only the same degree of care is to be required in all cases. The only safe rule is that the company is bound to use a degree of care and vigilance to prevent accidents and injury to others which is proportioned to the dangerous character of its business, and of the mode and means of conducting it. The true rule may be thus stated: The degree of vigilance which the law exacts in its requirements of ordinary care, varies with the probable consequences of negligence, and also with the command of means to avoid injuring others, possessed by the person on whom the obligation is imposed. [12 *N. Y.*, 425.] *N. Y. Superior Ct.*, 1857, *Johnson v. Hudson River R. R. Co.*, 6 *Duer*, 633; affirmed, 20 *N. Y.* (6 *Smith*), 65; disapproving *Brand v. Schenectady & Troy R. R. Co.*, 8 *Barb.*, 868.

35. *Accidents caused by track*. When a railroad company are duly authorized to lay their track in one of the streets of a city, they are not, at all events and without proof of negligence or want of skill and reasonable care, liable for accidents which may be caused by the existence of the track there. *N. Y. Com. Pl.*, 1854, *Mazetti v. N. Y. & Harlem R. R. Co.*, 8 *E. D. Smith*, 98.

36. *Fire*. If the most approved known means are used by the company to prevent

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the sparks from their engines from causing injuries, the railroad company is not liable in case damage is occasioned by fire communicated in that manner. [8 Barr., 466; 8 Barb., 427.] *Supreme Ct.*, 1854, *Rood v. N. Y. & Erie R. R. Co.*, 18 Barb., 80.

37. Liability to employees. It is the duty of an engineer upon a railroad to make known to the company any defects of fences, &c., which may lead to the straying of animals on the track, and any defects in the locomotive. The company are not liable for injuries to him arising from such defects which he did not make known. [8 N. Y., 175.] *Supreme Ct.*, 1855, *McMillan v. Saratoga & Washington R. R. Co.*, 20 Barb., 449.

38. A brakeman upon a railroad, whose duty it is not to apply the brakes except when directed by the engineer or conductor, cannot maintain an action against their common employer for an injury resulting from the culpable speed at which the engineer and conductor ran the train. A principal is not liable to one of his agents or servants for injuries sustained through the negligence of another agent or servant, when both are engaged in the same general business. [Citing many cases.] *Ct. of Appeals*, 1858, *Sherman v. Rochester & Syracuse R. R. Co.*, 17 N. Y. (8 Smith), 153.

39. Railroads in cities are not per se nuisances. *Chancery*, 1841, *Hamilton v. N. Y. & Harlem R. R. Co.*, 9 Paige, 171. *Supreme Ct.*, 1849, *Drake v. Hudson River R. R. Co.*, 7 Barb., 508; 1850, *Plant v. Long Island R. R. Co.*, 10 Id., 26; S. C., 9 N. Y. Leg. Obs., 58; *Sp. T.*, 1852, *Hentz v. Long Island R. R. Co.*, 13 Barb., 646; *Gen. T.*, 1853, *Milbau v. Sharp*, 15 Id., 193; 1854, *Anderson v. Rochester, &c., R. R. Co.*, 9 How. Pr., 553. *Ct. of Appeals*, 1857, *Williams v. N. Y. Central R. R. Co.*, 16 N. Y. (2 Smith), 97; 1856, *Davis v. Mayor, &c., of N. Y.*, 14 N. Y. (4 Kern.), 506. To the same effect, *Supreme Ct.*, 1850, *Harris v. Thompson*, 9 Barb., 850.

40. But an individual owner of real property, upon the public street of a city, may maintain an action to enjoin the construction there of a railway, which would be a nuisance. *Supreme Ct.*, 1853, *Milbau v. Sharp*, 28 Barb., 228; S. C., 7 Abbots' Pr., 220; affirming S. C., 17 Barb., 485, and 9 How. Pr., 102. To similar effect, *Ct. of Appeals*, 1856, *Davis v. Mayor, &c., of N. Y.*, 14 N. Y. (4 Kern.), 506.

II. RAILROAD CORPORATIONS.

1. In General.

41. General laws. In 1848, an act was passed to authorize incorporation of railroad companies, and to regulate them. (*Laws of 1848*, 221, ch. 140.) In 1850, that act was repealed, by a new act for the same purpose (*Laws of 1850*, 211, ch. 140), which is now, with its subsequent amendments (*Laws of 1851*, 20, ch. 19; 1853, 79, ch. 53; 1854, 608, ch. 282; 1857, 871, ch. 444; 1862, 811, ch. 449), the general railroad law of the State. Its provisions should be consulted in connection with this title. Many of them are made applicable to railroad corporations formed before 1848.

42. Common line. Companies whose roads embrace the same route, may agree for construction by one of a common line. *Laws of 1851*, 20, ch. 19, § 1; 1854,* 613, ch. 282, § 13.

43. Any mortgagee of a railroad and franchises thereof, may purchase at mortgage, execution, or judicial sale, and hold or convey.* 1 *Laws of 1857*, 871, ch. 444, § 1.

44. Proceedings to remedy failure or defect of title in lands acquired. *Laws of 1847*, 301, ch. 272.

45. Contract with Indian tribes, for use of lands. *Laws of 1836*, 461, ch. 316.

46. Increase of capital, to relay track, &c. *Laws of 1847*, 301, ch. 272; 503, ch. 405.

47. Debts. The act of 1845 (*Laws of 1845*, 251, ch. 230; repealed by *Laws of 1854*, 614, ch. 282, § 16),—which restricted the debts of railroad companies,—had no application to corporations formed under the general acts of 1848 and 1850. *Supreme Ct.*, 1853, *Rochester v. Barnes*, 26 Barb., 657.

48. Surrender of stock and franchises of leased road to lessee. *Laws of 1855*, 517, ch. 302.

49. Changes of grade authorized. *Laws of 1855*, 865, ch. 478.

50. Mortgages. The provision of the general act, § 28, subd. 10,—which authorizes a railroad corporation, organized under such act, "from time to time to borrow such sums of money as may be necessary for completing, or finishing, or operating their railroad, and to issue and dispose of their bonds for an amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company, for the purpose aforesaid,"—gives authority to railroad corporations to mortgage all and singular the property of the corporation, with all

* As to whether these apply to all railroads, or only those of corporations formed under the act of 1850, compare the title of these acts and § 49 of the act of 1850.

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its franchises, rights, and interests acquired, and to be acquired, as an entirety; and it is therefore entirely immaterial whether the right of way for the railroad was all acquired or not, at the time such mortgage was put on record, or whether the road had or had not been at that time entirely located, or the location thereof, if previously made, was afterwards changed. The right to change its location is one of the chartered privileges of the corporation, and embraced within the grant of its franchises. So, also, is the right to take such lands as might be requisite to complete the road upon its original, or upon any altered line. *Supreme Ct., Sp. T., 1857, Seymour v. Canandaigua & Niagara Falls R. R. Co., 25 Barb., 284; S. C., 14 How. Pr., 581.*

As to the constitutionality of statutes in exercise of the right of **Eminent domain**, see CONSTITUTIONAL LAW, 170-228.

2. Corporations under the General Statute.

A. The Statute.

51. The general act of 1850 (*q. v., supra*, 41) is constitutional. *Ct. of Appeals, 1853, Buffalo & N. Y. City R. R. Co. v. Brainard, 9 N. Y. (5 Seld.), 100.*

52. Application to existing corporations. The general railroad act of 1850 declares existing corporations to be subject to the provisions, not inconsistent with their charter, contained in certain sections, among which are the provisions relative to acquiring title to lands. *Held*, that a pre-existing company, whose charter provided a distinct and complete method of acquiring title, was not bound to pursue the new method, but might still take that authorized by their own charter. Since the provisions of the latter act could not be grafted on the former, leaving it entire, they must be deemed inconsistent. *Ct. of Appeals, 1855, Clarkson v. Hudson River R. R. Co., 12 N. Y. (2 Kern.), 304. Supreme Ct., 1853, Visscher v. Hudson River R. R. Co., 15 Barb., 37; Mosier v. Hilton, Id., 657.*

53. That in such case either mode may be pursued.* *Supreme Ct., 1853, Mosier v. Hilton, 15 Barb., 657.*

* See, also, the act of 1857 (1 *Laws of 1857*, 871, ch. 444, § 2), which amends the provisions of the act of 1850 on this subject, and provides that any railroad corporation in the State may acquire title by these proceedings.

B. Organization.

54. Preliminary subscription. A railroad corporation formed under the general railroad act, is not formed, and does not become a legal body, until all the requirements of the statute have been complied with, and the articles filed in the office of the secretary of state. Until this has been done, the subscription of any person to the articles is a mere proposition to take the number of shares specified, of the capital stock of the corporation thereafter to be formed, which is revocable, and not a binding promise to take and pay. *Supreme Ct., 1857, Burt v. Farrar, 24 Barb., 518.*

55. An agreement to take a certain number of shares of the capital stock subscribed previously to the incorporation of the company, creates, if not an express, an implied promise to pay, which will sustain an action by the company after its complete incorporation, to recover calls on the stock. *Ct. of Appeals, 1856, Buffalo & N. Y. City R. R. Co. v. Dudley, 14 N. Y. (4 Kern.), 386. See, also, Lake Ontario, &c., R. R. Co. v. Mason, 16 N. Y. (2 Smith), 451. To the contrary, Supreme Ct., 1854, Troy & Boston R. R. Co. v. Tibbits, 18 Barb., 297.*

56. In such an action, it is not necessary to prove that the number of shares subscribed for by defendant had been actually allotted to him. No excess of subscriptions being shown, the presumption is that the subscription-books were closed as soon as all the stock was taken. The title of the several subscribers to the number of shares respectively taken by them became perfect the moment the books were closed, and their certificates of stock are merely evidences of title. *Ct. of Appeals, 1856, Buffalo & N. Y. City R. R. Co. v. Dudley, 14 N. Y. (4 Kern.), 386.*

57. Neither an intermediate alteration of the charter by the Legislature under the power reserved, unless fraudulently procured, nor the fact that defendant was induced to subscribe, by the fraudulent representations of one of the company's officers, made at a public meeting, and in the presence of a majority of the board of directors, but not made by any authority from such board by resolution or otherwise, constitutes any defence. And the remedy by forfeiture of stock for non-payment of calls is merely cumulative. *Id.*

58. A subscription by a partnership name

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is a compliance with the provision in the general railroad act—requiring each subscriber to the articles of association to subscribe thereto “his name, place of residence, and amount by him subscribed”—especially where the subscription was made by one partner in the name of both, and the other subsequently ratified it. *Supreme Ct.*, 1856, Ogdensburgh, Rome & Clayton R. R. Co. v. Frost, 21 *Barb.*, 541.

59. — by heirs. A subscription by one of several heirs, as follows: “Estate of N. W., 100 shares, \$10,000,” not binding either upon himself or his co-heirs. *Supreme Ct.*, 1854, Troy & Boston R. R. Co. v. Warren, 18 *Barb.*, 810.

60. Liability of subscriber. A subscriber to the stock of a corporation, whether his promise to pay be express or implied, is liable to an action for the subscription, though the charter authorizes the directors to forfeit the stock and previous payments, upon non-payment of an instalment, provided the forfeiture has not been declared. The mere existence in the charter of authority to declare a forfeiture, affords no objection to an action at law. [1 *Cai.*, 381; 1 *Cai.* Cas., 95; 9 *Johns.*, 217; 14 *Id.*, 238; 11 *Id.*, 98; 14 *Wend.*, 20; 2 *Hall*, 504; 5 *Mass.*, 80; 1 *Bin.*, 70; 2 *Bibb*, 577; 3 *Hawks*, 520; 12 *Conn.*, 499; 12 *Id.*, 580; 2 *Barb.*, 294.] *Supreme Ct.*, 1851, Northern R. R. Co. v. Miller, 10 *Barb.*, 260; and see CORPORATION, tit. *Stockholders*.

61. A subscription to the capital stock of a railroad company, by which the subscriber agrees “to take the number of shares in said company” affixed to his name, is equivalent to an express promise to pay for the stock whenever the calls shall be made; or if not, it raises an implied promise which is equally efficacious with one expressed. [14 *Wend.*, 20; 2 *Hall*, 505; 12 *Conn.*, 509.] *Supreme Ct.*, 1856, Ogdensburgh, Rome & Clayton R. R. Co. v. Frost, 21 *Barb.*, 541.

62. Cumulative remedy. The remedy of a railroad company against a subscriber, in case of non-payment of the calls, by forfeiture of the stock, is only cumulative, and does not prevent an action for the instalments, where power is given to the company to make calls, and there has been a valid subscription to the stock. [10 *Barb.*, 269; 18 *Id.*, 297; 21 *Wend.*, 278.] *Id.*

63. Notice, though necessary to the subscriber on proceeding under the charter to forfeit the stock for non-payment, is not neces-

sary to render him liable to an action. *Ct. of Appeals*, 1857, Lake Ontario, &c., R. R. Co. v. Mason, 16 *N. Y.* (2 *Smith*), 451.

64. Conditional subscriptions. The general railroad law of 1848 confers no power to make conditional subscriptions; and such a subscription is contrary to public policy. [1 *Hill*, 518.] A condition annexed to a subscription, imposing an unauthorized limitation of the directors' statute power to call in stock, or which provides for a dividend by way of interest, to each paying subscriber, until the full completion of the road, is illegal and void, as contravening public policy. *Supreme Ct.*, 1854, Troy & Boston R. R. Co. v. Tibbits, 18 *Barb.*, 297.

65. Change of location. Where the act of incorporation, or articles of association, prescribe the limits within which a railroad company shall construct its road, it cannot, even under section 28 of the general railroad act, alter or change the route, after it has been located, so as to transcend those limits; at least not without releasing previous subscribers for stock who have not consented to such change. By making such change previous subscribers are released. [18 *Barb.*, 312.] *Supreme Ct.*, 1856, Buffalo, Corning & N. Y. R. R. Co. v. Pottle, 23 *Barb.*, 21.

66. Payment of subscriptions. The requirement that ten per cent. must be paid in before organization [§ 2], means not ten per cent. upon each separate share subscribed; for the word “thereon” does not refer to the shares separately; but ten per cent. upon such a sum of subscriptions as in the aggregate would make a total subscription of \$1000 for every mile of road proposed to be made. *Ct. of Appeals*, 1857, Lake Ontario, &c., R. R. Co. v. Mason, 16 *N. Y.* (2 *Smith*), 451; *S. P.*, 1854, Rensselaer & Washington Plank-road Co. v. Barton, *Id.*, 457, note.

67. The provision of section 4—requiring ten per cent. to be paid on every subscription—does not apply to subscriptions before organization under section 2, but only to those made after organization, under section 4. *Ct. of Appeals*, 1857, Lake Ontario, &c., R. R. Co. v. Mason, 16 *N. Y.* (2 *Smith*), 451. *Supreme Ct.*, 1856, Ogdensburgh, Rome & Clayton R. R. Co. v. Frost, 21 *Barb.*, 541.

68. Cash. Under section 4 of the general railroad act, which requires the payment of ten per cent. in money, by each subscriber,

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at the time of subscribing, a payment in money, *ex nomine*, at the time of subscribing to the capital stock of railroad company, is not necessary to the validity of the subscription as against the subscriber. A subsequent payment will operate as a waiver of the condition, and the party making it will be considered as recognizing his original liability. *Supreme Ct.*, 1858, *Beach v. Smith*, 28 *Barb.*, 354.

C. Personal Liability of Stockholders.

69. **Laborers and servants.** The part of § 10,—which makes the stockholders of every company jointly and severally liable for all debts due and owing to any of its laborers and servants for services performed for such corporation,—provides for the payment of the immediate servants, laborers, and employees of the company itself, in contradistinction to the laborers employed by contractors in the construction of the railroad, or of any part of the work. Section 12 makes provision for this latter class of laborers. *Supreme Ct.*, 1857, *Gallagher v. Ashby*, 26 *Barb.*, 148.

70. All persons employed in the service of the company who have not a different, proper, and distinctive appellation, such as officers and agents of the company, are servants of the company within the statute. (*Laws of 1850*, 214, § 10; 1854, 614, § 16.) *Supreme Ct.*, 1857, *Conant v. Van Schaick*, 24 *Barb.*, 87.

71. **Priority.** Section 10 of the act of 1850 (*Laws of 1850*, 211, ch. 140),—which provides that stockholders in railroad corporations shall be individually liable for debts of their corporation in an action brought after judgment and execution unsatisfied against the corporation,—places all judgment-creditors, whose judgments were not recovered for services rendered, upon an equal footing, without discrimination, in respect to the times the debts were contracted, or the judgments therefor recovered. *Supreme Ct.*, 1856, *Rankin v. Elliott*, 14 *How. Pr.*, 389; affirmed, *Ct. of Appeals*, 1857, 16 *N. Y. (2 Smith)*, 877.

72. After a receiver of an insolvent railroad corporation has been appointed, and an order made restraining proceedings against the company by any creditor, a creditor cannot bring an action under section 10 of the general railroad act, against a stockholder whose subscription is unpaid, to enforce his personal liability. The right of action for unpaid subscriptions is transferred to the receiver by his

appointment, and an action thereon by a creditor is in effect an action against the company. *Ct. of Appeals*, 1857, *Rankine v. Elliott*, 16 *N. Y. (2 Smith)*, 877; affirming *S. C.*, 14 *How. Pr.*, 389.

73. **Contractors.** A. contracted with the defendants for the construction of a part of their railroad. B, by an agreement with A, contracted to do a portion of the work, and employed the plaintiff as a laborer thereon. *Held*, that B. was a contractor within the meaning of the act, and the plaintiff could maintain an action under it against the company. *Ct. of Appeals*, 1855, *Kent v. N. Y. Central R. R. Co.*, 12 *N. Y. (2 Kern.)*, 628; approving *Warner v. Hudson River R. R. Co. (Supreme Ct., Circuit, 1851)*, 5 *How. Pr.*, 454; and overruling *Millered v. Lake Ontario, Auburn & N. Y. R. R. Co.*, 9 *Id.*, 238.

74. In an action against stockholders in a railroad corporation, to charge them personally, under the act of April 15, 1854, the plaintiff must not only prove a judgment against the corporation, and that execution has been returned unsatisfied, but he must also prove that the debt for which the judgment was recovered was one of the sort named in the act. When this is done, the amount due on the execution is the rule of damages. *Supreme Ct.*, 1857, *Conant v. Van Schaick*, 24 *Barb.*, 87.

75. The stockholders are not liable for debts contracted subsequent to that act. *Id.*

D. Acquiring Lands.

a. General Principles.

76. **Public purpose.** Railroads for the conveyance of travellers and merchandise from one part of the State to another, are public improvements, and for the benefit of the public, for which private property may be taken, under authority of the Legislature, on paying a just compensation to the owners. *Chancery*, 1831, *Beekman v. Saratoga & Schenectady R. R. Co.*, 3 *Paige*, 45. *Ct. of Errors*, 1837, *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 *Wend.*, 9. *Ct. of Appeals*, 1853, *Buffalo & N. Y. City R. R. Co. v. Brainard*, 9 *N. Y. (5 Seld.)*, 100.

77. **Bridging streams.** A railroad corporation has a right to erect a bridge upon piers, for the purpose of carrying their railways across a navigable river, between the places prescribed for the commencement and termination of the road; subject to the condition

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prescribed in the charter, that the usefulness of the stream should not be impaired thereby. *Supreme Ct.*, 1886, *People v. Rensselaer & Saratoga R. R. Co.*, 15 *Wend.*, 118. *Chancery*, 1837, *Weaver v. Rensselaer & Saratoga R. R. Co.*, cited in *Mohawk Bridge Co. v. Utica & Schenectady R. R. Co.*, 6 *Paige*, 554, 561.

78. Purchase of bridge. A railroad company, authorized by its charter to take lands necessary for its purposes, and whose route crosses a stream, may purchase a private bridge within such limits, if it will answer the corporate ends; but they will take it subject to the restrictions in respect to allowing free passage over it, to the injury of a neighboring toll-bridge, under which the private owners held it. *A. V. Chan. Ct.*, 1846, *Thompson v. N. Y. & Harlem R. R. Co.*, 3 *Sandf. Ch.*, 625.

79. Where the location of the track is left to the discretion of the agents of the corporation, the location will not be lightly interfered with; and certainly not after a long enjoyment by the company, and acquiescence of the public. *Supreme Ct.*, *Sp. T.*, 1852, *Hentz v. Long Island R. R. Co.*, 13 *Barb.*, 646.

80. One who purchases land adjoining a railroad, takes it *cum onere*, and cannot claim damages for the taking; nor is a relaying of the track a taking, so as to entitle him to compensation. *Id.*

81. A grant to a railroad corporation of so much of a farm as might be necessary for the construction of the road if it should cross the farm, provided it should not cross south of a certain line,—*Held*, inoperative if the road crossed the farm south of such line. *V. Chan. Ct.*, 1840, *Douglass v. N. Y. & Erie R. R. Co.*, *Clarke*, 174.

82. Condition. Plaintiff conveyed in fee to a railroad company, a piece of his land for the road, upon condition that the road should be completed over it by a certain day. It was not then completed, but after the day, plaintiff gave them notice to make the fences, and permitted them to make expenditures on the land, and did not assert the forfeiture until two years afterwards, and then brought ejectment. *Held*, that the forfeiture had been waived. *Supreme Ct.*, 1852, *Ludlow v. N. Y. & Harlem R. R. Co.*, 13 *Barb.*, 440.

83. Highway. The charter of a railroad company authorizing them to occupy a highway in laying the track, relates only to the public property in the road, and protects them

from indictment for a public nuisance, without affecting their liability to adjacent owners for damages. *Supreme Ct.*, 1841, *Fletcher v. Auburn & Syracuse R. R. Co.*, * 25 *Wend.*, 462. Followed, 1843, *Mahon v. Utica & Schenectady R. R. Co.*, *Hill & D. Supp.*, 156; 1858 [citing also 21 Conn., 294; 16 N. Y., 97; 3 Hill, 567], *Robinson v. N. Y. & Erie R. R. Co.*, 27 *Barb.*, 512.

84. Using a street for a railroad track, either upon its natural surface or by tunnelling, is not a misappropriation of it, if it do not substantially interfere with its use as a street. *Supreme Ct.*, 1851, *Adams v. Saratoga & Washington R. R. Co.*, 11 *Barb.*, 414. To the same effect, 1850, *Plant v. Long Island R. R. Co.*, 10 *Id.*, 26; S. C., 9 *N. Y. Leg. Obs.*, 53; 1851, *Chapman v. Albany & Schenectady R. R. Co.*, 10 *Barb.*, 360.

85. To allow a street in a city to be used for a railroad track, either upon its natural surface, or by tunnelling, is not a misappropriation of it, provided such use does not interfere with the free and unobstructed use of it by the public, as a highway for passage and repassage. The temporary inconvenience to which the adjoining proprietors are exposed by the construction of the work, does not entitle them to damages. Where the land of individuals is taken for a street in a city, and compensation is made for it, the city has the right to appropriate the land so taken to all such legitimate uses and servitudes as custom and the public good require that a street should be appropriated, without making further compensation. *Supreme Ct.*, 1850, *Plant v. Long Island R. R. Co.*, 10 *Barb.*, 26; S. C., 9 *N. Y. Leg. Obs.*, 53.

To similar effect, in case of damages occasioned by a change of grade of a street for the same purpose. 1851, *Chapman v. Albany & Schenectady R. R. Co.*, 10 *Barb.*, 360.

86. Injury to individual owners of land by the authorized construction of a railroad through a street, the title to which is in the People of the State, is *damnum absque injuria*, and gives them no right of action against the company. [4 N. Y., 195; 6 *Id.*, 522.] *Su-*

* See this case in table of *CASES OVERTURNED*, Vol. I., *Ante*; but compare *Corey v. Buffalo, Corning & N. Y. R. R. Co.*, 28 *Barb.*, 482, where it is said to be overruled by *Radcliff v. Mayor, &c.*, of Brooklyn, 4 *N. Y. (4 Comst.)*, 195, and *Gould v. Hudson River R. R. Co.*, 8 *N. Y. (2 Seld.)*, 522.

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preme Ct., 1856, *Corey v. Buffalo, Corning & N. Y. R. R. Co.*, 28 *Barb.*, 482.

87. One who dedicates land to the purpose of a highway does not relinquish to the public any thing more than the right of way, and the municipal or State authorities have no power to authorize the taking of such highway by a railroad company, without his consent or making compensation to him. The taking and use of the street for a railroad is not one of the modes of enjoying the public easement, but imposes an additional burden upon the soil, for which the owner is entitled to damages, and he may recover them in an action against the company if the road is taken without compensation. [8 *Hill*, 567; 4 *Cush.*, 68.] *Ct. of Appeals*, 1857, *Williams v. N. Y. Central R. R. Co.*, 16 *N. Y. (2 Smith)*, 97; reversing *S. C.*, 18 *Barb.*, 222. Compare DEDICATION, 87.

88. Private rights protected. It is true that by subdivision 5, of section 28, of the general railroad act, a railroad company is empowered to construct its railroad across, along, or upon any stream of water, water-course, street, highway, plank-road, turnpike, or canal, which the route of its road shall intersect or touch; but this provision grants only the right which the public had in such watercourses, roads, &c., and does not grant any right to violate private property without the consent of the owners. [25 *Wend.*, 462; 8 *Hill*, 567; 5 *Id.*, 170.] *Supreme Ct.*, 1855, *Ellicottville, &c., Plank-road Co. v. Buffalo, &c., R. R. Co.*, 20 *Barb.*, 644.

89. Stream. In an action against a railroad company, to recover damages for injuries to the plaintiff's land arising from the overflowing of a stream, caused by the acts of the defendant, it appeared that the defendant had, in constructing its road, excavated and removed the banks of the natural stream, in order to conform the ground to the grade of the railroad.

Held, that it was proper to charge that if the jury should find, from the evidence, that the injury and damage to the plaintiff was occasioned by such excavation and removal, and that but for such excavation and removal the injury and damage would not have occurred, the defendant was liable. The authority given to railroad companies by the general act, to cross streets, &c., does not exempt them from liability for all damage caused;

and negligence or want of skill is immaterial. *Supreme Ct.*, 1858, *Robinson v. N. Y. & Erie R. R. Co.*, 27 *Barb.*, 512.

90. Negligence or want of skill in the defendants is not material in an action against a railroad company for damages incurred by reason of their having interfered with a highway. *Id.*

91. Turnpike and Plank roads. Since the act of 1851 (*Laws of 1851*, 21, ch. 19, § 4), railroad companies have no right to enter upon a turnpike or plank road without the consent of the owners, except upon the condition of first paying the damages sustained by the turnpike or plank road company after the same shall have been ascertained under the statute. *Supreme Ct.*, 1855, *Ellicottville, &c., Plank-road Co. v. Buffalo, &c., R. R. Co.*, 20 *Barb.*, 644.

92. Public square. A railroad company, by proceeding under section 14 of the general act to acquire lands, obtain no greater right than the parties against whom they proceed possessed. To acquire a right to use a public square or place for any purpose inconsistent with the object of its dedication, they should proceed under section 26,—which provides for cases of lands held in trust. *Supreme Ct.*, 1854, *Anderson v. Rochester, &c., R. R. Co.*, 9 *Hov. Pr.*, 558.

93. Double penalties. A railroad company constructed their road across a highway, injuring the highway and neglecting to restore it. *Held*, in an action by the commissioners of highways, that they were not liable both to damages, under section 28 of the general railroad act (*Laws of 1850*, 224),—requiring crossings to be constructed without injury to the road,—and also to treble damages under 1 *Rev. Stat.*, 526, § 180,—respecting injuries to highways. *Supreme Ct., Sp. T.*, 1858, *Sipperly v. Troy & Boston R. R. Co.*, 9 *Hov. Pr.*, 88.

5. Proceedings to acquire Title.

94. Joint commission. The statute (*Laws of 1850*, ch. 140, §§ 14–16) authorizes a joint commission comprehending all the landowners embraced in one petition. Thus, by section 15, five persons may appraise all lands proposed to be taken in the county, and section 16 evidently contemplates a succession of appraisals by the same commissioners. One report may also embrace all the cases; and any person interested and made a party, can appeal from

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such part thereof as affects him. *Supreme Ct., Sp. T.*, 1851, *Troy & Rutland R. R. Co. v. Cleveland*, 6 *How. Pr.*, 238.

95. Affinity. The fact that the wife of a commissioner to appraise damages is cousin to one of the stockholders of the railroad, will not vitiate the appraisement. [17 Johns., 183.] *Supreme Ct., Sp. T.*, 1852, *Albany Northern R. R. Co. v. Cramer*, 7 *How. Pr.*, 164.

96. Act of 1851. Proceedings of commissioners appointed under Laws of 1851, ch. 19, § 3, must be in conformity with the general act of 1850, and the corporation has a right to appeal from their award under that act. *Supreme Ct.*, 1852, *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 *Barb.*, 100.

97. Measure of damages. The commissioners are to determine the compensation to be made to the owner for the land "proposed to be taken" and "appraised by them," and not the damages that will be occasioned by the construction and operation of the railroad over his premises. Where they permitted witnesses to give conjectural opinions as to the damage which would result to a mill on the owner's adjoining land, the award was set aside. The true and only inquiry is, what is the property worth now in the market, and what will it be worth after the improvement is made. *Supreme Ct.*, 1852, *Troy & Boston R. R. Co. v. Lee*, 18 *Barb.*, 169; *Sp. T.*, 1853 [citing, also, 16 *Barb.*, 68, 100], *Canandaigua & Niagara Falls R. R. Co. v. Payne*, 16 *Id.*, 273.

98. Value, how fixed. The commissioners should award damages for the market value of the land taken, and the diminution in the market value of the owner's adjoining land produced by the taking. They are to determine how much the mere taking of the land, not the use of it for a railroad or any particular purpose, will diminish the market value, and this diminution and the market value of the land taken, should be the amount of their award. *Supreme Ct., Sp. T.*, 1852, *Albany Northern R. R. Co. v. Lansing*, 16 *Barb.*, 68.

99. Hearing. The commissioners must view the premises, and hear the proofs and allegations of the parties, but may proceed in such order as they please, and give to either party the opening and closing argument, and may hear the parties either before or after viewing the premises. *Id.*

100. Waiver of notice. Where a notice

of appraisement of damages for the taking of lands by a railroad company (under Laws of 1847, ch. 31, § 4) is defective, nothing short of an appearance by the party whose lands are sought to be taken, and actual litigation upon merits, ought to be regarded as an implied waiver of the defect. *Ct. of Appeals*, 1854, *Cruger v. Hudson River R. R. Co.*, 12 *N. Y.* (2 *Kern.*), 190. Compare *Dyckman v. Mayor, &c.*, of *N. Y.*, 5 *N. Y.* (1 *Seld.*), 434; affirming *S. C.*, 7 *Barb.*, 498; *Mohawk & Hudson R. R. Co. v. Artcher*, 6 *Paige*, 84.

101. Signing report. Though section 16 of the act requires the report to be signed by a majority of the commissioners, they need not all be together at the signing, as it involves no deliberative or judicial action. *Supreme Ct.*, 1854, *Rochester & Genesee Valley R. R. Co. v. Beckwith*, 10 *How. Pr.*, 168.

102. Setting aside. The act (Laws of 1850, 211), does not give the court power to set aside the report of commissioners upon motion. After the report is confirmed, either party may appeal, and on the hearing of such appeal, the court may direct a new appraisal before the same or new appraisers, in its discretion. But it can exercise no powers not given by the act. [20 Johns., 268; 2 Hill, 14.] *Supreme Ct., Sp. T.*, 1852, *Albany Northern R. R. Co. v. Cramer*, 7 *How. Pr.*, 164.

103. The Supreme Court has no power to supervise or correct the proceedings of the commissioners of appraisal, unless it is specially conferred by statute; and an order setting aside their proceedings, is a nullity. [2 Hill, 14, 159; 1 *Id.*, 130; 6 Johns., 1; 7 *Id.*, 541; 19 *Id.*, 89; 20 *Id.*, 269; 11 *Wend.*, 154.] *Supreme Ct.*, 1853, *Visscher v. Hudson River R. R. Co.*, 15 *Barb.*, 87.

104. Confirmation. No error of law committed by the commissioners in their decision of the merits, or upon the admission or rejection of evidence, can be reviewed or examined on the application to confirm their report. Such decisions can only be reviewed on appeal from their appraisal, under section 18 of the act. [5 *How. Pr.*, 177; 6 *Id.*, 238, 467.] *Supreme Ct.*, 1854, *Rochester & Genesee Valley R. R. Co. v. Beckwith*, 10 *How. Pr.*, 168.

105. When a report of commissioners of appraisement is made, which upon its face appears to conform in substance to the requirements of the act, and notice is given according to the rules and practice of the court for its

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confirmation, it is the duty of the court to confirm it. No affidavits or other proof should be heard on such application, to contradict or impeach the truth of the matters contained in the report. *Id.*

106. On appeal from the report of commissioners, the court may, in its discretion, direct or refuse a new appraisal before the same or new commissioners. Affidavits cannot be read on the appeal, but the proceedings are to be reviewed upon the report. *Supreme Ct., Sp. T.*, 1851, *N. Y. & Erie R. R. Co. v. Coburn*, 6 *How. Pr.*, 228. To similar effect, 1850, *N. Y. & Erie R. R. Co. v. Corey*, 5 *Id.*, 177.

107. The court will not set aside the award except for substantial error. The commissioners are bound to be guided in their proceedings by the established rules of evidence, but a technical error in this respect will be disregarded; but otherwise, if the error be of such a character as to show that the commissioners have mistaken the principles that should govern their appraisal, and that the appellant may have been wronged by it. *Supreme Ct.*, 1852, *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 *Barb.*, 100; *S. P.*, 1851, *Rochester & Syracuse R. R. Co. v. Budlong*, 6 *How. Pr.*, 467; and see *Troy & Boston R. R. Co. v. Lee*, 13 *Barb.*, 169; *N. Y. Central R. R. Co. v. Marvin*, 11 *N. Y. (1 Kern.)*, 276.

108. Where the appraisal was for damages for the taking of a right to cross a turnpike, it being the duty of the railroad company to restore the turnpike "to its former state, or to such a state as not unnecessarily to impair its usefulness," it is substantial error to receive opinions that horses might be frightened off the new embankment made for the turnpike company by the railroad company; or that, at another crossing, it would be necessary for the sake of safety, to divert the line of the turnpike, at a cost of \$7,350; or a bridge ought to have been made; or evidence as to the amount of damages the turnpike company would sustain. *Supreme Ct.*, 1852, *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 *Barb.*, 100.

109. If the court is satisfied that the commissioners have not erred in the principles of their appraisal, no other error will suffice to induce them to send the report back for review. *Supreme Ct.*, 1852, *Troy & Boston R. R. Co. v. Lee*, 13 *Barb.*, 169.

110. Amount of award. On an appeal from an appraisal of compensation for land taken by a railroad company, the court will not interfere upon the ground that the amount of damages awarded was too small or too great, unless the evidence of injustice is palpable on its face. *Supreme Ct.*, 1851, *Rochester & Syracuse R. R. Co. v. Budlong*, 6 *How. Pr.*, 467.

111. Objections which might have been obviated below cannot be raised on appeal. A railroad company, formed under a special charter in 1845, took proceedings under the provisions of the general act of 1850 to acquire lands. In several cases, the same commissioners were appointed by the Supreme Court. Their report recited that they proceeded under the act of 1848 (which had then been repealed), and also showed they had proceeded to view the premises described in several cases at one time, and afterwards considered and examined each case separately. The report was confirmed at special term, and the order confirming it affirmed by the general term. The owners appeared before the commissioners and the court at each stage of the proceedings. *Held*, on appeal to the Court of Appeals, that no objections as to the irregularities having been taken below, they could not be raised there. *Ct. of Appeals*, 1853, *Buffalo & N. Y. City R. R. Co. v. Brainard*, 9 *N. Y. (5 Seld.)*, 100.

112. Right, when vested. The designation of lands required, the appointment of commissioners, and their report of the compensation to be made, vests no right, either in the company to the lands, or in the owners to the money awarded; and until an order of court is made, confirming the report, and directing the payment of the money, the proceeding may be set aside or abandoned. *N. Y. Superior Ct.*, 1850, *Hudson River R. R. Co. v. Outwater*, 3 *Sandf.*, 689.

113. Where a railroad company, upon an award of commissioners, have recorded the order and deposited the money as required by section 18 of the act of 1850, the title becomes wholly vested in the company, and no longer remains in the former owner. Hence the company cannot, by changing the route of their road, as they are authorized to do by section 23, avoid paying such compensation, on the ground that the premises are not necessary for them. *Supreme Ct. (Sp. T., 1854?)*, *Crowner*

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v. Watertown & Rome R. R. Co., 9 *How. Pr.*, 457.

114. Gaining possession of lands taken.

Upon completion of the proceedings prescribed, the company is authorized to "enter upon, take possession of, and use the land for the purposes of its incorporation." It derives its title from the statute, and not from the judgment of the court, and the court cannot give it possession by process. If the owner forcibly prevent the company from taking possession, the remedy is by action. *Supreme Ct., Sp. T.*, 1858, *Niagara Falls & Lake Ontario R. R. Co. v. Hotchkiss*, 16 *Barb.*, 270.

115. The existence of a mortgage which is a lien upon land taken and used by a railroad company for the purpose of constructing and operating its road, is a defect in the title, within the meaning of section 21 of the act of 1850, authorizing the company to proceed anew in such case. *Supreme Ct.*, 1854, *Matter of N. Y. Central R. R. Co.*, 20 *Barb.*, 419.

116. Redeeming mortgage. A railroad company who have appropriated lands which are subject to a mortgage, have a right to redeem their lands from the lien of the mortgage on the payment of a ratable proportion of the mortgage-debt, which they must do to the full value of the property, if need be, irrespective of the improvements put thereon by the company. *Supreme Ct., Sp. T.*, 1858, *Dows v. Congdon*, 16 *How. Pr.*, 571.

E. Fences and Crossings.

117. Before the statute. In general, a railroad company is not bound to contribute to the maintenance of fences between its road and adjoining lands; but must construct proper cattle-guards at highway crossings, and upon boundaries which its track crosses. *V. Chan. Ct.*, 1841, *Matter of Long Island R. R. Co.*, 8 *Edw.*, 487; qualifying *Matter of Rensselaer & Saratoga R. R. Co.*, 4 *Paige*, 558.

118. A railroad company having an exclusive right to the use of the land taken for its track, is not liable for injuries to cattle which stray thereon. Since cattle come there without right, want of care on the part of the corporation is not, in judgment of law, a fault on their part; but if it could be so considered, the plaintiff, having also been in fault, by which he contributed to produce the injury, is not entitled to recover. [4 *Car. & P.*, 875; 6 *Id.*, 28; 8 *Id.*, 873; 9 *Id.*, 601; 4 *Id.*, 297;

2 *Stark.*, 382; 2 *Pick.*, 621; 12 *Id.*, 177; *Cro. Jac.*, 158; 2 *Hall*, 151; 19 *Wend.*, 899; 1 *Cow.*, 88.] *Ct. of Appeals*, 1850, *Munger v. Tonawanda R. R. Co.*, 4 *N. Y. (4 Comst.)*, 849; and *S. C.* below, 5 *Den.*, 255. Approved, 1855, *Corwin v. N. Y. & Erie R. R. Co.*, 18 *N. Y. (3 Kern.)*, 42. *S. P.*, *Supreme Ct.*, 1855, *Terry v. N. Y. Central R. R. Co.*, 22 *Barb.*, 574.

119. Town regulations. The regulations respecting fences, which towns are authorized to make, do not apply to railroads, for they cannot be completely inclosed; and if cattle stray upon a railroad and are killed by a train, the company is not liable. *Supreme Ct.*, 1848, *Tonawanda R. R. Co. v. Munger*, 5 *Den.*, 255.

120. Screen for parallel highway. The company are not liable for the death of an animal from fright caused by the usual noise made by the engine and train, unless they are chargeable with negligence in the construction of the road so near the highway, and without a proper screen, in which case they may be held liable. *Supreme Ct.*, 1850, *Moshier v. Utica & Schenectady R. R. Co.*, 8 *Barb.*, 427.

121. Railroad companies, in the use and management of their roads, are bound only to use ordinary care; and the omission to erect fences, screens, or guards between their road and a highway, or turnpike, contiguous thereto, cannot be considered a want of such care. *Supreme Ct.*, 1855, *Coy v. Utica & Schenectady R. R. Co.*, 28 *Barb.*, 648; disapproving *Moshier v. Utica & Schenectady R. R. Co.*, 8 *Id.*, 427; *supra*, 120.

122. Cars on road of other company. The acts of 1839 and 1847 permit one company to run its cars over the road of another by arrangement; and the former is not liable for an accident in so running, produced by the negligence of the other to erect fences and cattle-guards, and without negligence on its own part in running the cars. *Supreme Ct.*, 1853, *Parker v. Rensselaer & Saratoga R. R. Co.*, 16 *Barb.*, 315.

123. Act of 1848. The provisions of the general railroad act of 1848, relative to fences, —*Held*, applicable to all then existing corporations. *Supreme Ct.*, 1850, *Snydam v. Moore*, 8 *Barb.*, 358; *Waldron v. Rensselaer & Saratoga R. R. Co.*, *Id.*, 390. Followed, 1852, *Talmadge v. Rensselaer & Saratoga R. R. Co.*, 18 *Id.*, 498.

The contrary held in respect to farm crossings in a case where, before the passage of

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the act, a railroad company acquired the title by payment of compensation. 1850, *Milliman v. Oswego & Syracuse R. R. Co.*, 10 *Barb.*, 87.

124. Under the act of 1848,—which made the corporation and its agents liable for all damages which shall be done by their agents or engines, to cattle, &c., before the erection of division fences, and cattle-guards,—the engineer and fireman, who was the servant of the engineer, were *Held*, chargeable, severally, or jointly with the corporation. *Supreme Ct.*, 1850, *Snydam v. Moore*, 8 *Barb.*, 358; and see *Corwin v. N. Y. & Erie R. R. Co.*, 18 *N. Y.* (3 *Kern.*), 42.

125. **Animal in highway.** If the engine runs over a horse in a highway, the horse not being rightfully there, the railroad company is not liable for the injury, unless it was the result of the gross negligence of the engineer. [*Am. L. J.*, Sept., 1849, 116.] *Supreme Ct.*, 1850, *Waldron v. Rensselaer & Saratoga R. R. Co.*, 8 *Barb.*, 390; and see *Corwin v. N. Y. & Erie R. R. Co.*, 18 *N. Y.* (3 *Kern.*), 42; but compare *Laws of 1862*, 844, ch. 459, § 1.

126. If the company had omitted to construct the cattle-guards at the road-crossings, as required by the act, and an animal at large is killed in the road, the omission cannot make the corporation liable, without showing other negligence of defendants. *Supreme Ct.*, 1850, *Waldron v. Rensselaer & Saratoga R. R. Co.*, 8 *Barb.*, 390.

127. Permitting one's cattle to be at large in the highway at a railroad crossing, at the usual time of passage of trains, is negligence, and bars a recovery for damage to them by the train in passing. So where the cattle are trespassers in the highways the owner cannot recover, though the company's servants were grossly negligent;—*e. g.*, where the cattle were pastured on an open lot adjoining the highway. *Supreme Ct.*, 1851, *Clark v. Syracuse & Utica R. R. Co.*,* 11 *Barb.*, 112.

128. **Act of 1850.** A railroad company are liable for injury to cattle straying upon the railroad track, in consequence of their own neglect to maintain fences and cattle-guards as required by the Laws of 1850, 288, § 44, although the plaintiff was not an adjoining proprietor, and it is not shown how or

whence the cattle came upon the road. The statute was intended to impose an absolute liability upon railroad companies so neglecting, without reference to mere negligence on the part of the owner of cattle. [2 *Eng. L. & Eq.*, 289.] *Ct. of Appeals*, 1855, *Corwin v. N. Y. & Erie R. R. Co.*, 18 *N. Y.* (3 *Kern.*), 42; overruling *Marsh v. N. Y. & Erie R. R. Co.*, 14 *Barb.*, 364; where negligence of the owner was held a defence.

129. The fact that a third person, who was an adjoining owner, had covenanted with the company to maintain the fence, and that his breach of the covenant was the reason that the fence was down, is no defence for the company. *Id.*

130. **Owner's agreement to maintain fences.** A. made an oral agreement with a railroad company, for valuable consideration, that he would maintain the fences along his own land; he neglected it for six years and then through defect in the fences his own cattle got upon the track and were killed. *Held*, that he could not recover. If the plaintiff is in fault, he can maintain no action, even if the other party is guilty of blame. [5 *Car. & P.*, 375; 6 *Id.*, 58; 4 *Id.*, 106; 8 *Barb.*, 390, 358, 368; 3 *M. & W.*, 244; 8 *Man. & Gr.*, 114; 5 *Den.*, 255; affirmed, 4 *N. Y.*, 349.] *Supreme Ct.*, 1852, *Talmadge v. Rensselaer & Saratoga R. R. Co.*, 18 *Barb.*, 498.

131. A contract between an owner of land and a company, that the latter should "construct and maintain good and sufficient fences on each side of the track, and also two crossings for teams," and making no provision for gates,—*Held*, not to relieve the company from its statutory obligation to maintain gates. *Ct. of Appeals*, 1857, *Poler v. N. Y. Central R. R. Co.*, 16 *N. Y.* (2 *Smith*), 476.

132. **Act of 1854.** Companies required to erect fences, cattle-guards, &c., but with the proviso that no railroad corporation shall be required to fence the sides of its roads, except when such fence is necessary to prevent horses, cattle, sheep, and hogs from getting on to the track of the railroad from the lands adjoining the same. *Laws of 1854*, 611, ch. 282, § 8.

133. **Remedy against person, or grantees of person, agreeing to maintain fence, but not doing so.** *Laws of 1854*, 612, ch. 282, § 9.

134. **Of the duty of adjoining owners,** to give notice to the company, of defects in the fences, &c. *Poler v. N. Y. Central R. R. Co.*, 16 *N. Y.* (2 *Smith*), 476.

135. **Cattle, on land of a third person, ad-**

* Unquestionably unsound. *Jackson v. Burlington & Rutland R. R. Co.*, 25 *Vt.* (2 *Deans*), 162.

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joining a railroad, passed through the gate of the farm crossing, left open by the owner of the land, upon the track, and were killed. *Held*, that the corporation was not liable. *Supreme Ct.*, 1852, *Brooks v. N. Y. & Erie R. R. Co.*,* 18 *Barb.*, 594. Approved and followed, *N. Y. Com. Pl.*, 1853, *Halloran v. N. Y. & Harlem R. R. Co.*, 2 *E. D. Smith*, 257.

136. A crooked or Virginia fence, of which every corner projects over the line, alternately upon the land of the adjoining proprietor and that of the company, is a fence upon the *sides* of the railroad, within the meaning of the statute; and the company commit no trespass upon the land of the adjoining proprietor, in erecting such fence. This kind of fence has been built as a division fence time out of mind. *Supreme Ct.*, 1854, *Ferris v. Van Buskirk*, 18 *Barb.*, 397. Compare *PRIVATE WAYS*, 26.

137. Rebuilding. Where, under the conditions on which the company acquired their title to the land, the adjoining owner was bound to maintain fences,—*Held*, that after the fences had been burned by sparks from the locomotive, the company were not under such an obligation to rebuild, as to be liable to him for injuries to cattle which escaped on to the track. *Supreme Ct.*, 1855, *Terry v. N. Y. Central R. R. Co.*, 22 *Barb.*, 574.

138. Servants of the company. The duty, under Laws of 1850, 288, is one in respect to the owners of such animals only; and the liability prescribed is all that is incurred by a violation of it. Railroad companies are not bound, as to its servants, to erect and maintain fences on the sides of the roads; so that they can be held liable for injuries to their own servant, in consequence of their omission to fence. *Supreme Ct.*, 1855, *Langlois v. Buffalo & Rochester R. R. Co.*, 19 *Barb.*, 864.

139. Cattle-guards not required at farm crossings. The act requires cattle-guards at road crossings, not at farm crossings. *Supreme Ct.*, 1852, *Brooks v. N. Y. & Erie R. R. Co.*, 18 *Barb.*, 594.

140. — nor at street crossings. The requirement of cattle-guards at road crossings does not apply to the crossings of a street in a village or city. *Supreme Ct.*, 1851, *Vander-*

kar v. Rensselaer & Saratoga R. R. Co., 13 *Barb.*, 390. Followed, 1853, *Parker v. Rensselaer & Saratoga R. R. Co.*, 16 *Id.*, 315; and see *Halloran v. N. Y. & Harlem R. R. Co.*, 2 *E. D. Smith*, 257.

141. If the landowner refuses to have cattle-guards erected, or undertakes, with the company, to erect them himself, the omission of the company to perform the duty imposed by the statute is not wrongful; for the provision of the statute is for the benefit and protection of the landowner. Hence, in such case, a tenant of the landholder cannot recover for an animal killed in the absence of such guards. *Supreme Ct.*, 1854, *Tombs v. Rochester & Syracuse R. R. Co.*, 18 *Barb.*, 583.

142. Farm crossing. An owner, whose farm is divided by a railroad, has a right to a reasonable election of a place for a farm crossing; but the company may, for their own convenience, make it at another place, making him compensation. Where, at the time of appraisalment, the owner pointed out where he wished it, and nothing more was said on the subject, and the title of the company being perfected, they were about to make the crossing at another place to the detriment of the farm,—*Held*, that the company should be enjoined from constructing their road through the farm until they would engage to make the crossing at the place selected by the owner, or make compensation for the difference of location. *Supreme Ct.*, 1851, *Wheeler v. Rochester & Syracuse R. R. Co.*, 12 *Barb.*, 227.

143. Village lot. Under sections 44, 50, of the general railroad act, companies are bound to make the land crossings as well on a village lot as on a farm, and as well where their right was obtained by agreement with the owners, as where it was acquired by compulsory proceedings. *Supreme Ct.*, 1854, *Clarke v. Rochester, &c., R. R. Co.*, 18 *Barb.*, 350.

F. Signals.

144. The ringing of the bell or sounding of the whistle is required only as the engine approaches the crossing, not after it has passed. A complaint in an action founded on such negligence must allege that the omission occurred while the train was approaching. *Supreme Ct.*, 1853, *Wilson v. Rochester & Syracuse R. R. Co.*, 16 *Barb.*, 167.

145. Bell and whistle at crossings. Before the act of 1854 (which restricted this re-

* This case is not an authority for holding plaintiff's negligence, or the fact that the cattle were trespassing on the adjoining lands, a defence. *Ct. of Appeals*, 1855, *Corwin v. N. Y. & Erie R. R. Co.*, 18 *N. Y.* (3 *Kern.*), 42.

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quirement to the case of a crossing on the same level), the statute required that "when a railroad shall cross any travelled public road or street," a signal should be made at every passage of a train, and a penalty was affixed to the omission. *Held*, that a case where a railroad passed over the street upon a bridge at a height of fifteen feet above the street, was within both the letter and the intent of the statute, and the penalties were incurred by a neglect to make the signal. *Ct. of Appeals*, 1855, *People v. N. Y. Central R. R. Co.*, 13 *N. Y.* (3 *Kern.*), 78; affirming *S. C.*, 25 *Barb.*, 199.

146. Penalty for each offence. A new penalty is incurred every time that any engine of the company passes without making the signal. *Id.*

147. Gross negligence in a person injured at a railroad crossing by a train will defeat his action for damages, notwithstanding the omission of those running the train to ring the bell or sound the steam-whistle as required by law. *Ct. of Appeals*, 1858, *Stevens v. Oswego & Syracuse R. R. Co.*, 18 *N. Y.* (4 *Smith*), 422. To the same effect is *Dascomb v. Buffalo & State Line R. R. Co.* (*Supreme Ct.*, 1858), 27 *Barb.*, 221.

148. The language of this provision of the statute requires the application of a different rule from that which holds in the case of neglect to comply with the requirements respecting cattle-guards. *Supreme Ct.*, 1858, *Dascomb v. Buffalo & State Line R. R. Co.*, 27 *Barb.*, 221.

2. Particular Charters.

149. Stock, personal property. The clause in the charter of a railroad company declaring its stock personal property, merely relates to the nature of the property the stockholders are to be deemed to have in the company, and not to the character of the property held by the company in its corporate capacity, for the benefit of such stockholders. *Chancery*, 1884, *Mohawk & Hudson R. R. Co. v. Clute*, 4 *Paige*, 884.

150. A charter requiring that a railroad should commence near or at a city bounded northerly by the centre of a river, and run thence on the north side of the river, gives authority to commence it in the city and to carry it across the river by a bridge. *Chancery*, 1887, *Mohawk Bridge Co. v. Utica & Schenectady R. R. Co.*, 6 *Paige*, 554.

151. Location. Where the charter of a railroad company requires the whole line of the road to be surveyed and located, and the certificate of location to be filed, the company cannot, after doing this, change the route. *Chancery*, 1841, *Hudson & Delaware Canal Co. v. N. Y. & Erie R. R. Co.*, 9 *Paige*, 323.

152. Power. Authority to use "any mechanical power," authorizes steam-power. *Supreme Ct.*, 1850, *Moshier v. Utica & Schenectady R. R. Co.*, 8 *Barb.*, 427.

153. Crossing stream. Under a charter providing that whenever it shall be necessary to intersect or cross any stream of water or watercourse, or any road or highway, it shall be lawful for the corporation to construct their road across or upon the same, but in such a way as not to impair its usefulness, the railroad company are liable for damage to plaintiff's lands situated on a stream, occasioned by an overflow of water, caused by the construction of the road over the stream, and through its banks. [16 *Ad. & El.*, 643.] *Ct. of Appeals*, 1855, *Brown v. Cayuga & Susquehanna R. R. Co.*, 12 *N. Y.* (2 *Kern.*), 486.

154. Court. The charter of a railroad corporation required it, in case of disagreements as to price of land, to apply to a vice-chancellor. An amendatory act transferred the authority of the vice-chancellor to any court of record of the county where the land was taken. *Held*, that a County Court had jurisdiction. *Supreme Ct.*, 1858, *Mosier v. Hilton*, 15 *Barb.*, 657.

155. Notice. Under a statute requiring that reasonable notice, of not less than ten days, should be given of appraising damages, and plea setting up title by virtue of proceedings under the act, alleging only that reasonable notice was given, is bad. *Ct. of Appeals*, 1854, *Cruger v. Hudson River R. R. Co.*, 12 *N. Y.* (2 *Kern.*), 190.

156. Validity of notice of appraisement, of summons of jury, and sheriff's return, and of proceedings of appraisal and power to adjourn the same, under a peculiar charter. *Id.*

157. The time of completing the Harlem railroad, as fixed by its charter and statutes extending the same, only applied to the road as originally authorized; and the continuation of the road into the city, which by other statutes was authorized to be done, with the permission of the Corporation, may be made at any time during the continuance of the charter.

Rape.

Real Actions.

Chancery, 1841, *Hamilton v. N. Y. & Harlem R. R. Co.*, 9 *Paige*, 171.

158. Hudson River Road—Alterations. The Hudson River Railroad Company has, under the fifth section of its charter, power to alter its line, so as to take different land of the same owners, or a part of the same land previously designated on the filed map. *N. Y. Superior Ct.*, 1850, *Hudson River R. R. Co. v. Outwater*, 8 *Sandf.*, 689.

159. — title. Where proceedings of the Hudson River Railroad Company in acquiring land, have been in conformity with its charter, its title becomes perfect on the filing and recording of the rule of court made on the certificate of the commissioners, and payment or deposit of the compensation awarded; and an order vacating the proceedings does not divest the title. *Supreme Ct.*, 1858, *Vischer v. Hudson River R. R. Co.*, 15 *Barb.*, 87.

160. — cutting off wharf. The provision in the charter of the Hudson River Railroad Company, that if any wharf or dock should be cut off by the railroad the company must extend or restore it, does not apply to a wharf within a bay which is crossed by the road without crossing the wharf. *Ct. of Appeals*, 1854, *Tillotson v. Hudson River R. R. Co.*, 9 *N. Y. (5 Seld.)*, 575.

161. — bays. The provision of the charter of the Hudson River Railroad Company (§ 15),—requiring them to provide draw-bridges where their track crosses bays,—means such bays only as have a general navigation. *Supreme Ct.*, 1856, *Getty v. Hudson River R. R. Co.*, 21 *Barb.*, 617.

162. Remedy under the charter of the Hudson River Railroad Company for one whose access to the river has been cut off without compensation or restoring it. *N. Y. Superior Ct.*, 1852, *Furniss v. Hudson River R. R. Co.*, 5 *Sandf.*, 551.

RAPE

1. Definition and punishment of. 2 *Rev. Stat.*, 668, § 22.

2. To warrant a conviction for rape upon a female above the age of ten (2 *Rev. Stat.*, 668, § 22, subd. 2), it ought to appear that there was the utmost reluctance and resistance upon her part. *Oyer & T.*, 1854, *People v. Morri-*

son, 1 *Park. Cr.*, 625. *Supreme Ct.*, 1838, *People v. Abbot*, 19 *Wend.*, 192.

As to Evidence in cases of rape, see EVIDENCE, 2850-2852.

As to Indictment for rape, see INDIOTMENT, 88.

REAL ACTIONS.

1. A writ of right lies only for the recovery of a fee simple, and regards only the legal estate; though it seems that in the case of wild lands, actual entry is not necessary to be shown. *Supreme Ct.*, 1834, *Bradstreet v. Olarke*, 12 *Wend.*, 602, 677.

2. The heir may count on the ancestor's seizin of lands which were wild and uncultivated, notwithstanding the ancestor was never in possession. *Supreme Ct.*, 1847, *Willson v. Betts*, 4 *Den.*, 201.

3. A devisee cannot maintain a writ of right upon the seizin of his testator. [*Co. Lit.*, 298, § 514; 2 *Saund.*, 45, b.; 1 *H. Bl.*, 1, a.; *Com. Dig.*, tit. *Droit*, C, 8; 2 *Sch. & Lef.*, 104; 2 *Merriv.*, 255.] *Supreme Ct.*, 1831, *Williams v. Woodward*, 7 *Wend.*, 251. Compare *Bradstreet v. Olarke*, 12 *Id.*, 602, 678.

4. Special imparlance on appearance of tenant. *Haviland v. Bond*, 4 *Johns.*, 309; *Whitbeck v. Shoenfelt*, 9 *Id.*, 265.

5. Tenant is bound to plead on first day of term, after special imparlance. *Supreme Ct.*, 1800, *Haines v. Budd*, 1 *Johns. Cas.*, 335.

6. Pleadings and record. See *Malcom v. Gardner*, 1 *Cow.*, 187.

7. Practice generally. *Malcom v. Rogers*, 1 *Cow.*, 186, n.; *Malcom v. Gardner*, *Id.*, 187.

8. Mode of pleading in dower *unde nihil habet*. *Allan v. Smith*, 1 *Cow.*, 180.

9. The tenant may be called on the first day of the term, and his default entered for his non-appearance, and if he does not appear, on the *quarto die post*, and excuse his default, he will be nonsuited. *Supreme Ct.*, 1800, *Swift v. Livingston*, 2 *Johns. Cas.*, 112; *S. C.*, *Col. & C. Cas.*, 122.

10. Tenant must appear and plead on the *quarto die post*. Plea of non-summone must be verified. *Supreme Ct.*, 1806, *St. Croix v. Sands*, 1 *Johns.*, 328.

11. Demandant. Tenant is demandable on the *quarto die post* only, but the demandant

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on the *primo die placiti*, and if he does not appear, his default may be entered, and this subjects him to a nonsuit, unless he excuses it on the *quarto die post*. [Carth., 178.] *Supreme Ct.*, 1800, *Swift v. Sacket, Col. & C. Cas.*, 124.

12. Effect of omitting to enter ne recipiatur, on *quarto die post*. *Supreme Ct.*, 1800, *Sacket v. Lothrop, 1 Johns. Cas.*, 249; *S. C., Col. & C. Cas.*, 94.

13. After rule to the sheriff to return *sedentia curia*, the demandant is considered as continued in court from day to day during the term. *Ib.*

14. Default of demandant on the last day of term, excused. *Van Bergen v. Palmer, 18 Johns.*, 504.

15. Defaults in, may be opened. *Allan v. Smith, 20 Johns.*, 477.

16. The mise, tender of the demi-mark, and the trial. *Ten Eyck v. Waterbury, 7 Cow.*, 51.

17. View. In general, tenant is entitled to a view. *Supreme Ct.*, 1800, *Freeholders of Gravesend v. Voorhis, 1 Johns. Cas.*, 287.

So, also, is the demandant. 1800, *Haines v. Budd, Id.*, 885.

But under 1 Rev. L., 86, a view is not to be granted unless it is shown to be necessary. 1822, *Ostrander v. Kneeland, 20 Johns.*, 276; and see *Vischer v. Conant, 4 Cow.*, 396, and 398, *note*.

18. The demandant must sue out the writ, though it be asked for by the tenant. *Supreme Ct.*, 1800, *Scofield v. Lodie, 1 Johns. Cas.*, 895.

19. On the issue on a writ of right, the only question is, which of the parties has the better right, and the evidence to establish the right is subject to the same rules as in other cases. *Supreme Ct.*, 1802, *Nase v. Peck, 3 Johns. Cas.*, 128.

20. Judgment not to be granted after irregular service or defective return of summons; for the tenant is entitled to an alias. *Supreme Ct.*, 1800, *Scofield v. Lodie, 1 Johns. Cas.*, 895.

21. Motion for judgment necessary. *Van Drisner v. Christie, 3 Cai.*, 189; *S. C., Col. & C. Cas.*, 482.

22. Costs. The demandant, in a real action, neither recovers nor pays costs, because he recovers no damages. [10 Co., 116; 1 H. Bl., 11; 7 T. R., 268.] But in many cases the courts relieve upon terms, including the

payment of costs. *Supreme Ct.*, 1800, *Phillips v. Peck, 2 Johns. Cas.*, 104; *S. C., Col. & C. Cas.*, 112.

23. An elector, having left the State, leave to amend the panel by adding another, was granted. *Haughtalling v. Bronk, 3 Cai.*, 190; *S. C., Col. & C. Cas.*, 495.

24. Electors of grand assize entitled to three dollars per diem for going and returning. *Bryan v. Seely, 18 Johns.*, 128.

25. Abolition of real actions. 2 *Rev. Stat.*, 848, § 24.

26. The Revised Statutes—which abolish the proceeding as to voucher in real actions—do not apply to suits then pending. *Supreme Ct.*, 1880, *Bradstreet v. Clarke, 4 Wend.*, 211.

REAL PROPERTY.

[The cases and statutes here referred to, relate to the general principles of the title and enjoyment of real property, many of which will be found more fully illustrated in detail under the heads enumerated at the end of each division of this article.]

I. OF THE TITLE TO REAL PROPERTY.

II. THE USE OF REAL PROPERTY.

III. ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

I. OF THE TITLE TO REAL PROPERTY.

1. The people of the State are the original source of title to land; and all lands declared allodial. 1 *Rev. Stat.*, 718, §§ 1, 8; *Const. of 1846*, art. 1, §§ 11, 13. To similar effect, 1815, *Jackson v. Hart, 12 Johns.*, 77.

2. French patents. The courts cannot take notice of any title to land not derived from our own government, and verified by a patent under the great seal of the State, or the province of New York. Claims to lands within this State, founded on French grants, under the capitulation of Montreal, in 1760, or the treaty of 1763, are claims which might have been presented and urged to the government, but not a legal title which can be recognized by the court. *Supreme Ct.*, 1809, *Jackson v. Ingraham, 4 Johns.*, 168. Followed, 1815, *Jackson v. Waters, 12 Id.*, 865.

3. Lands under water. In this country, the People, who, by virtue of their sovereignty, own the lands under water of navigable streams or arms of the sea, have a power of disposal thereof, which is more extensive than that of the King of England, in respect to

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such soil in England. The Legislature of this State, like Parliament, may grant such soil, especially for purposes of public welfare, which, in their judgment, require it. *Ct. of Appeals*, 1852, *Gould v. Hudson River R. R. Co.*, 6 *N. Y. (2 Seld.)*, 522. Compare *Rogers v. Jones*, 1 *Wend.*, 287. To similar effect, *Ct. of Errors*, 1829, *Lansing v. Smith*, 4 *Wend.*, 9; affirming *S. C.*, 8 *Cow.*, 146. *S. P.*, *Ct. of Appeals*, 1859, *People v. Tibbetts*, 19 *N. Y. (5 Smith)*, 528.

4. Title to lands under water, above tide-water—discussed. *Canal Appraisers v. People*, 17 *Wend.*, 570.

5. The owner of a bank of a navigable river has no right of private property in the water, or lands under water, between high and low water marks; and therefore the construction of a railroad across a deep bay of the Hudson river, in pursuance of an act of the Legislature, and in conformity with its provisions, though it cut off a riparian proprietor from the free use of the river, except through a draw in the road, does not give such proprietor any right of action for his damages. *Ct. of Appeals*, 1852, *Gould v. Hudson River R. R. Co.*, 6 *N. Y. (2 Seld.)*, 522.

6. A riparian owner, on the Genesee river, at Rochester, holding under a grant from the State, fortified by a long adverse possession, is both by the common law and by virtue of his peculiar title, the owner of the adjacent bed of the river, and of the use of the waters thereof, and is entitled to compensation for the diversion of the waters to public use, to the injury of his mills, &c. *Ct. of Errors*, 1841, *Commissioners of Canal Fund v. Kempshall*, 26 *Wend.*, 404; and see *Exp. Jennings*, 6 *Cow.*, 518.

7. Accession. Seaweed, thrown up by the sea, may be considered as one of those marine increases arising by slow degrees, and according to the rule of common law, belongs to the owner of the soil. If marine increase be by small and almost imperceptible degrees, it goes to the owner of the land; but if it be sudden and considerable, it belongs to the sovereign. [2 *Black. Com.*, 261; *Harg. Law T.*, 28.] *Supreme Ct.*, 1807, *Emans v. Turnbull*, 2 *Johns.*, 318.

8. A right of fishing in any water gives no power over the land. [Sav., 11; 8 *T. R.*, 256.] *Supreme Ct.*, 1807, *Cortelyou v. Van Brundt*, 2 *Johns.*, 357.

9. General provisions respecting the creation and division of estates in land. 1 *Rev. Stat.*, 722.

10. An estate during widowhood is a freehold estate during its continuance. If the widow grants in fee, the grantee takes her estate, and if he dies intestate with respect to it, his personal representatives may convey, and their grantees may levy a fine, binding upon strangers. *Supreme Ct.*, 1848, *Roseboom v. Van Vechten*, 5 *Den.*, 414.

11. Fixtures. Although the rule as to fixtures is relaxed as between landlord and tenant, it is not relaxed as between grantor and grantee. *N. Y. Com. Pl.*, 1855, *Main v. Schwarzwaelder*, 4 *E. D. Smith*, 278.

Consult, also, *FIXTURES*.

12. Improvements. One who has made improvements upon land, the legal title of which was in another, where there has been no fraud, and no acquiescence on the part of the latter, after he had knowledge of his legal rights, cannot have relief in equity as to the value of his improvements. *Chancery*, 1887, *Putnam v. Ritchie*, 6 *Paige*, 390.

13. Notice. Of the general rule that the possession of land is notice to others of the possessor's title, and its exceptions. [4 *Kent's Com.*, 179; 6 *Wend.*, 218, 226; 10 *Barb.*, 97, 354; 12 *Id.*, 605.] *Supreme Ct.*, 1856, *Cook v. Travis*, 22 *Barb.*, 388.

Consult, also, *NOTICE*.

14. That a covenant of a grantee of lands not to establish thereon any thing which may be a nuisance to the neighboring owners, creates an easement or servitude in favor of prior grantees of neighboring lands and those claiming under them. [4 *Paige*, 510; 8 *Id.*, 351.] *Supreme Ct.*, 1856, *Brouwer v. Jones*, 23 *Barb.*, 158.

Consult, also, *COVENANTS, and INJUNCTION*.

15. At law, an equitable claim cannot prevail against the legal title. *Supreme Ct.*, 1806, *Jackson v. Chase*, 2 *Johns.*, 84; 1807 [citing, also, *Bull N. P.*, 110; 2 *T. R.*, 684; 7 *Id.*, 49; 8 *Id.*, 128; 5 *East*, 188; 6 *Ves.*, 89; 2 *Ev. Poth.*, 195], *Jackson v. Pierce*, *Id.*, 221; 1808, *Jackson v. Deyo*, 3 *Id.*, 422; 1811, *Jackson v. Van Slyke*, 8 *Id.*, 487. *Ct. of Errors*, 1826, *Sinclair v. Jackson*, 8 *Cow.*, 548; and see *Jackson v. Sisson*, 2 *Johns. Cas.*, 321.

So held, of a mortgage. *Supreme Ct.*, 1830, *Jackson v. Parkhurst*, 4 *Wend.*, 369.

So held, of a resulting trust. 1848, *Moore v.*

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Spellman, 5 *Den.*, 225; overruling Jackson v. Townsend, cited in 7 *Wend.*, 879.

Otherwise under the Code of Procedure.

16. Right to enter. One having the legal title by purchase at a judicial sale, may enter peaceably. *Supreme Ct.*, 1806, McDougall v. Sitcher, 1 *Johns.*, 42; 1826, Orser v. Storms, 9 *Cow.*, 687.

17. A grant of timber standing, with the right to enter, to cut and remove it until a certain day,—*Held*, only a grant of such as should be removed on or before that day. *A. V. Chan. Ct.*, 1843, McIntyre v. Barnard, 1 *Sandf. Ch.*, 52.

18. Where a person enters under a parol agreement for the purchase of the land, cuts timber, and afterward rescinds the agreement, he is a trespasser. The agreement is not a license to enter and cut. *Supreme Ct.*, 1812, Suffern v. Townsend, 9 *Johns.*, 85. To somewhat similar effect, 1816, Ives v. Ives, 13 *Id.*, 285. Consult, also, LICENSE; and VENDOR AND PURCHASER.

19. When land is charged with a burden, the charge ought to be equal, and one part ought not to bear more than its due proportion; and equity will preserve this equality by compelling the owner of each part to a just contribution. [3 *Co.*, 14; 2 *P. Wms.*, 98.] *Chancery*, 1815, Stevens v. Cooper, 1 *Johns. Ch.*, 425.

20. The principle of the statute of quia emptores [18 Ed. I., A. D. 1290], which provided that freeholders might sell subject to the services, &c., due the lord of the fee, was brought by our ancestors to the colony of New York, and became a part of its law, and of the law of this State, independent of the statute of 1787, abolishing tenures. *Ct. of Appeals*, 1859, Van Rensselaer v. Hays, 19 *N. Y. (5 Smith)*, 68; affirming S. C., 27 *Barb.*, 104. The contrary view was taken in *De Peyster v. Michael*, 6 *N. Y. (2 Seld.)*, 467.

21. Possibility. The expectancy of an heir apparent, or presumptive, is less than a possibility [1 *Ves.*, 409; *Co. Litt.*, 265, a], and cannot be released or conveyed. Though by a covenant of warranty it might pass by estoppel. *Supreme Ct.*, 1880, Jackson v. Bradford, 4 *Wend.*, 619. Compare Lawrence v. Bayard, 7 *Paige*, 70.

22. Pre-emption. The good-will of the State to give to actual settlers the benefit of their improvements and the pre-emption right

of purchase, is a valuable interest, which is a fair subject of contract and transfer, and will be protected in equity. *Chancery*, 1844, Armour v. Alexander, 10 *Paige*, 571.

Otherwise, under the acts of Congress, of the right of pre-emption of a settler upon lands of the United States. *A. V. Chan. Ct.*, 1844, Craig v. Tappin, 2 *Sandf. Ch.*, 78.

23. The breach of a condition subsequent does not divest the estate, but confers a right of entry upon the grantor or his heirs, and may be waived. *Supreme Ct.*, 1852, Ludlow v. N. Y. & Harlem R. R. Co., 12 *Barb.*, 440. *N. Y. Superior Ct.*, 1855, Phoenix v. Commissioners of Emigration, 12 *How. Pr.*, 1; affirming S. C., 1 *Abbotts' Pr.*, 466.

24. Waiver. That the owner's non-interference with an encroachment on his land, might excuse a trespass, but could not operate to divest and transfer the title. *N. Y. Superior Ct.*, 1856, Miller v. Platt, 5 *Duer*, 272.

25. Effect of an allotment in partition of lands which had been reduced by a local improvement, and partitioned under peculiar circumstances. *Bartow v. Draper*, 5 *Duer*, 180.

26. Buying in title. The party in possession, or his grantor, may always buy in an outstanding title for his benefit. The prohibition from purchasing pretended titles was intended for the benefit of the party at the time in possession; and it ought not to be used as a weapon against such party. *Supreme Ct.*, 1811, Jackson v. Given, 8 *Johns.*, 187. Consult, also, CHAMPERTY.

27. Statute proceedings. Where proceedings are authorized by statute, in derogation of the common law by which the title to real property is taken from the owner and transferred to another, every requisite of the act, having the semblance of benefit to the former, must be strictly complied with. [6 *Wheat.*, 119; 4 *Id.*, 77; 7 *Cow.*, 88; 7 *Wend.*, 143; 20 *Id.*, 249; 1 *Hill*, 180.] *Supreme Ct.*, 1843, Hubbell v. Weldon, *Hill & D. Supp.*, 189.

28. Location. That in all cases of uncertainty in the location of patents and deeds, courts hold the party to his actual location. *Jackson v. Murray*, 7 *Johns.*, 5.

29. Long acquiescence in an erroneous location, will authorize the jury to find that the plaintiff had agreed to a location different from his deed; and, whether he knew his rights or not, such acquiescence, or location,

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will conclude him. [1 Cai., 368; 3 Johns., 8, 269; 7 Id., 245.] *Supreme Ct.*, 1827, Rockwell v. Adams, 7 Cow., 761.

30. By a map of a tract of land for which patents were issued, lots No. 15 and No. 16 were made to join each other, and, by the mistake or fraud of the surveyor, according to the courses and distances of his survey, a piece of land was left between them. *Held*, that after various mesne conveyances during a lapse of nearly eighteen years, the parties were bound by their actual locations under their deeds, according to the original survey. *Supreme Ct.*, 1810, Jackson v. Ogden, 7 Johns., 288.

31. Where a survey was made by the direction and under the observation of the grantee, —*Held*, that he could not, especially after the lapse of twenty-six years, vary the location, but must be deemed to have ratified the survey. *Supreme Ct.*, 1812, Jackson v. Smith, 9 Johns., 100.

32. The owners of the several lots surveyed, patented, and described, are bound by their actual locations, according to the lines on the ground, without regard to the circumstance, that some of the lots would exceed and some fall short of the quantity of acres mentioned in the patents. *Supreme Ct.*, 1825, Jackson v. Tallmadge, 4 Cow., 450; S. P., 1819, Jackson v. Freer, 17 Johns., 29.

33. Where in the description of premises in a deed conveying lands, course and distance, and monument are given, the premises must be located according to the deed; and all parol evidence of the intent, the declarations, and acts of the parties, going to establish a different location, is inadmissible as contradicting or varying the deed, unless a possession be shown under claim of title continued for such length of time as will be a bar to a recovery in an action of ejectment. *Supreme Ct.*, 1888, Clark v. Wethey, * 19 Wend., 820.

34. **Boundaries.** Mere silent acquiescence in an adverse possession, according to an erroneous line, is no bar till it shall have continued for the time demanded by the Statute of Limitations, unless the jury infer an agreement. *Supreme Ct.*, 1888, Jackson v. McConnell, 19 Wend., 175.

35. Exceptions to the rule that a crooked

fence will be regarded as a boundary, if fixed and acquiesced in by the owners of adjoining lands. *Lamb v. Coe*, 15 Wend., 642.

36. Where a grant is made by the State to riparian owners upon an irregular water-front of the land under water to a certain distance from the shore, and an apportionment of the land so granted is afterwards made upon a basis not strictly correct, and one of such proprietors has made improvements, laid out streets and lots, and executed conveyances according to such apportionment during a less period than twenty years, he will be held to have acquiesced in such apportionment so far that he cannot claim a new partition upon technically correct principles. As such acquiescence does not act merely as an estoppel, it is not necessary that the party seeking to take advantage of it should have been induced, by the conduct of the party acquiescing, to make improvements according to such apportionment. *Ct. of Appeals*, 1852, O'Donnell v. Kelsey, 10 N. Y. (6 Seld.), 412; affirming S. C., 4 Sandf., 202.

37. An easement may be granted with the reservation of an absolute power of revocation. *Supreme Ct.*, 1842, *Exp.* Miller, 2 Hill, 418.

38. **Canaan.** Construction and effect of the act of March 22, 1791, relative to title of lands in Canaan. *Jackson v. Benjamin*, 8 Johns., 101.

As to the **Abolition of tenures**, see **TENURES**.

As to the power of **Alienation** and restrictions thereon, see **SUSPENSION OF POWER OF ALIENATION**; **TRUST**; and **ACCUMULATIONS**.

As to **Boundaries**, **Commons**, **Fences**, **Pews**, **Watercourses**, and **Wharves**, see those titles.

As to the **Capacity** of particular classes of persons, see **ALIEN**; **CORPORATION**; **HABITUAL DRUNKARDS**; **HUSBAND AND WIFE**; **INDIANS**; **INFANTS**; **INSANE PERSONS**; **MUNICIPAL CORPORATIONS**; and the titles there referred to.

As to **Conveyances** of real property, see **ACKNOWLEDGMENT OF DEEDS**; **CHAMPERTY AND MAINTENANCE**; **COVENANT**; **DEDICATION**; **DEED**; **FINE AND RECOVERY**; **FORECLOSURE**; **FRAUDULENT CONVEYANCES**; **MORTGAGE**; **RECORDING DEEDS**; **SEAL**.

As to the effect of **Judgments and Decrees** upon real property, and sales thereof under them, see **EXECUTION**; **JUDGMENT**; **JUDICIAL SALE**.

* See this case in table of **CASES CRITICISED**, Vol. I., *Ante*.

The Use of Real Property.

As to Particular estates, see ADMEASUREMENT OF DOWER; COPARCENARY; CURTESY; DEVISE; DOWER; ENTAILS; QUARANTINE; REMAINDER; TENANT FOR LIFE; TENANT IN COMMON.

As to Possession and acts in pais as affecting title, see ADVERSE POSSESSION; DISSEIZIN; ENTRY; ESTOPPEL; LIMITATIONS; SEIZIN.

As to the Powers of agents and trustees of various classes, see POWERS; TRUSTS; and the titles there referred to.

As to Proceedings to take real property for public use, see AD QUOD DAMNUM; CANALS; COMPENSATION; CONSTITUTIONAL LAW; HIGHWAYS; MUNICIPAL CORPORATIONS, and the titles there referred to; and titles of various classes of corporations authorized to take lands.

As to Public lands, see COMMISSIONERS OF LAND-OFFICE; MILITARY BOUNTY LANDS; PATENTS (FOR LANDS); SALT SPRINGS.

As to Succession to real property, see DESCENT; ESCHEAT; LEGATEES; HEIRS; and DEVISEES.

As to Transmission of property by will, see DEVISE; WILL, and the titles there referred to.

As to the Validity and effect of contracts relating to real property, see CONTRACTS, and the titles of particular classes of contracts, which relate to it, there referred to; LANDLORD AND TENANT; VENDOR AND PURCHASER.

As to What is real property, see FIXTURES; and, also, as between personal representative and heir, see DESCENT; DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; and WILL.

II. THE USE OF REAL PROPERTY.

39. That every man may use his own land for all the purposes to which such lands are usually applied, without being answerable for the consequences, provided he exercises proper care and skill to prevent any unnecessary injury to the adjacent landowner. *Ct. of Appeals*, 1850, *Radcliff v. Mayor, &c.*, of Brooklyn,* 4 N. Y. (4 Comst.), 195.

40. What things a man may do on his own land and not be liable to adjoining owners for consequences. *Id.*

41. If one sets fire to his own fallow ground, and it spreads to the woodland of his

neighbor, he is not liable in damages to the latter, unless there was some negligence or misconduct of himself or his servants. A man may lawfully keep fire on his own premises. [8 Bl. Com., 43; 1 Noy's Max., c. 44.] *Supreme Ct.*, 1811, *Clark v. Foot*, 8 Johns., 421. Approved and followed, 1856 [citing, also, 4 N. Y., 195], *Stuart v. Hawley*, 22 Barb., 619. Compare *Radcliff v. Mayor, &c.*, of Brooklyn, 4 N. Y. (4 Comst.), 195.

42. The mere fact that the fire was set in a dry time, in July, upon low, swampy ground, previously burnt over and destitute of brush, does not show negligence. *Supreme Ct.*, 1856, *Stuart v. Hawley*, 22 Barb., 619.

43. Plaintiff's wood was on defendant's land, and defendant having given plaintiff a reasonable notice of his intention, and requiring him to remove it, set fire to his fallow, and the wood still remaining upon the land, was burned. *Held*, that the defendant was not liable therefor in the absence of wilful wrong or gross negligence. *Supreme Ct.*, 1854, *Bennett v. Scutt*, 18 Barb., 347.

44. Grant to railroad. Where an owner of land grants a portion of it to a railroad company for their railroad, he holds his land subject to the consequences attendant upon the use of the portion granted; and particularly such as would result from the running of engines, and the consequent exposure of property, on his adjacent land, to such injury and loss as would naturally result therefrom, with ordinary care on the part of the company. [9 Metc., 553; 4 Cush., 288; Shep. Touchst., 89.] *Supreme Ct.*, 1854, *Rood v. N. Y. & Erie R. R. Co.*, 18 Barb., 80.

45. Windows. One is not liable for building on his own land, whereby his neighbor's lights are obstructed. *Supreme Ct.*, 1835, *Mahan v. Brown*, 18 Wend., 261; 1838, *Parker v. Foote*, 19 Id., 309; and see ANCIENT LIGHTS; and EASEMENT, 6.

46. A man has a right to build a fence upon his ground for the purpose of darkening the windows of his neighbor. *Supreme Ct.*, 1856, *Pickard v. Collins*, 23 Barb., 444.

47. Rain water. Where the owner of land permits water to fall from the roof of his building, even upon his own soil, but so near the boundary as to overflow his neighbor's ground, he is liable for the injury done thereby. *Supreme Ct.*, 1853, *Bellows v. Sackett*, 15 Barb., 96.

* In this case, *Lasala v. Holbrook* (4 Paige, 169), where the right to the natural support of adjacent land was asserted, is questioned; but see *infra*.

The Use of Real Property.

48. Nuisance. If an owner so constructs and adapts a building, that in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, he is liable for the nuisance thus caused by his tenants to whom he lets the same. But if it proved a nuisance by reason of a special, unusual circumstance,—*e. g.*, water in the cellar,—the defendant is not liable for the nuisance, unless he knew, or had reason to believe, when he let the building, that the use of it in the ordinary mode would prove a nuisance. [4 Den., 311.] *Supreme Ct.*, 1856, *Pickard v. Collins*, 28 *Barb.*, 444.

49. Statute authority. Where a company is authorized, by statute, to cut a canal, they are not liable, in an action by the owner of the land through or near which the canal is cut, for injuries to his land, arising necessarily from the act of making it, pursuant to the statute, or from its contiguity; but only for such damages as result from neglect in keeping the canal and its embankments in repair. [Esp. Dig., 598; 1 Str., 384; 2 Lev., 72; 4 T. R., 794.] *Supreme Ct.*, 1807, *Steele v. Western Inland Lock Navigation Co.*, 2 *Johns.*, 288.

50. Consent to obstruction of water-course. If the owner of land upon a water-course, across which the highway officers built a bridge, concurs in making the bridge in the manner which they adopt, his grantee of the lands cannot recover for injuries to the lands resulting from such mode of construction. But merely insisting upon his rights in respect to a certain flume, would not preclude a recovery, unless yielding what he claimed would prevent making a safe and proper bridge. *Ct. of Appeals*, 1857, *Conrad v. Trustees of Ithaca*, 16 *N. Y. (2 Smith)*, 158.

51. It is no objection to a recovery for injury to a building, in such case, that it was erected in a spot which had become dry land by change of the channel. *Id.*

52. Excavations. Where one, making an excavation for the improvement of his own lot, digs so near the foundation of a building on the adjacent lot, as to cause it to crack and settle, he is not liable for the injury, unless negligence in not taking reasonable care to prevent the injury is shown, or malice. [15 *Johns.*, 213; 8 *Id.*, 421; 2 *Roll. Abr.*, 565; 1 *Sid.*, 167; 12 *Mass.*, 220.] *Supreme Ct.*, 1819, *Panton v. Holland*, 17 *Johns.*, 92.

An allegation that defendant did the act,

maliciously intending to injure the plaintiff,—*Held*, not sufficient. *Id.*

53. That ancient buildings, and those which were granted by the owner of the lot on which the excavation is made, or by those from whom he derives title, form an exception to this rule. *Chancery*, 1888, *Lasala v. Holbrook*, 4 *Paige*, 169.

54. An owner of land has not a right, by excavating upon his own soil, to remove the natural support which his land should afford to the land of an adjoining owner; especially where his excavations are not for ordinary purposes, of improvement or building, but for using the soil removed. [Reviewing many authorities, and disapproving 4 *N. Y.*, 195; *g. v.*, *supra*, 39.] *Supreme Ct.*, 1855, *Farrand v. Marshall*, 21 *Barb.*, 409. To the same effect was a previous decision in 8 *C. (Sp. T.*, 1858), 19 *Id.*, 880.

55. Blasting. The owner of land is limited in his use of it, by the rights of others to the lawful possession of theirs. In making use of his own he is liable for direct injuries to their possession without regard to the extent or motives of the aggression. Thus the owner who in making a lawful excavation on his own land, casts earth and stones upon that of the neighbors by blasting, is answerable for the damage, although negligence or want of skill in the blasting is neither alleged nor proved. *Ct. of Appeals*, 1849, *Hay v. Cohoes Co.*, 2 *N. Y. (2 Comst.)*, 159; affirming 8 *O.*, 8 *Barb.*, 42. *Tremain v. Cohoes Co.*, 2 *N. Y. (2 Comst.)*, 163. To the same effect, *N. Y. Com. Pl.*, 1853, *Gourdier v. Cormack*, 2 *E. D. Smith*, 200; and see *Radoliff v. Mayor, &c.*, of Brooklyn, 4 *N. Y. (4 Comst.)*, 105.

56. And in such case the tenant of the premises trespassed upon may have an action for the injury to his possession as well as may the reversioner, under the statute, for the injury to the reversion. *N. Y. Com. Pl.*, 1853, *Gourdier v. Cormack*, 2 *E. D. Smith*, 200; 8 *P.*, 1854, *Hardrop v. Gallagher*, *Id.*, 523.

57. Act of third person. Where the defendant permitted another person to remove earth from a hill on defendant's land, and it was so negligently done that earth slid from the hill upon plaintiff's land;—*Held*, that defendant was liable therefor. It is a general principle of the common law, that the owner of premises is bound so to control the use of them as not to produce injury to others; and

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if he permits another to place his premises in such a situation as to cause an injury, he will be answerable. [2 Den., 445; 1 Bos. & P., 404.] It is to be intended that the owner has control over those who work upon his premises; and he cannot discharge himself from that intentment of law by any act or contract of his own. *Supreme Ct.*, 1848, *Gardner v. Heartt*,* 2 Barb., 165; and see a former decision in S. C., 1 Den., 466.

58. Underground stream. The owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by so doing he intercepts one of the underground sources of a spring on his neighbor's land which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor. A different rule should be applied to a sub-surface stream from that which applies to an ordinary watercourse. *Supreme Ct.*, 1855, *Ellis v. Duncan*, 21 Barb., 230; S. C., 11 How. Pr., 515.

59. Fencing. No one but the adjoining owner or possessor has any interest in the duty or obligation of another to build or maintain a division fence. [17 Wend., 320; 12 Eng. Law & Eq. R., 520.] The omission to do so, though the want of the fence results in injury to a third person, gives such person no ground of action. Thus where a laborer being at work on defendant's land, under a steep bank, a horse escaped from a neighboring field, through the want of a fence, and fell on plaintiff. *Held*, that this gave him no cause of action. *Supreme Ct., Sp. T.*, 1854, *Ryan v. Rochester & Syracuse R. R. Co.*, 9 How. Pr., 458.

60. A landlord may maintain an action on the case against a third person for so disturbing his tenant's possession, with a wrongful and malicious intent to injure the landlord, that the tenant was obliged to abandon the possession, whereby the landlord lost his rent which he would otherwise have received, and the premises sustained injury and dilapidation, by reason of their remaining unoccupied during the remainder of the year. *N. Y. Superior Ct.*, 1828, *Aldridge v. Stuyvesant*, 1 Hall, 210.

* Reversed, on the question of title, 1 N. Y. (1 Comst.), 528.

As to **Easements**, see **ANCIENT LIGHTS**; **EASEMENT**; **PARTY-WALLS**; **PRESCRIPTION**.

As to the law of **Landlord and Tenant**, see that title, and **LEASE**.

As to the **Maxim** that a man is not to use his property to the injury of others, see **MAXIMS**, 72, 246, 253, 290.

As to the validity and effect of **Particular agreements or relations**, see **CONTRACTS**, and the appropriate titles there referred to, and the topics under which such relations are treated, as **LANDLORD AND TENANT**; **TENANT FOR LIFE**, &c.

As to the **use of Real Property** by the public, see **BRIDGES**; **DEDICATION**; **FERRIES**; **HIGHWAYS**; **PLANK-ROAD COMPANIES**; **RAIL-ROAD COMPANIES**; **TURNPIKE COMPANIES**.

III. ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

61. For what ejectment lies. Whenever a right of entry exists, and the interest is tangible, so that possession can be delivered, ejectment will lie for it. A deed which reserves to the grantor, &c., "the right and privilege of erecting a mill-dam at a certain place described, and to occupy and possess the premises without any hindrance or molestation from the grantee or his heirs," reserves such an interest. *Supreme Ct.*, 1812, *Jackson v. Buel*, 9 Johns., 298.

62. The grant of a privilege to erect a thing on land, without defining the place where, or the quantity of ground to be occupied, does not, without an actual entry and location, confer such a right as to enable the lessee to maintain ejectment. *Supreme Ct.*, 1819, *Jackson v. May*, 16 Johns., 184.

63. Land under water. An action will lie to recover land under water, granted by the commissioners of the land-office for the purpose of erecting docks, &c., for commercial purposes. *Supreme Ct.*, 1858, *Champlain & St. Lawrence R. R. Co. v. Valentine*, 19 Barb., 484.

64. Reclaimed ground. Ejectment will lie for land once below high-water mark on navigable waters, but since raised above it by human labor. *Supreme Ct.*, 1848, *People v. Mauran*, 5 Den., 389.

65. Right of way. Ejectment does not lie for a mere right of way. As a general rule, it cannot be sustained for things that lie merely

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in grant, not capable of being delivered in execution. [2 Bac. Abr., 417; Adams on Ej., 16; 3 Bl., 199, n.; Runn. on Ej., 25; 1 Lee's Dict., 524; 2 Roll. R., 482; 1 Lill. Pr., 677; 1 M. & W., 201; 1 Ohip. Vt., 204.] *Supreme Ct., Sp. T., 1852, Northern Turnpike-road Co. v. Smith, 15 Barb., 355; S. P., 1851, Redfield v. Utica & Syracuse R. R. Co., 25 Id., 54; and see Jackson v. May, 16 Johns., 184.*

66. Overhanging wall. A portion of space occupied by the overhanging of a wall over land belonging to the plaintiff, may be recovered by him in an action under the Code to recover the possession of real property. *N. Y. Superior Ct., 1855, Sherry v. Freeking, 4 Duer, 452.*

67. Chattel. Defendant moved hay-scales on plaintiff's land. *Held*, that there being no proof of his subsequent occupation of it, ejectment did not lie. *Supreme Ct., 1828, Jackson v. Pike, 9 Cow., 69.*

68. Highway. The owner of a freehold over which a highway lies, can maintain ejectment for an encroachment thereon. [Smith's Lead. Cas., 183.] *Supreme Ct., 1854, Etz v. Daily, 20 Barb., 82; overruling dictum in Adams v. Saratoga & Washington R. R. Co., 11 Id., 414.*

69. The use of a highway by a railroad company, for their track, which does not exclude the public use, is not an occupation, an exercise of acts of ownership, or a claim of title or interest, within 2 Rev. Stat., 804, § 4—which authorizes actions of ejectment. *Supreme Ct., Sp. T., 1851, Redfield v. Utica & Syracuse R. R. Co., 25 Barb., 54.*

70. Notice to quit. Where defendant entered adversely, permission to continue in possession given to him by one of the lessors, and his disclaimer of holding adversely, do not make him a tenant, so as to entitle him to notice to quit. *Supreme Ct., 1807, Jackson v. Tyler, 2 Johns., 444.*

71. To sustain ejectment, a notice to quit is not necessary, unless where the relation of landlord and tenant existed. *Supreme Ct., 1808, Jackson v. Deyo, 8 Johns., 422; 1816 [citing 1 Johns., 822], Jackson v. Aldrich, 18 Id., 106.*

72. Where the relation of landlord and tenant is once established, it attaches to all who may succeed to the possession, through or under the tenant, either immediately or remotely; and this, though the purchaser from the lessee takes an absolute grant, not knowing

the tenancy. *Supreme Ct., 1825, Jackson v. Davis, 5 Cow., 128; 1827 [citing, also, 2 T. R., 58; 1 Id., 760, n.; 1 Cai., 444; 2 Johns. Cas., 228; 8 Johns., 223, 499], Jackson v. Harsen, 7 Id., 328; S. P., 1808, Jackson v. Seissam, 8 Johns., 499.*

73. Evidence to disprove the tenancy is admissible, though it also goes to disprove the landlord's title. *Supreme Ct., 1810, Jackson v. Vosburgh, 7 Johns., 186.*

74. After expiration of a lease, the tenant took a new lease, which did not include certain four acres covered by the first lease. Held, that his continued holding of the four acres could not be adverse. *Supreme Ct., 1842, Livingston v. Proseus, 2 Hill, 526.*

75. A landlord who has regained possession cannot maintain ejectment in order to bar the tenant's right under the lease. *Supreme Ct., 1805, Jackson v. Hake, 2 Cai., 335.*

76. Title in dispute. The plaintiff had been in possession of premises for several years, claiming title thereto, and the defendant went into possession under a contract with the plaintiff, by which the defendant agreed to purchase the plaintiff's improvements, and his title to the premises as soon as it should be settled, if it should prove to be good—the title, as stated in the contract, being then in dispute. *Held*, that this was abundant evidence of title in the plaintiff to sustain an action of ejectment, aside from the rights of the defendant under the contract. The prior possession of the plaintiff was *prima-facie* evidence of his title, and the defendant, by taking possession under him, was precluded from disputing his title, except to show that he, the defendant, was not in default in performing the contract. And this, notwithstanding the recital that the title was in dispute—a better title than the plaintiff's not being recognized. *Supreme Ct., 1856, Spencer v. Tobey, 22 Barb., 260.*

77. Mere possession of one who entered without claim of title, will not maintain the action. *Supreme Ct., 1798, Truesdale v. Jeffries, 1 Cai., 190, note.*

78. A mere possessory title is sufficient as against one who entered without claim or color of title; for he is a trespasser. *Supreme Ct., 1806, Jackson v. Hazen, 2 Johns., 22.*

79. A prior possession, short of twenty years, under a claim or assertion of right, will prevail over a subsequent possession short of

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twenty years, where no other evidence appears on either side. *Supreme Ct.*, 1818, *Smith v. Lorillard*, 10 *Johns.*, 388; 1825, *Jackson v. Denn*, 5 *Cow.*, 200. To similar effect, 1828, *Jackson v. Hubble*, 1 *Id.*, 618; and see *People v. Leonard*, 11 *Johns.*, 504.

80. But it will not so prevail when it has been voluntarily relinquished, without an *animus revertendi*. *Supreme Ct.*, 1886, *Whitney v. Wright*,* 15 *Wend.*, 171.

81. The rule that a prior possession, under a claim of right, and not voluntarily abandoned, will prevail in ejectment, over a subsequent possession by mere entry without any lawful right [10 *Johns.*, 388], is subject to the qualification that no other evidence of title appears on either side, and that the subsequent possession of the defendant was acquired by mere entry, without any lawful right. Where the subsequent possession is acquired by a recovery in ejectment, it affords a better presumption of right than the prior possession. *Ct. of Errors*, 1819, *Jackson v. Rightmyre*, 16 *Johns.*, 314; affirming *S. C.*, 18 *Id.*, 367. Followed, *Supreme Ct.*, 1827, *Jackson v. Walker*, 7 *Cow.*, 637.

82. Occasional resort to, or temporary occupation of open lands, not sufficient, without paper title distinctly describing the land. *Supreme Ct.*, *Sp. T.*, 1850, *Lane v. Gould*, 10 *Barb.*, 254.

83. In an action for the recovery of land, plaintiff is bound to show, either a prior actual possession, or a paramount legal title. *N. Y. Superior Ct.*, 1855, *Bartow v. Draper*, 5 *Duer*, 130; and see *Montgomery v. Johnson*, 9 *How. Pr.*, 282.

For further illustrations of these principles, see **EJECTMENT**.

As to **Draining swamps**, and **Private ways**, see those titles.

As to the **Liens of mechanics**, see **MECHANICS' LIEN**.

As to **Parties**, **Pleadings**, and **Evidence**, in actions relating to real property, see those titles.

As to actions and proceedings to recover **Possession**, see, also, **EJECTMENT**; **MESNE PROFITS**; **SUMMARY PROCEEDINGS**.

As to actions relative to the **Title** to real

property, see **CLOUD ON TITLE**; **DETERMINATION OF CONFLICTING CLAIMS**; **INJUNCTION**; **PARTITION**.

As to **Who may be made defendants**, see **PARTIES**.

As to **Wrongs** relating to real property, see **FORCEFUL ENTRY AND DETAINER**; **INTRUSION**; **NUISANCE**; **TRESPASS**; **WASTE**.

RECEIPT.

1. **Effect.** A receipt of payment for a bill of goods, unexplained or uncontradicted, is conclusive against a recovery for the goods. *N. Y. Com. Pl.*, 1859, *Lambert v. Seely*, 17 *How. Pr.*, 432.

2. Two partners having made an agreement with each other to unite in buying out the third on certain terms, the third executed a receipt for the consideration, referring to the agreement. *Held*, this was a recognition of the agreement, and bound him by all its terms as much as if he had signed it as a party. *N. Y. Superior Ct.*, 1856, *Buchanan v. Chesebrough*, 5 *Duer*, 238.

3. A receipt for a part-payment of a debt secured by a mortgage on chattels,—*Held*, not operative to release a part of the chattels under the circumstances, although the creditor had promised to release a part, on payment of a proportion of the debt. *N. Y. Superior Ct.*, 1858, *Olark v. Griffith*, 2 *Bow.*, 558.

4. A receipt for a balance due for timber delivered,—*Held*, in a peculiar case, no bar to a subsequent action for a misfeasance in regard to timber forming part of the same contract, but not delivered. *Supreme Ct.*, 1812, *Jenner v. Joliffe*, 9 *Johns.*, 381.

5. **Receipt in full.** One who gives a receipt under compulsion,—*e. g.*, where a person employed is refused the wages necessary for his support unless he will sign a receipt of a part-payment in full,—is not concluded by it, although it is expressed to be in full. *Supreme Ct.*, 1817, *Thomas v. McDaniel*, 14 *Johns.*, 185. *N. Y. Com. Pl.*, 1855, *Rourke v. Story*, 4 *E. D. Smith*, 524.

6. The words "in full," occurring in a receipt at the end of a specification of several demands, are not necessarily confined to the demand last mentioned, but may extend to the others. *Supreme Ct.*, 1848, *Bogart v. Van Velsor*, 4 *Edw.*, 718.

* See this case commented on in *Wheeler v. Eyrers*, 4 *Hill*, 446.

Rights and Liabilities of Receptors.

7. Receipt "in full,"—*Held*, open to proof that no money was paid, but only a check which was dishonored. *Supreme Ct.*, 1851, *Houston v. Shindler*, 11 *Barb.*, 36.

8. A receipt, although in full of all demands, and under seal, is no bar to a subsequent action, if it was given without any consideration. If given upon an actual part-payment, it would show an accord and satisfaction. *N. Y. Com. Pl.*, 1848, *Riley v. White*, 6 *N. Y. Leg. Obs.*, 272.

9. A receipt given to one of two joint and several debtors, for half the amount, "in full of his obligation," does not operate to discharge the other. *N. Y. Com. Pl.*, 1854, *Buckingham v. Oliver*, 3 *E. D. Smith*, 129.

10. A receipt "in full for timber and for all trespasses,"—*Held*, a bar to an action of *replevin* for timber taken. *Supreme Ct.*, 1850, *Taylor v. Harlow*, 11 *Barb.*, 282.

As to the validity of an **Accord and satisfaction**, proved by a receipt, see **ACCORD AND SATISFACTION**, 21, 22, 38, 43.

For the distinction between a receipt and a **Bill of lading**, see **BILL OF LADING**; **EVIDENCE**, 985-991.

As to use of receipts as instruments of **Evidence**, see **EVIDENCE**.

As to the effect of a receipt given for a **Note**, received in payment, see **DEBTOR AND CREDITOR**, 97; **PAYMENT**, 59.

As to **Forgery** of receipt, see **FORGERY**, 29.

As to the admissibility of **Parol evidence** to explain a receipt, see **EVIDENCE**, 969-984.

As to the construction and effect of receipts peculiar to **Particular trades** and employments, such as carriers' receipts, &c., see **BAILMENT**, 34, **BILL OF LADING**; **CARRIER**, 5, 28, 60, 61, 140; **CONTRACTS**, 435.

As to **Stealing** receipts, see **LARCENY**, 18, 19.

RECEPTOR.

1. **Liability.** A receptor to the sheriff is a naked bailee, and responsible only for gross negligence; and where the property is taken out of his possession by a paramount title,—*e. g.*, an execution levied upon it before it came to the defendant's possession,—he is not liable. *Supreme Ct.*, 1827, *Edson v. Weston*, 7 *Cow.*, 278. Compare *Phillips v. Hall*, 8 *Wend.*, 610.

2. **Power to sue.** A receptor to a sheriff

or constable, for goods levied upon, has no property in them, and cannot maintain trover. If he is in possession, it is merely as the officer's servant. [9 *Mass.*, 104, 265; 11 *Id.*, 211; 5 *Id.*, 308; 14 *Id.*, 217.] *Supreme Ct.*, 1817, *Dillenback v. Jerome*, 7 *Cow.*, 294; *S. P.*, 1832, *Mitchell v. Hinman*, 8 *Wend.*, 667; but see *Phillips v. Hall*, *Id.*, 610; and compare *Butts v. Collins*, 13 *Id.*, 189; *Miller v. Adsit*, 16 *Id.*, 335 (*q. v.*, *infra*, 3).

3. A receptor may maintain *replevin* for the property, if wrongfully taken from his custody. The receptor is not, in general, a mere servant, but is responsible to the officer. The goods are in custody of the law, while in his possession, and he is entitled to the protection of the law, as well as the officer himself would be. Moreover, it is well settled that trespass will lie; and *replevin* is a concurrent remedy; and the provisions of 2 *Rev. Stat.*, 522,—authorizing *replevin* suits,—apply to such case. *Ct. of Errors*, 1836, *Miller v. Adsit*, 16 *Wend.*, 335.

4. A receptor of goods to the sheriff may have trespass against a wrongdoer who takes them out of his possession. *Ct. of Errors*, 1834, *Butts v. Collins*, 13 *Wend.*, 189.

5. **Fraudulent receptor.** Under confession of judgment, an execution was taken out immediately, by consent, and the debtor delivered to the constable a third party's receipt for his goods, and while the goods were still in the debtor's possession, they were sold, by his consent, by the constable, and bought by the creditor, and the same receptor gave a new receipt for them, and left them in the debtor's possession. *Held*, that the receptor had no title, and could not maintain an action against another creditor who levied on them. *Supreme Ct.*, 1812, *Burnell v. Johnson*, 9 *Johns.*, 243.

RECEIVER.

[Under this title are presented cases relating to receivers, their appointment, and functions; but other cases, connected more or less closely with the same general subject, should be sought under **INJUNCTION**, and in those articles in which are treated the classes of cases where receivers are appointed, such as **CORPORATION**, **CREDITORS' SUITS**, **PARTNERSHIP**, &c.]

I. IN GENERAL.

II. IN SUITS IN EQUITY.

1. In what cases appointed.

2. Appointing. Giving security. Removing. Accounting.

In General.

8. *Obtaining title and possession in creditors' suits.*

III. IN ACTIONS UNDER THE CODE OF PROCEDURE.

I. IN GENERAL.

1. **Receivers of safety-fund banks**, provisions relating to. *Laws of 1829*, ch. 94.

2. **Fraudulent acts.** Receivers authorized to treat as void certain fraudulent acts. *Laws of 1858*, 506, ch. 814.

3. **Insolvents.** Receivers, &c., may petition for discharge of debtor of their estate. *Laws of 1850*, 392, ch. 210.

4. **Special act.** Receivers, under the act of 1836,—which provided for the adjustment of the affairs of certain insurance companies in the city of New York, that were rendered insolvent by the great fire,—though they are not appointed by the Court of Chancery, are under its control. *Chancery*, 1836, *Matter of Globe Ins. Co.*, 6 *Paige*, 102; *Holbrook v. American Fire Ins. Co.*, *Id.*, 220.

5. Of the proper mode of proceeding in such cases. *Matter of Globe Ins. Co.*, 6 *Paige*, 102.

6. **Torts.** A receiver, as such, is vested with all the rights of action which the company of which he is receiver had when he was appointed, and he can sue for torts committed before his appointment. *N. Y. Superior Ct.*, 1848, *Brouwer v. Hill*, 1 *Sandf.*, 629.

7. **How far bound by corporate acts.** Legal acts of a corporation bind its receiver. [Distinguishing *Leavitt v. Palmer*, 3 *N. Y.* (3 *Comst.*), 19; *Gillet v. Moody*, *Id.*, 479; *Brouwer v. Hill*, 1 *Sandf.*, 629.] *Ct. of Appeals*, 1850, *Hyde v. Lynde*, 4 *N. Y.* (4 *Comst.*), 387. *Supreme Ct.*, 1857, *Devendorf v. Beardsley*, 28 *Barb.*, 656; and see *Porter v. Williams*, 9 *N. Y.* (5 *Seld.*), 142.

8. Where a corporation have made a transfer of securities to secure performance of their illegal contract, their receiver, appointed upon their insolvency, may repudiate the illegal transfer, and claim them as part of the fund. *Ct. of Appeals*, 1852, *Talmage v. Pell*,* 7 *N. Y.* (3 *Seld.*), 528.

9. That where a corporate company has done acts in fraud of creditors, or members of the company, and a receiver is afterwards appointed, the remedy by proceedings in disaffirmance thereof should be in the name of

the persons defrauded, not that of the receiver. *Hyde v. Lynde*, 4 *N. Y.* (4 *Comst.*), 387.

10. The act enlarging the powers of receivers of corporations (*Laws of 1852*, 67, ch. 71, § 2) is a public and general act, and not unconstitutional because its object is not expressed in the title. *Ct. of Appeals*, 1859, *Bangs v. Duckinfield*, 18 *N. Y.* (4 *Smith*), 592.

11. **Leave to sue in trustee's name.** A trustee having been enjoined from interfering with the trust-estate, and a receiver appointed, if it becomes necessary to bring suits at law for the benefit of the estate, the court should authorize the receiver to bring such suits, in the name of the trustee, on giving security to indemnify the trustee. *Chancery*, 1814, *Green v. Winter*, 1 *Johns. Ch.*, 60.

12. **Rights of stranger.** Although if the receivership interferes with the rights of a stranger, he may apply for protection, a stranger is not authorized to apply for that which he would not have been entitled to if none were appointed. *Chancery*, 1843, *Howell v. Ripley*, 10 *Paige*, 43. *S. P.*, 1846, *Matter of Ingraham*, 2 *Barb. Ch.*, 35.

13. That the court will give such directions, on the application of a stranger, as may be necessary to protect his rights. *Chancery*, 1838, *Vincent v. Parker*, 7 *Paige*, 65.

14. Thus where a portion of the rents and profits of which a receiver had been appointed were not in litigation, but belonged to a third person who claimed them in right of his wife; and she had filed a bill for divorce for adultery;—*Held*, that on her opposing his application to have them paid over to him, they should be paid into court by the receiver to the credit of the divorce suit. *Id.*

15. **Acting instructions.** A special receiver appointed in the course of an action, to take custody of a fund in suit, is an officer of the court, and as such is entitled to the instructions of the court, when the question is, What is his duty under the orders made in the case? *Supreme Ct.*, 1855, *Curtis v. Leavitt*, 1 *Abbotts' Pr.*, 274; *S. C.*, 10 *How. Pr.*, 481.

16. **Solicitor.** A receiver should not employ as his solicitor, the solicitor of the complainant. *V. Chan. Ct.*, 1834, *Ray v. Macomb*, 2 *Edw.*, 165; *S. P.*, 1833, *Matter of Ainsley*, 1 *Id.*, 576.

17. In general a receiver cannot employ the solicitor of either party to aid him in discharging his duty; and if he does, the solicitor

* See this case in table of CASES CRITICISED, Vol. I., *Ante*.

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must look to the receiver for payment. *Chancery*, 1886, *Ryckman v. Parkins*, 5 *Paige*, 548.

18. A receiver may employ counsel of one of the parties in a service relative to the fund which is for the common interest of both parties, and not adversely to either; and payment for his services should be allowed out of the fund. *N. Y. Superior Ct., Sp. T.*, 1860, *Bennett v. Chapin*, 3 *Sandf.*, 678.

19. The rule that a receiver cannot employ the solicitor of a party, is for the protection of those parties; and a stranger, sued by the receiver, cannot raise the objection. *Chancery*, 1844, *Warren v. Sprague*, 11 *Paige*, 200; *S. C.*, 3 *N. Y. Leg. Obs.*, 122; overruling *S. C.*, 4 *Edw.*, 416.

20. Suing. The receiver in a creditor's suit represents all the parties, not merely the complainant. He may, of his own motion, file a bill to collect assets; and the creditor's assent is necessary only to protect him from costs. *A. V. Chan. Ct.*, 1848, *Green v. Bostwick*, 1 *Sandf. Ch.*, 185.

21. A receiver sues subject to the direction and control of the court which appointed him; and if he sues vexatiously where there is no foundation, the court has power in its discretion to restrain him on petition of the parties aggrieved. Where the receiver sues in the name of a third person, he ought always to obtain leave of the court first, on notice to such person. *Ct. of Errors*, 1886, *Merritt v. Merritt*, 16 *Wend.*, 405; affirming *S. C.*, 5 *Paige*, 125.

22. Protection. Though the court would protect the legal and proper possession of its receiver, against suits at law, as well as violence; it will not protect from suits a receiver who attempts to obtain, by violence, property in the possession of a third person under claim of title. But where the receiver has by the acts complained of secured a fund to be paid into court, the order permitting suits against him should provide for the disposition of that fund according to the event of the suits. *Chancery*, 1840, *Parker v. Browning*, 8 *Paige*, 388.

23. Enjoining. A receiver who has authority from the court to sue, is bound to proceed with his action, and is not to be restrained by injunction out of another court, or by making him a party to a new action, and obtaining an injunction. The proper

method is to apply to the court whose officer he is, for instruction. *Supreme Ct., Sp. T.*, 1857, *Winfield v. Bacon*, 24 *Barb.*, 154; and see *Van Rensselaer v. Emery*, 9 *How. Pr.*, 185.

24. An action against a receiver should not be restrained on the ground that a former judgment has disposed of the matters involved in the action; but the receiver should be left to set that up as a defence. *Supreme Ct., Sp. T.*, 1858, *Jay's Case*, 6 *Abbotts' Pr.*, 293.

25. Interference. If a person having a superior legal title or lien, attempts to disturb the possession of a receiver without obtaining the leave of a court of equity, the question is one of contempt purely, and does not affect the legal right. *Ct. of Appeals*, 1859, *Chautauque County Bank v. Rieley*, 19 *N. Y. (5 Smith)*, 369.

26. Sale. That property many times exceeding in value the demand, should not be sold at auction. *V. Chan. Ct.*, 1838, *Wardell v. Leavenworth*, 3 *Edw.*, 244.

27. A receiver of real estate, to lease it and collect the rents and out of them to pay annuities charged upon the land, leased it for twenty years. The tenant, who was insolvent, assigned his whole term, save one day; and thereafter, the rent having become two years in arrear, an order was made by the court, on the petition of the receiver, and with the consent of three-fifths, in amount, of the parties interested in the land, authorizing the receiver to accept a surrender of the lease from the assignee, and to execute a new lease to him, at a reduced rent which had been agreed upon by the parties, on the assignee's paying the arrears of rent due from his assignor. There was no proof that the property had fallen in value. *Held*, that this arrangement was not proper. Under the circumstances, the only fair test of the value was an auction. If the assignee would surrender the lease and pay the arrears, he might be discharged from further liability; and in such case the receiver should proceed to lease the premises by auction; but if he would not do this, the receiver should proceed to recover possession of the lands. *Supreme Ct.*, 1857, *Lorillard v. Lorillard*, 4 *Abbotts' Pr.*, 210; *S. C.*, less fully, 28 *Barb.*, 528.

28. Distribution of fund. When judgment-creditors have acquired a lien upon a fund in the hands of a receiver, the court will not,

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upon their petition, make an order upon the receiver to satisfy the judgment out of the moneys in his hands, until a decree has been made in the action in which the receiver was appointed, and notice has been given to all other creditors interested in the distribution of the fund. But in order to protect the petitioners, an order will be made upon the receiver forbidding him to make any payments out of the fund without notice to the petitioners, and allowing them to institute such an action against the receiver and others, as they may be advised. [8 Barb., 596; 4 Sandf., 718; 7 Gill, 887; 1 Sch. & Lef., 295; 2 Moll., 128, 497; Beatt., 180.] *N. Y. Superior Ct.*, 1858, *Hubbard v. Guild*, 2 *Duer*, 685.

29. Continuing the business. The receiver of a partnership should proceed and sell as soon as practicable; and, if it be necessary, in order to preserve the good-will, the business may be continued under his direction, in the mean time. *So held*, in the case of a newspaper, the defendants being allowed to continue editing, under the direction of the receiver. *Chancery*, 1884, *Marten v. Van Schaick*, 4 *Paige*, 479.

30. After a vessel which was in litigation had been sailed for two seasons under the directions of a receiver,—*Held*, that it was unfit that such operations should be conducted under the direction of the court for so long a time; and a sale must be ordered. *Chancery*, 1824, *Orane v. Ford*, *Hopk.*, 114.

31. Though in general the court should not authorize the receiver of partnership property to carry on the business, in the use of the firm property, until a sale could be made, it may do so where the property is such,—*e. g.*, the horses of a livery stable,—as would be at great expense, and suffer injury by not being used. *Supreme Ct., Sp. T.*, 1856, *Jackson v. De Forest*, 14 *How. Pr.*, 81.

32. The receiver of a firm whose business is the publication of a newspaper, may be empowered to carry on the paper till sufficient time is allowed to dispose of it advantageously. *N. Y. Superior Ct., Sp. T.*, 1859, *Dayton v. Wilkes*, 17 *How. Pr.*, 510.

33. Counsel-fees. That a receiver, upon the passing of his accounts, is not entitled to counsel-fees which he has paid on an unsuccessful defence to the suit brought against him by the owner of the fund; nor for the expenses of an unsuccessful appeal. *Chancery*,

1848, *Utica Ins. Co. v. Lynch*, 2 *Barb. Ch.*, 578.

34. Compensation. Where a receiver's account is taken without annual rests, the commissions are to be computed upon the aggregate amount of the receipts and disbursements. *Chancery*, 1836, *Matter of Bank of Niagara*, 6 *Paige*, 218. Compare *Vanderheyden v. Vanderheyden*, 2 *Id.*, 287.

35. Under an order allowing a receiver the same compensation as that allowed by law to executors, he is not entitled to make a rest, and begin anew with full commissions, every time he made a deposit in bank, as directed by the order of appointment; but only on the gross amounts, except where there are periodical accounts. [6 *Paige*, 218.] *N. Y. Superior Ct.*, 1850, *Bennett v. Chapin*, 3 *Sandf.*, 678.

36. He is entitled to commissions on the assets taken out of his hands on a settlement of the suit. [4 *Sandf. Ch.*, 511.] *Id.*

37. By the fair construction of 2 Rev. Stat., 98, § 58,—allowing commissions to executors, &c., for "receiving and paying out" moneys,—a receiver is entitled to one half of the specified rates for receiving, and one half for paying out. He is also entitled to be repaid actual disbursements, prudently made or incurred, in the care of the trust property. *Supreme Ct., Sp. T.*, 1856, *Howes v. Davis*, 4 *Abbotts' Pr.*, 71.

38. If a receiver acts as counsel in the business of the trust, he is not entitled to special remuneration beyond taxable fees as counsel. *Chancery*, 1836, *Matter of Bank of Niagara*, 6 *Paige*, 218.

39. Where a receiver held a mortgage as part of the trust-estate, and became the purchaser of the mortgaged premises for his own benefit under the foreclosure of a prior mortgage, but afterwards advertised the junior mortgage for sale as part of the assets of the trust, and upon the sale, informed the purchaser of all the facts. *Held*, that such purchaser could not claim that the receiver was estopped from setting up that he held the title under the foreclosure of the elder mortgage; though he would have been entitled to do so if he had been actually misled. *Ct. of Appeals*, 1852, *Jewett v. Miller*, 10 *N. Y. (6 Seld.)*, 402.

40. Attornment. The assignee of a security for the payment of rent, given by the lessee to the mortgagor, and by him assigned, is not bound by a proceeding to compel the lessee to attorn to a receiver appointed in a suit

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to foreclose the mortgage, unless he has notice of the proceeding and opportunity to be heard. [8 Paige, 567.] *Supreme Ct.*, 1849, *Zeiter v. Bowman*, 6 *Barb.*, 188.

41. Suit before the Code. A receiver, appointed in an action commenced in chancery and continued in the Supreme Court in equity, has the powers and is subject to the obligations and duties declared in 2 Rev. Stat., 469, § 68; but a rule appointing referees, to which such receiver gives his assent, should be entered in the court of equity by which he was appointed, and any appeal from the decision of the referees is to be heard there also. *Supreme Ct.*, 1855, *Tracy v. Talmadge*, 1 *Abbotts' Pr.*, 460.

42. Court. Under Laws of 1849, ch. 226, the receiver of a banking association may be appointed by the court, not necessarily by a justice out of court. *Supreme Ct.*, *Sp. T.*, 1858, *Stewart v. Beebe*, 28 *Barb.*, 84.

43. Vacating receivership of bank. On what grounds an appointment of a receiver of a bank will be vacated on petition of a creditor not a party to the proceedings for the appointment. *Bowery Bank Case*, 5 *Abbotts' Pr.*, 415.

44. Notice of receiver's applications to the court, not to be required to be given to all parties, unless necessary. *Matter of Bangs*,* 15 *Barb.*, 264.

45. That a motion for a receiver does not involve the merits. *Ct. of Errors*, 1829, *Chapman v. Hammersley*, 4 *Wend.*, 173. *Supreme Ct.*, 1843, *Sheldon v. Weeks*, 2 *Barb.*, 532; *S. C.*, 1 *Code R.*, 87; 1849, *Conro v. Gray*, 4 *How. Pr.*, 166.

46. That the right to an injunction to restrain the disposal of property, necessarily involves the right to have a receiver appointed. *Mitchell v. Bettman*, 25 *Barb.*, 408.

47. Title. A receiver of an insolvent corporation, appointed under 2 Rev. Stat., 460, §§ 67, 68, 71; *Id.*, 462, §§ 86–89,—which provides that such receivers shall be vested with all the estate of the corporation, from the time of having filed the security; and that all sales, &c., of property of the corporation, made after the filing of the petition for dissolution, are void as against the receiver and creditors,—cannot take possession of the property of the

corporation, or be deemed vested with the estate, before filing the required security. But when his appointment is thus completed, the estate vested in him relates back to the time of granting the order for reference to appoint a receiver. *Supreme Ct.*, 1857, *Matter of Berry*, 26 *Barb.*, 55.

48. Receivers of public moneys, how removed. 1 *Rev. Stat.*, 122, § 39.

49. — of savings banks authorized to make distributions. *Laws of 1855*, 612, ch. 386.

As to the powers and duties of **Statutory receivers**, consult **CORPORATION**, and the statutes referred to in that and connected titles.

II. IN SUITS IN EQUITY.

1. In what Cases appointed.

50. In any case where it is necessary for the preservation of the property pending litigation, a receiver may be appointed. [2 Bro. P. O., 504; 1 Ball & B., 75.] *Chancery*, 1829, *Lawrence v. Greenwich Fire Ins. Co.*, 1 *Paige*, 587. Compare *Patten v. Accessory Transit Co.*, 4 *Abbotts' Pr.*, 139; reversed, *Id.*, 235.

51. Partnership. Where either partner has a right to dissolve the partnership, and the partnership agreement makes no provision for closing the concerns, it is a matter of course, on a bill filed for the purpose, to appoint a receiver. *Chancery*, 1830, *Law v. Ford*, 2 *Paige*, 810. To similar effect, 1834, *Marten v. Van Schaick*, 4 *Id.*, 479.

52. A partner having the assets in his possession, cannot apply for a receiver. *V. Chan. Ct.*, 1831, *Smith v. Lowe*, 1 *Edw.*, 33.

53. A receiver will not be appointed, in a suit for a dissolution, though an *ex-parte* injunction is outstanding, if it does not appear that the complainant is entitled to a dissolution. *V. Chan. Ct.*, 1840, *Garretson v. Weaver*, 3 *Edw.*, 385.

54. In a creditor's suit, if real property is discovered, and its application becomes necessary to satisfy the debt, a receiver of the rents may be appointed, unless the complainant knew of the title, and might have had it sold under the execution. *V. Chan. Ct.*, 1839, *Congden v. Lee*, 3 *Edw.*, 304. Compare *Stoors v. Kelsey*, 2 *Paige*, 418.

55. Where a creditor has obtained an injunction, it is his duty to apply for a receiver. *Chancery*, 1831, *Osborn v. Heyer*, 2 *Paige*, 342; 1834, *Bloodgood v. Clark*, 4 *Id.*, 574. Followed in supplementary proceedings under

* Reversed on the merits, *sub nom. Bangs v. Gray*, 12 *N. Y. (2 Kern.)*, 477.

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the Code. *Supreme Ct., Sp. T.*, 1857, Webb v. Overmann, 6 *Abbotts' Pr.*, 92.

56. This rule applies as well where the debtor's assignee is a party and has been enjoined, as where the debtor is the sole defendant. *V. Chan. Ct.*, 1840, Bank of Monroe v. Schermerhorn, *Clarke*, 214.

57. It is no objection that the defendants have not answered. *Ib.*

58. — **against partners.** On a creditor's bill against two partners, one of whom has assumed the debt, the receivership should be extended to the partnership effects, and to the individual property of such partner, as well as to that of the other partner. *Chancery*, 1848, Henry v. Henry, 10 *Paige*, 814.

59. **Doubtful validity of transfer.** A want of actual possession, and of a continued change in the possession, of chattels, under a bill of sale, &c., is not deemed conclusive evidence of fraud, but only presumptive, and the court is left with a discretion as to requiring delivery and the giving possession to a receiver in a creditor's suit; and it will not do so where an agent of the purchaser is shown to be exercising a control over the property, and has the power, at any moment, to assume the actual possession, unless the purchaser is a party to the suit. *V. Chan. Ct.*, 1841, Robeson v. Ford, 8 *Edw.*, 441.

60. **Remedy at law.** A receiver will not be appointed in a creditor's suit, where it appears from the bill that the plaintiff's remedy at law has not been exhausted. *Supreme Ct., Sp. T.*, 1847, Starr v. Rathbone, 1 *Barb.*, 70.

61. Defendant's positive affidavit that no execution upon the judgment on which the bill is filed has ever been returned, is a sufficient answer to the motion. *Supreme Ct., Sp. T.*, 1847, Wright v. Strong, 8 *How. Pr.*, 112.

62. **Opportunity to apply at law.** Where there is on the face of a creditor's bill a reasonable doubt as to the regularity either of the judgment or execution, defendant should be allowed a reasonable time to apply to the court of law for relief, before the appointment of a receiver. *V. Chan. Ct.*, 1840, Bank of Wooster v. Spencer, *Clarke*, 386. To the same effect, *Chancery*, 1840, Williams v. Hogeboom, 8 *Paige*, 469.

63. **Insolvent assignee.** Where debtors, in failing circumstances, assign to a person who is insolvent, in trust for creditors, a receiver will be appointed, upon the application of such

creditors, to take charge of the property so assigned. *Chancery*, 1828, Haggarty v. Pittman, 1 *Paige*, 298.

64. **Foreclosure.** Where the premises are insufficient to satisfy the debt, and the persons liable therefor are insolvent, the mortgagee has an equitable lien for the deficiency, upon the rents and profits which accrue after his debt is due, and he may at any time after bill filed, have a receiver of such rents and profits appointed for his benefit; but if the debt is not due, he cannot have a receiver, unless the rents and profits are specifically pledged. *Chancery*, 1835, Bank of Ogdensburgh v. Arnold, 5 *Paige*, 38; 1843, Howell v. Ripley, 10 *Id.*, 48; 1845, Astor v. Turner, 11 *Id.*, 436.

65. But he cannot call upon a junior mortgagee in possession, or an owner of the equity of redemption who was not bound for the debt, to refund rents and profits received by them before he attempted to get a specific lien by the appointment of a receiver. *Chancery*, 1843, Howell v. Ripley, 10 *Paige*, 43. Compare *Sea Insurance Co. v. Stebbins*, 8 *Paige*, 565.

66. A receiver cannot be appointed in foreclosure, except where the person in possession is a party or a tenant of a party. *Chancery*, 1841, *Sea Ins. Co. v. Stebbins*, 8 *Paige*, 565.

67. **On bill to redeem.** A receiver is not appointed against a mortgagee in possession, so long as he will swear there is a balance due him. Although the fact may be contested, the court cannot determine it on affidavits. [1 *Jac. & Walk.*, 627; 2 *Id.*, 557; 13 *Ves.*, 377; 1 *Pow. on Mort.*, 299.] *V. Chan. Ct.*, 1839, Quinn v. Brittain, 8 *Edw.*, 314.

68. Receiver of mortgaged premises not to be appointed, pending bill to redeem, if the complainant is not insolvent. *Chancery*, 1835, Jenkins v. Hinman, 5 *Paige*, 809. Compare *Frelinghuysen v. Colden*, 4 *Id.*, 204.

69. **Trust-fund.** If a bill charge an executor with abuse of trust, a receiver may be appointed. *Chancery*, 1817, Boyd v. Murray, 8 *Johns. Ch.*, 48.

70. A trustee will not be divested of his trusts, and a receiver appointed, before answer, if there is no danger of irreparable loss. *Chancery*, 1823, Ogden v. Kip, 6 *Johns. Ch.*, 160. *S. P.*, West v. Swain, 8 *Edw.*, 420.

71. The court will not appoint a receiver in a suit against a trustee, merely because he has mixed the trust-money with his own, if it is

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not shown that the fund is in danger. *Chancery*, 1835, *Orphan Asylum Society v. McCarter*, *Hopk.*, 429.

72. Where the fund is in danger, and there has been negligence or improper conduct of the trustee, the appointment of the receiver is a matter of right. Where there were several trustees, the court directed a receiver to be appointed to act with one of them who was solvent, if he should consent. *Chancery*, 1828, *Jenkins v. Jenkins*, 1 *Paige*, 248.

73. Vacant trusteeship. Where a trust has devolved upon the Court of Chancery, the parties interested may apply for a receiver, to act until a new trustee be appointed. *Chancery*, 1846, *McCosker v. Brady*,* 1 *Barb. Ch.*, 329.

74. In a contest between two parties, each claiming to hold property as trustees of an association, if danger to the fund or bad faith is not shown, a receiver should not be appointed. The exercise of the power of appointing a receiver must depend upon sound discretion, and in a case in which it must appear to be fit and reasonable that some indifferent person should take charge of the property for the greater safety of all the parties concerned. [1 *Johns. Ch.*, 58.] The court looks to the security and preservation of the property, and ought not to interfere pending the litigation, when the plaintiff's right is not perfectly clear, and the property itself, or the income arising from it, is not shown to be in danger. [*Hopk.*, 429.] There must be some evil actually existing, or some evidence of danger to the property, or a strong special case of fraud in the defendant clearly proved. [18 *Ves.*, 105, 266; 16 *Id.*, 69; 1 *Beatt.*, 402.] *V. Chan. Ct.*, 1835, *Willis v. Corlies*, 2 *Edw.*, 281.

75. On a mere bill to stay waste, a receiver is never appointed. An injunction is sufficient. *V. Chan. Ct.*, 1838, *Robinson v. Preswick*, 3 *Edw.*, 246.

76. Public office. The appointment of a receiver of the fees of an officer, where the duties and the reception of the fees are so connected that they cannot be separated without rendering the office valueless,—*e. g.*, in an inspectorship of flour,—should not be granted, for it would be in effect a temporary appoint-

ment of a public officer. *Chancery*, 1842, *Tappan v. Gray*,* 9 *Paige*, 507; reversing S. C., 8 *Edw.*, 450.

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77. Where a stockholder and director was regularly appointed receiver in a suit in which the corporation was plaintiff, and had gone far in the faithful and successful discharge of his trust before objection was made, the court ordered a new reference for an appointment, with liberty to the complainant to propose him anew, he to continue in office in the mean time. *V. Chan. Ct.*, 1840, *Bank of Monroe v. Schermerhorn*, *Clarke*, 866.

78. Two suits. Where the same property is involved in two suits, the same person is to be appointed receiver in both [Rule 189]; and this even though the parties defendant are not identical, if they have no conflicting claims. *Chancery*, 1846, *Cagger v. Howard*, 1 *Barb. Ch.*, 368. To similar effect, 1831, *Osborn v. Heyer*, 2 *Paige*, 342.

79. But thus extending the receivership does not alter the rights of the parties. *Chancery*, 1848, *Howell v. Ripley*, 10 *Paige*, 48.

80. A receiver is not appointed before answer, especially where one is not prayed for in the bill, unless it appears that the fund is in danger. [*Edw. on R.*, 15.] *V. Chan. Ct.*, 1840, *West v. Swan*, 8 *Edw.*, 420.

81. Notice. In special cases a receiver may be appointed without notice to the defendant, where irreparable injury to one or both parties would flow from delay,—*e. g.*, where the defendant has left the State, and cannot be served, and his solicitor declines to receive notice, and there are rents to be collected. [1 *Ball & B.*, 75.] *Chancery*, 1828, *People v. Norton*, 1 *Paige*, 17.

82. In general, a receiver cannot be appointed *ex parte*, where the defendant is proceeded against as an absentee, until the bill is taken as confessed. *V. Chan. Ct.*, 1840, *Sandford v. Sinclair*, 3 *Edw.*, 393.

83. An *ex-parte* order for a receiver ought not to be granted, where the defendant is not in default for not appearing, unless he has

* Affirmed, *Ct. of Appeals*, 1843, 1 *N. Y. (1 Comst.)*, 314.

* The decree was affirmed by the Court of Errors, 1848 (7 *Hill*, 259); two members of the court indicating their concurrence as to the jurisdiction of chancery, but not as to the legality of the appointment. No other opinions are reported.

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fraudulently withdrawn from the jurisdiction, or unless it is necessary, in order to save the property from being wasted, or lost. *Chancery*, 1840, Sandford v. Sinclair, 8 *Paige*, 373; Gibson v. Martin, *Id.*, 481.

84. In a creditor's suit receiver may be applied for, on notice, at any time after suit commenced; and, after the bill is taken as confessed, without notice. *Chancery*, 1838, Austin v. Figueira, 7 *Paige*, 56; and see Nesmeth v. Halsted, 11 *Id.*, 647.

85. A copy of the bill should be served before moving. *V. Chan. Ct.*, 1838, Hart v. Tims, 8 *Edw.*, 226.

86. Motion for receiver of assigned property, denied before answer, without prejudice to renewal after answer, where both judgment-debtor and assignee swore that the assigned property was insufficient to pay the debts, and that there was no intent to defraud creditors. *Chancery*, 1843, Bechtel v. Cutter, 2 *Ch. Sent.*, 72.

87. Nominating. That in creditors' suits, especially where there is no defence except destitution of property, the nomination of the complainant has preference; but a judgment-creditor of, and indorser for, some of the defendants, should not be appointed. *Chancery*, 1846, Ridgway v. Weeks, 6 *Ch. Sent.*, 39.

88. Where it is referred to a master to report a proper person to be appointed a receiver, an order of appointment by the court is necessary. Where the direction is to appoint a receiver and take the requisite security, the appointment by the master is complete, though any party in interest may petition that the master may review his report. *Chancery*, 1840, Matter of Eagle Iron Works, 8 *Paige*, 385.

This is the proper practice in equitable actions under the Code. [§§ 244, 469; Rule 89; 1 Whit. Pr., 298; 2 *Id.*, 484.] *N. Y. Com. Pl., Sp. T.*, 1854, Wetter v. Schlieper, 7 *Abbotts' Pr.*, 92.

89. Upon a reference to appoint a receiver in a creditor's suit, the master may require the defendant to answer under oath as to the property in his possession or control; and may examine witnesses to ascertain if there is any in the hands of third persons, to which the receiver is entitled; but cannot require defendant to deliver up property which he swears is not in his possession or control. *Chancery*, 1836, Fitzburgh v. Everingham, 6 *Paige*, 29;

1846, Green v. Hicks, 1 *Barb. Ch.*, 309. *V. Chan. Ct.*, 1840, Austin v. Dickey, 8 *Edw.*, 378. *S. P.*, *Chancery*, 1838, Gihon v. Albert, 7 *Paige*, 278; and see Browning v. Bettis, 8 *Id.*, 568; Copous v. Kauffman, *Id.*, 588.

90. After the assets have been delivered to the receiver, the usual examination upon the order to appoint a receiver should not, in general be renewed. *Chancery*, 1844, Hudson v. Pleta, 11 *Paige*, 180.

91. Objections to motion. Neither pendency of a motion for leave to amend the bill, if the defect is not fatal, or such as to render the bill demurrable, nor the fact that the defendant has given notice of a motion to dissolve the injunction, is an objection to the motion to appoint a receiver. *Chancery*, 1845, Barnard v. Darling, 1 *Barb. Ch.*, 76.

92. The waiver of an answer on oath constitutes no objection to the appointment of a receiver, or to an order for the examination of the defendant with respect to the property to be assigned. *Chancery*, 1846, Root v. Safford, 2 *Barb. Ch.*, 83.

93. In a creditor's suit a copy of Rule 191 must be served with the subpoena, but an omission is not an answer to the motion for a receiver. *Chancery*, 1845, Nesmeth v. Halsted, 11 *Paige*, 647.

94. County. The receiver in a creditor's suit may be appointed in the county where the assets, &c., are, though the debtor has removed, pending the suit, to another county. *V. Chan. Ct.*, 1840, Bank of Monroe v. Schermerhorn, *Clarke*, 214.

95. Though the fact that the execution, on which a creditor's suit is founded, was issued to the wrong county, would be a good objection to the appointment of a receiver; if the bill aver that it was issued to the proper one, the defendant cannot dissolve the injunction on a contradicting affidavit; he must move on bill and answer. *Chancery*, 1847, Strange v. Longley, 3 *Barb. Ch.*, 650.

96. Security. The defendant, when his rights require it, may apply for an order that the receiver file his bond *nunc pro tunc*, even after discontinuance; and all parties having a common interest in such an order, should be parties to an appeal from it. *Chancery*, 1847, Whiteside v. Prendergast, 2 *Barb. Ch.*, 471.

97. Discharge. The arbitration or discontinuance of a suit does not discharge a receiver; but he may be discharged on his application.

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unless the rights of a defendant require his continuance. *Id.*

98. The abatement of a suit does not discharge a receiver, previously appointed. [8 Dan. Ch. Pr., 225; 1 Hog., 174.] *Chancery*, 1846, *McCosker v. Brady*,* 1 *Barb. Ch.*, 329.

99. **Resignation.** A receiver will not be discharged, upon his own application, unless he shows reasonable cause, especially where it might inconvenience parties in interest and third persons. Pressure of his own business, and the difficulty of the trust, are not sufficient reasons. *V. Chan. Ct.*, 1843, *Beers v. Chelsea Bank*, 4 *Edw.*, 277.

100. **Removing.** The fact that the receiver has employed the complainant's counsel, is not ground for removing him, if there was no collusion. *V. Chan. Ct.*, 1840, *Bank of Monroe v. Schermerhorn*, *Clarke*, 366.

101. **Accounting.** A receiver passes his accounts before a master, and the report needs no confirmation, nor can exceptions be taken to it; but any party in interest may apply to the court to review the principles on which the accounting has been had. [2 S. & S., 170; 3 Russ., 522.] *V. Chan. Ct.*, 1836, *Brower v. Brower*, 2 *Edw.*, 621.

102. A receiver cannot be compelled, in the middle of a suit, to account to a party. He is only to account to the court, under the rules. *V. Chan. Ct.*, 1837, *Musgrove v. Nash*, 3 *Edw.*, 172.

8. Obtaining Title and Possession, in Creditors' Suits.

103. **Order for delivery.** If the creditor desires an actual delivery of property to the receiver, he must call upon the master to ascertain the property under defendant's control, and order its delivery, especially where the defendant swears it is in another person's possession. The defendant may controvert the fact of possession, and he may appeal from the master. *Chancery*, 1840, *Cassilear v. Simons*, 8 *Paige*, 273.

104. In a creditor's suit the referee should decide and specify what effects are to be delivered to the receiver; specifying those which are excepted because exempt from execution. If the effects are ponderous, he should fix a time for the debtor to deliver them. *N. Y. Su-*

perior Ct., *Chambers*, 1848, *Dickerson v. Van Tine*, 1 *Sandf.*, 724.

105. An order should not be made requiring a defendant in a creditor's bill to deliver property or money to a receiver, unless it appears that the party has the power to obey the order. The failure of the party to show to whom he has paid money which was in his possession several months before the bill was filed, is not sufficient to warrant an order on him to pay the money to the receiver, if he states positively that he had paid it away. *Suprem⁸ Ct.*, *Sp. T.*, 1848, *Sheldon v. Weeks*, 7 *N. Y. Leg. Obs.*, 57.

106. **Neglect to assign.** The neglect of the defendant in a creditor's bill to assign to the receiver, is no ground for the master's refusing to compel him to deliver over his property to the receiver upon oath. *Chancery*, 1842, *Eldred v. Hall*, 9 *Paige*, 640.

107. That though the debtor neglected to make an assignment to the receiver, the court would protect the equitable title of the latter. *Chancery*, 1842, *Albany City Bank v. Schermerhorn*, 9 *Paige*, 372.

108. **The receiver's acceptance of an assignment, excepting an annuity, is no waiver of the right to contest the master's decision excepting it.** *Chancery*, 1844, *Dagraw v. Clason*, 11 *Paige*, 186.

109. **Debtor must assign.** Although the defendant in a creditor's suit deny on oath that he has any property, he must comply with the order requiring him to execute to the receiver a formal assignment of all his property. *Chancery*, 1837, *Chipman v. Sabbaton*, 7 *Paige*, 47; and see *Bloodgood v. Clark*, 4 *Id.*, 574.

110. **Receiver's title.** The appointment of a receiver vests the debtor's personal property in him without formal assignment. *A. V. Chan. Ct.*, 1845, *Storm v. Waddell*, 2 *Sandf. Ch.*, 494. To same effect, *V. Chan. Ct.*, 1840, *Albany City Bank v. Schermerhorn*,* *Clarke*, 297.

111. That a receiver is not vested with the title to real estate by the mere order of the court, and without an actual conveyance to him. *Chancery*, 1846, *Wilson v. Wilson*,† 1 *Barb. Ch.*, 592.

* Reversed, on the question of contempt, 10 *Paige*, 268.

† See this case in table of CASES CRITICISED, Vol. I., *Ante*.

* Affirmed, *Ct. of Appeals*, 1848, 1 *N. Y. (1 Comst.)*, 214.

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112. One who is not a party to a creditor's suit cannot object to the receiver's title, that the debtor's tenant was not served with a copy of the order appointing the receiver, or that he did not attorn to the receiver. *V. Chan. Ct., 1840, Albany City Bank v. Schermerhorn,* Clarke, 297.*

III. IN ACTIONS UNDER THE CODE OF PROCEDURE.

113. Partnership. Where one of two partners or joint adventurers has filed a cross-complaint, and obtained an injunction against the other, in respect to the partnership affairs, a receiver will be granted on the latter's motion, although his original complaint contains no prayer for a receiver. *N. Y. Superior Ct., 1850, McCrackan v. Ware, 3 Sandf., 688.*

114. In an action to close up a partnership, brought by one whose right as a partner is wholly denied by defendant, and is not clearly established by the affidavits, a receiver or an injunction should not be granted; there being no proof that the fund is in danger. *N. Y. Superior Ct., 1852, Goulding v. Bain, 4 Sandf., 716.*

115. Limited partnership. A receiver of a limited partnership may be appointed after dissolution, as in other cases of partnership; for 1 Rev. Stat., 766, § 18, allows an accounting between general and special partners, the same as other partners. *Supreme Ct., Sp. T., 1853, Hogg v. Ellis, 8 How. Pr., 478.*

116. Of the modes of proceeding in an action by a member of a voluntary association to dissolve the partnership. *Kapp v. Barthan, 1 E. D. Smith, 622.*

117. Receiver of bank. The holder of a certified check protested for non-payment, obtained, on the day of protest, an order to show cause against the bank, returnable on the same day; and the cause was, at the appointed hour, heard, the bank declared insolvent, without opposition, and a receiver appointed. *Held*, that these proceedings must be treated as equivalent to a voluntary assignment by the bank of its property for the benefit of its creditors; and the validity of the appointment of the receiver must be tested by the question, whether such an assignment would

have been valid. *Supreme Ct., Sp. T., 1857, Bowery Bank Case, 5 Abbotts' Pr., 415.*

118. Creditor's action. A plaintiff should always apply for a receiver, when he has obtained an injunction against the judgment-debtor, to protect his property and effectuate his lien. *Supreme Ct., 1857, Lent v. McQueen, 15 How. Pr., 818; Sp. T., 1857, Webb v. Overmann, 6 Abbotts' Pr., 92.*

119. Where an action was brought on behalf of one firm out of a large number of creditors of an insolvent firm, and was brought not only against the general partners of the firm indebted, but also against a special partner who denied his indebtedness;—*Held*, that an application for an injunction and the appointment of a receiver must be denied. *N. Y. Com. Pl., Sp. T., 1855, La Chaise v. Lord, 1 Abbotts' Pr., 218; S. C., 10 How. Pr., 461; 4 E. D. Smith, 612, note.*

120. To warrant the granting of such an application, it should be made in behalf of all the creditors of the insolvent firm who will unite therein, and all the defendants sought to be made liable as partners should admit the indebtedness. *Id.*

121. Contingent judgment. The application for appointment of a receiver in a creditor's suit, cannot be resisted on the ground that the judgment was one confessed to secure a contingent liability not yet matured. On such an application the court cannot go behind the judgment and execution. The question whether the plaintiff was entitled to issue execution, must be raised by motion. [8 Paige, 378; 8 Edw., 398.] *Supreme Ct., 1857, Lent v. McQueen, 15 How. Pr., 818.*

122. A simple contract-creditor cannot maintain an action to set aside a fraudulent assignment for the benefit of the debtor's creditors, and for a receiver. *Supreme Ct., Sp. T., 1851, McCarthy v. Hancock, 9 N. Y. Leg. Obs., 98; S. P., Creditor's Suit, 115, 116.*

123. Chattel mortgage. To appoint a receiver of chattel property held by a mortgagee in possession, except in case of necessity to secure the rights of other parties, is to impair the obligations of the contract between such mortgagee and the mortgagor, and so is beyond the constitutional powers both of the court and of the Legislature. *Supreme Ct., 1857, Patten v. Accessory Transit Co., 4 Abbotts' Pr., 235; S. C., 18 How. Pr., 502; reversing S. C., 4 Abbotts' Pr., 189.*

* Reversed, on the question of contempt, *Chancery, 1848, 10 Paige, 263.*

In Actions under the Code of Procedure.

124. The appointment of a receiver involves, in effect, an injunction; and is, therefore, to be directed with great caution, and only in cases of pressing and apparent necessity. *Id.*

125. Relationship to a party is not alone a sufficient ground for the removal of a receiver; at most, it is but a circumstance to be taken into consideration at the time of making the appointment. *N. Y. Com. Pl., Sp. T., 1854, Wetter v. Schlieper, 7 Abbotts' Pr., 92.*

126. Rival creditors. Pending a creditor's action, negotiations were had for a compromise with creditors, upon an understanding that the plaintiffs in the action should not be prejudiced by the delay necessary. But meanwhile other plaintiffs commenced a second action for the same purpose, and obtained a reference to appoint a receiver. The defendants appealed from the order, and stayed the proceedings thereon, and meanwhile suffered the plaintiffs in the first action to obtain a like order, from which they took no appeal, and thereupon a receiver was appointed in the first action. *Held*, on application of the plaintiffs in the second action, 1. That the defendants having been guilty of no fraud or collusion, the order of appointment in the first action should not be vacated. 2. That no objection being shown to the receiver actually appointed, the order should not be modified. The receiver is the officer of the court, not the agent of the party. 3. That the plaintiffs in the second suit were entitled to have been heard on the application for his appointment, and that they should be allowed to take an order so far opening the reference as to permit them to be heard, and that the referee inquire whether the receiver was suitable to be appointed in both suits. *N. Y. Com. Pl., 1855, Lottimer v. Lord, 4 E. D. Smith, 188.*

127. Several hostile receivers. Where creditors, claiming in affirmance of an assignment, recovered a judgment in an action in which one of the assignees only was a party, and other creditors subsequently brought an action on their own behalf alone to set aside the assignment, in which they succeeded,—*Held*, that the receiver appointed in the former suit was not entitled to have the decree in the latter suit opened to allow him to defend and interpose the claim of the plaintiffs in the former suit to priority. *Supreme Ct., 1858, Wheeler v. Wheedon, 9 How. Pr., 298.*

128. Receivers, in what cases appointed under the Code. *Laws of 1852, 656, ch. 392, § 244 (amending Code of Pro., § 244); amended by Laws of 1858, 496, ch. 306, § 20; 1862, 849, ch. 460, § 10.**

129. The fact that there is danger that the property will be "lost or materially injured or impaired," is important as the basis of an application for a receiver under section 244 of the Code. *Supreme Ct., Sp. T., 1856, Hamilton v. Accessory Transit Co., 8 Abbotts' Pr., 255.*

130. Enforcing delivery. In a creditor's suit, if the debtor does not comply with the referee's direction to deliver property to the receiver, the plaintiff should proceed by attachment, on the application for which, the debtor will be heard by way of appeal from the decision of the referee in ordering the delivery. The receiver is not to resort to force, or to measures tending to produce violence. *N. Y. Superior Ct., 1848, Dickerson v. Van Tine, 1 Sandf., 724.*

131. A receiver having, without specific direction by the referee, taken goods apparently in the debtor's possession, but which were claimed by one not a party to the suit, was ordered to restore them, on the claimant's undertaking to hold them subject to the order of the court; and a reference as to title was directed. *Id.*

132. A receiver appointed in supplementary proceedings, having applied to the court for leave to take and sell property of the judgment-debtor, which was covered by a chattel mortgage not yet due, and leave having been refused, subsequently, by direction of the judgment-creditor, took possession forcibly; and pending an order to show cause why he should not return it, and restraining him from selling meantime, he sold the same in parcels without giving notice of the mortgage. *Held*, that the judgment-creditor and the receiver were liable to the mortgagee, in an action for the illegal taking and selling the property without recognition of plaintiff's rights, for the amount of the debt and interest, with interest on the aggregate from the time it fell due. *N. Y. Su-*

* The amendments of 1858 consist in excepting from subd. 1 the cases where judgment on failure to answer may be had without application to the court; and in extending subd. 4 to foreign corporations having property in this State. The amendment of 1862 fixes the compensation of receivers of foreign corporations.

The Statute.

Intent.

perior Ct., 1857, *Manning v. Monaghan*, 1 *Bono.*, 459.

133. The receiver in such case has not the justification of process which the sheriff selling under execution has. [1 Kern., 501.] He had at most a right to keep the property, or to sell only the debtor's right of possession, and he should not have sold in parcels, so that the mortgagee could not follow the property. *Id.*

134. The title of a receiver relates back to the order for his appointment, and is not affected by an intermediate levy. *N. Y. Superior Ct.*, 1852, *Rutter v. Tallis*, 5 *Sandf.*, 610.

135. Where the order appointing a receiver provided that, before acting, he should give security,—*Held*, that when the security was perfected, the title vested in him as of the date of his appointment, and defeated an intermediate levy. *Supreme Ct., Sp. T.*, 1857, *Steele v. Sturges*, 5 *Abbotts' Pr.*, 442.

136. The title of the receiver becomes perfect when he has given the requisite security, and it then relates back to the order appointing him. A sequestration or an assignment of personal property is unnecessary. *N. Y. Superior Ct.*, 1852, *West v. Fraser*, 5 *Sandf.*, 658.

137. A receiver appointed in supplementary proceedings against one who, in acting as an agent,—*e. g.*, an auctioneer,—kept a general bank account, in which were mingled his funds and those of his principals, is, by virtue of his appointment as such, vested with the legal title to the balance in bank. *N. Y. Superior Ct.*, 1857, *Levy v. Oavanagh*, 2 *Bono.*, 100.

138. The debtor cannot, in such cases, by drawing a check, or assigning a part of the balance, transfer the same, as against the receiver, to a customer who employed him with knowledge of his practice of mingling the proceeds of sales with his own funds. *Id.*

139. *Personalty.* An order appointing a receiver in a creditor's action, when it is consummated by his giving security, vests in him the judgment-debtor's personal estate and equitable interests, as of the date of the order, without any assignment. *Supreme Ct.*, 1849, *Wilson v. Allen*, 6 *Barb.*, 542. Compare *Mann v. Pentz*, 2 *Sandf. Ch.*, 257; reversed, *Ct. of Appeals*, 1850, 8 *N. Y.* (3 *Comst.*), 415.

140. *Real property.* In an action by a creditor, to remove a fraudulent obstruction to his remedy, by execution, the appointment of a receiver, though it may vest in him the title to the debtor's personal estate, does not vest in

him the title to real estate. That is transferred only by force of the debtor's own conveyance, which the court has power to compel him to execute. Such a conveyance is, in substance, but the creation of a trust for creditors. Judgment-creditors, not parties to the proceedings, and not affected by a *lis pendens*, filed before their liens attach, are not compelled to renounce their legal rights, and come in under the trust. *Ct. of Appeals*, 1859, *Chantauque County Bank v. Risley*, 19 *N. Y.* (5 *Smith*), 869.

141. Powers and duties of receivers of debtors' estates regulated. *Rule 92 of 1858.*

RECEIVING STOLEN GOODS.

1. *The statute.* "Every person who shall buy or receive, in any manner, upon any consideration, any personal property, of any value whatsoever, that shall have been feloniously taken away, or stolen from any other, knowing the same to have been stolen," to be punished by imprisonment, or fine, or both. 2 *Rev. Stat.*, 680, § 71.

2. *Intent.* In order to constitute the crime of receiving stolen goods, the property must be received feloniously, or with intent to secrete it from the owner, or in some other way to defraud him of the property. Though the statute is silent as to the intent of the receiver, it must be construed according to its manifest object, which is to punish persons who receive stolen property, to defraud the owner of his property. *Supreme Ct.*, 1854, *People v. Johnson*, 1 *Park. Cr.*, 564.

3. A receiving of goods, knowing them to be stolen, with intent to extort from the owner a reward for delivering them to him, is within the prohibition of the statute. *Supreme Ct.*, 1842, *People v. Wiley*, 8 *Hill*, 194.

4. A police-judge, having learned that bonds had been stolen from a bank, procured an interview with agents of the bank, in which he proposed to procure a restoration of the property, if they would pay a certain reward. This was agreed to; and he procured and brought the property to them, and they paid the reward. *Held*, that upon all the circumstances proved, the jury were justified in finding that he procured this agency from the bank, under a previous arrangement with the thief, intending to make a profit to himself from the crime, but concealing this intent from

Who may take it.

What it should contain.

the bank; in which case he was punishable as a receiver. *Ib.*

5. **The English statutes upon receiving stolen goods,**—reviewed. *Ib.*

6. **Bonds.** That an indictment for receiving bonds is not supported by proof of receiving simple contracts. *Ib.*

7. **Place of trial.** Under 2 Rev. Stat., 726, § 43, a person may be tried and convicted of the offence of feloniously receiving and having stolen goods, either in the county where the prisoner originally received the stolen property, or in any county in which he afterwards had it. *Supreme Ct.*, 1857, *Wills v. People*, 3 *Park. Cr.*, 473.

8. **What facts are sufficient to show that the accused has had the stolen property in the county in which he is brought to trial.** *Ib.*

9. **Not necessary to aver in indictment, or prove on trial, for receiving stolen goods, that the principal who stole the property has been convicted.** 2 *Rev. Stat.*, 680, § 72; *Malcolm's Case*, 1 *City H. Rec.*, 60.

10. **Embezzled property.** Receiving embezzled money, goods, &c., knowing them to have been embezzled, punishable in same manner as embezzlement. 2 *Rev. Stat.*, 678, § 61.

11. **Forged tickets.** Receiving forged or counterfeited railroad tickets, knowing them to be forged, &c., and with intent to injure or defraud, declared forgery in third degree. *Laws of 1865*, 914, ch. 499, § 4.

As to **Receiving property by falsely personating another person**, see **FALSE PERSONATING**.

RECOGNIZANCE.

1. **Who may take it.** A recognizance voluntarily given, pursuant to the order of an officer who has general jurisdiction to let to bail, and to take recognizances, is valid, though the officer who took it was not the one before whom the application was pending. *Supreme Ct.*, 1849, *People v. Leggett*, 5 *Barb.*, 860.

2. **One arrested in O. county on an indorsed warrant issued in S. county, on a charge of false pretences, was released on entering into a recognizance in O. county.** *Held*, the recognizance was a nullity. He should have been carried to S. county. *Supreme Ct.*, 1844, *Clark v. Cleveland*, 6 *Hill*, 844.

3. **How it should be taken.** Recognizances authorized to be taken in any criminal proceeding in open court by any court of record, shall be entered in the minutes, and the substance there-

of read to the person recognized. All other recognizances in any criminal proceeding, or proceeding under the laws respecting internal police, shall be in writing and subscribed by the parties to be bound thereby. 2 *Rev. Stat.*, 746, § 24.

4. **A recognizance taken pursuant to 2 Rev. Stat., 746, § 24, must be entered in the minutes of the court; and the entry must contain all the substantial parts of the indebtedness.** An entry of the fact that a recognizance was taken, is not sufficient. *Supreme Ct.*, 1848, *People v. Graham*, 1 *Park. Cr.*, 141.

5. **It is not necessary, in order to charge the surety in a recognizance, that the principal should unite in the same recognizance.** It is enough if the instrument is signed by the person sought to be charged. *Supreme Ct.*, 1833, *People v. Huggins*, 10 *Wend.*, 465.

6. **What it should contain.** In a recognizance it is not necessary to set forth the offence with the particularity required in an indictment. *Supreme Ct.*, 1837, *People v. Blankman*, 17 *Wend.*, 252.

7. **Where the recognizance is conditional for the doing some act for which a recognizance may properly be taken, and the officer before whom it was acknowledged had authority to act in that class of cases, the recognizance is valid although it does not recite the special circumstances under which it was taken.** *Supreme Ct.*, 1847, *People v. Kane*,* 4 *Den.*, 530. Followed, 1849, *People v. Millis*, 5 *Barb.*, 511; 1850, *Gildersleeve v. People*, 10 *Id.*, 85; S. C., 9 *N. Y. Leg. Obs.*, 18.

8. **A recognizance which requires the party to "appear at the next Court of General Sessions, and answer all such matters as shall be alleged against him, and not depart the court without leave,"—is valid.** It is not necessary that it should recite any particular charge. The legal effect of it is to require the recognizer to answer any charge that may be preferred against him until discharged by act of the court. *Supreme Ct.*, 1850, *Gildersleeve v. People*, 10 *Barb.*, 85; S. C., 9 *N. Y. Leg. Obs.*, 18.

9. **Where defendant, instead of being examined, gives recognizance for his appearance, he is presumed to have waived an examination.** Hence a recognizance need not show probable cause for believing the accused guilty, or that the magistrate has made any adjudication in

* Overrules *People v. Koeber*, 7 *Hill*, 89; and *People v. Young*, *Id.*, 44.

When returnable.

the matter. *Ot. of Appeals*, 1848, *Champlain v. People*, 2 *N. Y. (2 Comst.)*, 82.

10. **When returnable.** A recognizance taken by a United States commissioner upon a criminal complaint, should be made returnable before the court at a term thereof, not at chambers. *Supreme Ct.*, 1847, *Corlies v. Waddell*, 1 *Barb.*, 355.

11. A recognizance taken by a justice of the peace, to appear and answer to a criminal charge, must be to the next court having cognizance of the offence, and in which the prisoner may be indicted; a recognizance to appear at court subsequent to the next court, is void. *Supreme Ct.*, 1854, *People v. Mack*, 1 *Park. Cr.*, 567.

12. **Interpretation.** A recognizance was conditioned that the prisoner should appear at a Court of General Sessions, to be held on the fourth Monday of February next, to answer, &c., and not depart the court without leave;—*Held*, 1. That the time when the prisoner was required to appear was stated with sufficient certainty. 2. His default might be entered on any day during the term. He was bound to attend and answer during the term, unless discharged. The English practice of giving notice to the bail where the prisoner is to be called later than the first day of term, does not prevail here. *Supreme Ct.*, 1837, *People v. Blankman*, 17 *Wend.*, 253; *S. P.*, 1838, *People v. Stager*, 10 *Id.*, 481.

13. A recognizance conditioned for the appearance of the prisoner "at the next Court of Sessions to be held at the court-house in the city of H., to be tried by a jury," is to be construed as requiring his appearance at the next Court of Sessions to be held in the city of H., and not at the next Court of Sessions, there, at which a jury shall be summoned. *Supreme Ct.*, 1858, *People v. Derby*, 1 *Park. Cr.*, 392.

14. A **misnomer** of the court at which the party is to appear, contained in a recognizance,—*e. g.*, where the "Court of Sessions" was named as the "Court of General Sessions of the Peace,"—will not necessarily avoid it. A "*descriptio curia*" may be treated like a *descriptio persona*. *Supreme Ct.* (1850?), *People v. Hawkins*, 5 *How. Pr.*, 1.

15. **Performance of condition.** A recognizance to appear before a court, or officer, is not satisfied by the mere corporal presence of the party; he must answer. *Supreme Ct.*, 1847, *People v. Wilgus*, 5 *Den.*, 58.

Excuse for Non-performance.

16. A recognizance to appear and answer, is not satisfied by an appearance and readiness to answer on the first day, but is broken by not appearing when called, on any day of the term. *So held*, although the recognizance did not contain the clause that "he shall not depart," &c. *Supreme Ct.*, 1838, *People v. Stager*, 10 *Wend.*, 481.

17. Recognizance to appear and prosecute suit with effect, forfeited by suffering nonsuit. *Supreme Ct.*, 1799, *Covenhoven v. Seaman*, 1 *Johns. Cas.*, 38; *S. O.*, 2 *Cas. Cas.*, 322.

18. **Respite.** That upon remitting an indictment to another court, the recognizance may be respited until the session of that court. *People v. Gay*, 10 *Wend.*, 509.

19. When the party does not appear pursuant to the terms of a recognizance, the order for a suit is sometimes respited or delayed till a future day. Then if the party makes default, a suit is ordered. In such case, the declaration should take no notice of the respite, but should allege for a breach the original default. *Supreme Ct.*, 1845, *People v. Hainer*, 1 *Den.*, 454.

20. **Excuse for non-performance.** It is a good defence to an action on a recognizance, that the performance of the condition has been rendered impossible by act of the law,—*e. g.*, where the party recognized is prevented from appearing, by being imprisoned elsewhere; or by act of God,—*e. g.*, by the sickness and death of the principal. *Supreme Ct.*, 1842, *People v. Bartlett*, 3 *Hill*, 570; 1838, *People v. Manning*, 8 *Cov.*, 297.

21. Under a recognizance to answer a suit to be commenced, defendant may show that the issuing the writ was feigned. *Supreme Ct.*, 1814, *Brown v. Van Duzen*, 11 *Johns.*, 472.

22. It is not a defence to an action on a recognizance conditioned for appearance, that no indictment was found at the court where the accused was bound by it to appear, since the discharge of the accused does not depend on the failure to find a bill; but where none is found, it is in the discretion of the court to discharge him. *Ot. of Appeals*, 1848, *Champlain v. People*, 2 *N. Y. (2 Comst.)*, 82.

23. The forfeiture accrues, and the right of action becomes complete on default to appear. A subsequent arrest of the prisoner, and his discharge upon entering into another recognizance, and the performance of its condition,

Enforcement of Forfeited Recognizance.

For the Appearance of Witnesses.

constitute no defence to an action on the first. *Supreme Ct.*, 1844, *People v. Anable*, 7 *Hill*, 88.

24. Effect of recognizance. Recognizances not to bind lands or other property; but to be deemed mere evidences of debt. 2 *Rev. Stat.*, 362, § 21.

25. The former law regulating the enforcement and collection of forfeited recognizances, stated. *People v. Van Eps*, 4 *Wend.*, 887; *People v. Lott*, 21 *Barb.*, 180.

26. The act of 1844,—providing that recognizances to answer any criminal charge in the city and county of New York, on being filed with a copy of the order of forfeiture in the county clerk's office, shall be equivalent to a judgment—did not contravene the Constitution of 1821, and the act is applicable to a recognizance taken before its passage. *Supreme Ct.*, 1850, *Gildersleeve v. People*, 10 *Barb.*, 85.

27. Estreat to be made by entry of an order directing the recognizance to be prosecuted. 2 *Rev. Stat.*, 486, § 81.

28. How to be sued. When a recognizance to the People, &c., shall have been forfeited, the district-attorney of the county in which it was taken shall prosecute it by action of debt. Proceedings and pleadings to be same as in personal action for recovery of debt; except that it shall not be necessary to show damages, but on showing breach, or on entering judgment by default, the judgment shall be absolute for the penalty of the recognizance. 2 *Rev. Stat.*, 485, § 29.

29. Jurisdiction. A recognizance in the Oyer and Terminer may be sued by action of debt in the Supreme Court. *Supreme Ct.*, 1830, *People v. Van Eps*, 4 *Wend.*, 887.

30. A recognizance given in bastardy proceedings under 1 *Rev. L.* of 1812, 306, § 1, may be sued in the Supreme Court. *Supreme Ct.*, 1832, *People v. Corbett*, 8 *Wend.*, 520.

31. Where the bail all reside in the county, the action on a recognizance should be brought in the court in which it was taken. The Supreme Court has jurisdiction, but it will not exercise it because it is inconvenient. *Supreme Ct., Sp. T.*, 1845, *People v. Backman*, 1 *How. Pr.*, 221.

32. The district-attorney has discretion as to what court he will sue a recognizance in; the residence of the bail makes no difference. *Supreme Ct., Sp. T.*, 1845, *People v. Allen*, 2 *How. Pr.*, 84.

33. Defences. In an action on a recognizance for the good behavior of one who has

abandoned and neglected to provide for his wife, &c., the sureties may defeat recovery by proving that the person claiming to be the wife was not the wife; and this, notwithstanding the conviction. *Ct. of Errors*, 1843, *Duffy v. People*, 6 *Hill*, 75.

34. In a suit upon a recognizance in bastardy, evidence that the mother is able to maintain the child, is not admissible. *Supreme Ct.*, 1832, *People v. Corbett*, 8 *Wend.*, 520.

35. Executions to be awarded on judgment on recognizance, in same manner and with like effect as upon judgments in personal actions. 2 *Rev. Stat.*, 485, § 80.

36. Provisions of the Code of Procedure, applied to all recognizances forfeited in any Court of General Sessions of the Peace, or of Oyer and Terminer. All laws conflicting with such application, repealed. *Laws of 1855*, 305, ch. 202.

37. A United States marshal has no authority to receive money upon an estreated recognizance in a criminal case, until an execution has been duly issued and placed in his hands. *Supreme Ct.*, 1847, *Corlies v. Waddell*, 1 *Barb.*, 355.

38. County Court may remit forfeited recognizances. 2 *Rev. Stat.*, 486, § 37; *Code of Pro.*, § 80, subd. 12.

39. So may New York Common Pleas. *Laws of 1851*, 464, ch. 198, § 6.

40. Witnesses; how to be recognized to appear and testify. 2 *Rev. Stat.*, 709, §§ 21-24; *Laws of 1845*, 187, ch. 180, § 19.

41. How proceeded against. *Laws of 1845*, 187, ch. 180, § 20.

42. What the recognizance must contain. A recognizance for the appearance of witnesses, must contain an acknowledgment of indebtedness to the People, and must mention the offence charged. An entry in the clerk's minutes, under the title of a cause, stating that R. was recognized in \$100 to appear at, &c., to testify for the People in the above cause, is not a recognizance, and cannot be sued as such. *Supreme Ct.*, 1844, *People v. Rundle*, 6 *Hill*, 506.

43. Inserting in the condition of a witness's recognizance, words requiring him to appear and testify "as well to the grand as the petit jury," does not vitiate it. *Supreme Ct.*, 1849, *People v. Millis*, 5 *Barb.*, 511.

44. Certifying. Recognizances taken from witnesses, by magistrates, to be certified to court, at which the witnesses are bound to appear on the first day of the sitting. 2 *Rev. Stat.*, 709, §§ 26, 29.

General Principles.

RECORDING DEEDS.

- I. GENERAL PRINCIPLES.
- II. UNDER THE RECORDING ACTS BEFORE THE REVISED STATUTES.
- III. UNDER THE REVISED STATUTES.
- IV. THE DOCTRINE OF NOTICE.

I. GENERAL PRINCIPLES.

1. **That which is not in truth a deed is not aided by being recorded as such.** *Supreme Ct.*, 1827, *Jackson v. Richards*, 6 *Cow.*, 617.

2. **Mere written declaration.** Many years after a deed had been executed and recorded, the grantee put on record an instrument stating that she had never accepted it. *Held*, that this was not entitled to record, and hence not admissible in evidence. Such an instrument is not a "writing concerning lands," &c. (1 *Rev. L.*, 869), in any other sense than the testimony of any witness would be if reduced to writing. *Id.*

3. **Separate agreement.** A prior mortgagee cannot enlarge his demand beyond what appears upon the record, in consequence of a separate agreement with the mortgagor, to the prejudice of a subsequent mortgagee without notice of the agreement. *Chancery*, 1823, *St. Andrew's Church v. Tompkins*, 7 *Johns. Ch.*, 14.

4. **Mistake.** A mortgage was given to secure \$3,000, but, by mistake, the clerk registered it as for \$300. *Held*, that it was notice to subsequent *bona-fide* purchasers, to the extent only of the sum expressed in the registry; though actual notice of the true sum contained in the mortgage, would be sufficient as to all transactions subsequent to the time of such notice. *Ct. of Errors*, 1820, *Beekman v. Frost*, 18 *Johns.*, 544; *S. C.* below, 1 *Johns. Ch.*, 288.

5. **"Void."** A statute declaring an unregistered instrument void, should be construed to mean void only against *bona-fide* purchasers. None of the registering acts have been considered as destroying the conveyance, as between the parties to it, from the omission to record it. The record is only intended for the benefit of purchasers and creditors. *Supreme Ct.*, 1818, *Jackson v. Burgott*, 10 *Johns.*, 457; *Jackson v. West*, *Id.*, 466; 1823, *Jackson v. Phillips*, 9 *Cow.*, 94.

6. **Cancelling.** Record of an agreement for the sale of lands cancelled by order of court, for non-performance on the part of purchaser. *Drew v. Duncan*, 11 *How. Pr.*, 279.

7. **Any persons may examine** the records, in the office of the Register of Deeds of the city of New York, for themselves, and this right is not subject to the payment of any fee. *Supreme Ct., Sp. T.*, 1852, *Townshend v. Register of Deeds*, 7 *How. Pr.*, 818.

8. Under the provision of 2 *Rev. Stat.*, 4 ed., 478, § 50,—which requires the register to keep books in which deeds and mortgages shall be recorded, and an index thereto, which index shall, at all proper times, be open for the inspection of any person paying therefor the fees allowed by law,—the register is not entitled to charge a fee for a search made by another person than the register and his assistants. *N. Y. Com. Pl.*, 1853, *Townshend v. Dyckman*, 2 *E. D. Smith*, 224.

9. **A requisition upon the recording officer** to search the title of A. B. to lands described, is sufficiently specific; and the officer is bound to comply on payment of his fees; but it calls only for an answer as to the title of A. B.; and if the inquirer wishes the title of those under whom A. B. claimed, he must amend his requisition accordingly. *Supreme Ct., Sp. T.*, 1852, *Townshend v. Register of Deeds*, 7 *How. Pr.*, 818.

10. **Expenses of record-books** a county charge. *Bright v. Supervisors of Chenango*, 18 *Johns.*, 242.

11. **History of the statutes** of registry in this State. *Fort v. Burgh*, 6 *Barb.*, 60.

12. **Loan commissioners.** The entry in the book of mortgages to the commissioners for loaning the United States deposit fund, of a mortgage, out of the order due to its date, and upon a page which should have contained a mortgage executed several years before, is not constructive notice to a subsequent mortgagee in good faith. [8 *Vt.*, 172; 1 *Johns. Ch.*, 288; 2 *Binn.*, 40.] The provisions of the act, so far as they are intended to direct inquirers in their search and examination for incumbrances, must be at least substantially complied with. *Ct. of Appeals*, 1858, *N. Y. Life Ins. Co. v. White*, 17 *N. Y.* (3 *Smith*), 469.

As to the constitutionality of a **Retrospective** recording act, see **CONSTITUTIONAL LAW**, 60.

Under the Recording Acts before the Revised Statutes.

II. UNDER THE RECORDING ACTS BEFORE THE REVISED STATUTES.

13. The acts. That before June 1, 1793, there was no law requiring a deed to be recorded, and none of the recording acts are retrospective. *Supreme Ct.*, 1832, Jackson v. Chamberlain, 8 *Wend.*, 620.

14. That the provision of the act of 1805 (4 *Webst.*, 301),—requiring previously executed deeds to be recorded,—is binding upon the grantees of such deeds as were in existence and in a situation to be recorded subsequent to the passing of the act and within the time prescribed. *Chancery*, 1837, Varick v. Briggs, 6 *Paige*, 323; but see affirmance, 22 *Wend.*, 543.

15. A deed of military bounty-lands, executed and acknowledged by the grantor, according to the requirements of the act of 1794, after May 1, and before Dec. 1, 1797, was entitled to be recorded. *Chancery*, 1843, Crowder v. Hopkins, 10 *Paige*, 183.

16. The act of 1822—declaring that mortgages shall be considered as recorded from the time of delivery to the clerk—does not apply to mortgages delivered before the act. *Supreme Ct.*, 1828, Jackson v. Van Valkenburgh, 8 *Cow.*, 260.

17. Of the effect of the acts of 1793, 1801, and 1805; and of the divisions of counties therein named. Varick v. Briggs, 6 *Paige*, 323.

18. Repeal of early acts. Upon a just construction of the general repealing act of 1828 (3 *Rev. Stat.*, 180, § 1, subd. 97, 364, 399; *Id.*, 155, §§ 2, 5), and of the provisions of the Revised Statutes, the previous recording acts remain in force, in respect to previous unrecorded deeds and mortgages, at least so far as such acts relate to the rule of priority between such deeds and mortgages, or between them and subsequent conveyances. The registry acts are remedial, and must therefore be liberally and beneficially construed. [4 *Cow.*, 605.] *Supreme Ct.*, 1849, Fort v. Burch, 6 *Barb.*, 60.

19. An unconditional covenant to convey lands, made in 1729, conveys an equitable title; and though expressing no legal consideration otherwise than by the seal, is within the recording acts, so as to allow an exemplification to be read in evidence. *Ct. of Appeals*, 1859, Hunt v. Johnson, 19 *N. Y.* (5 *Smith*), 279.

20. A subsequent registered deed has

preference over a prior unregistered deed of which the grantee in the subsequent deed had not notice. *Supreme Ct.*, 1811, Jackson v. Given, 8 *Johns.*, 137.

21. Notice. Vague reports of the existence of a dormant conveyance should not be construed into notice. *Id.*; 1815 [citing 2 *Atk.*, 275], Jackson v. Wood, 12 *Johns.*, 242.

22. Explicit notice of the prior unregistered deed must be given, in order to prevent a subsequent purchaser's deed from taking effect. *Supreme Ct.*, 1815, Jackson v. Elston, 12 *Johns.*, 452.

23. A sheriff's deed must be recorded in order to avail against a subsequent *bona-fide* purchaser whose deed is first recorded. *Supreme Ct.*, 1816, Jackson v. Terry, 13 *Johns.*, 471; and see Jackson v. Post, 9 *Cow.*, 120; Jackson v. Chamberlain, 8 *Wend.*, 620.

24. A valid conveyance, though not recorded, divests the grantor of any interest in the premises, so that a sale on execution against the grantor on a subsequent judgment passes nothing; and the sheriff's deed does not avail, though recorded before the prior conveyance. *Supreme Ct.*, 1825, Jackson v. Town, 4 *Cow.*, 599; 1828, Jackson v. Post, 9 *Id.*, 120.*

25. If A. receives a deed, having notice of a prior unrecorded deed to B., his deed, though first recorded, is void; and if B. records his deed, the record is notice to a subsequent purchaser for value from A., and such purchaser gets no title. The statute relating to the record of deeds does not give the one first recorded preference, but declares the unrecorded deed void as against it. *Supreme Ct.*, 1836, Jackson v. Post, 15 *Wend.*, 588; S. P., 1837, Van Rensselaer v. Clark, 17 *Id.*, 25.

26. If a conveyance is recorded before a judgment is rendered against the vendor, the purchaser and his grantees are not bound to notice the subsequent judgment, and the sheriff's deed on a sale thereon when recorded; and though the prior conveyance were frau-

* In Jackson v. Chamberlain (8 *Wend.*, 620), and Jackson v. Post (15 *Id.*, 588), this doctrine is disapproved, and the former case is treated as to be sustained, if at all, on the ground that the grantor in that case never had title; and the latter case on the ground that the subsequent purchaser in that case had notice. See, also, Tuttle v. Jackson, 6 *Wend.*, 213, 225.

Under the Recording Acts before the Revised Statutes.

dulent as against the judgment-creditor, *bona-fide* purchasers, though they purchased from the grantee in that conveyance after the recording of the sheriff's deed, are to be protected. Prior purchasers are not to be called on to search for subsequent conveyances. *Supreme Ct.*, 1842, *Hooker v. Pierce*, 2 *Hill*, 650.

27. **Mortgage of leasehold.** The statute concerning registry of mortgages of "*lands, tenements, and hereditaments*," applies to mortgages of leasehold as well as of freehold estates. [1 *H. Black.*, 25; 1 *Plowd.*, 87.] *Ct. of Errors*, 1807, *Johnson v. Stagg*, 2 *Johns.*, 510, and see *Berry v. Mutual Ins. Co.*, 2 *Johns. Ch.*, 608.

28. **Equitable mortgage.** The statute, speaking of any writing in the nature of a mortgage, extends to a mere equitable mortgage, or incumbrance. *Chancery*, 1815, *Parkist v. Alexander*, 1 *Johns. Ch.*, 894.

29. **The registry of a mortgage** is, in judgment of law, notice of such mortgage to all subsequent purchasers and mortgagees. Nothing but actual fraud can divest the prior mortgagee of the priority springing from the recording of his mortgage. *Ct. of Errors*, 1807, *Johnson v. Stagg*, 2 *Johns.*, 510. *Chancery*, 1814, *Frost v. Beekman*,* 1 *Johns. Ch.*, 288; 1815, *Parkist v. Alexander*, 1 *Johns. Ch.*, 894; 1819, *Brinkerhoff v. Lansing*, 4 *Id.*, 65.

30. That a purchaser at sheriff's sale must be deemed to have had notice of a mortgage which has been registered; and the fact that the mortgagee bid at the sale does not estop him. *Supreme Ct.*, 1809, *Jackson v. Dubois*, 4 *Johns.*, 216.

31. **Where there is an absolute deed, and a defeasance** is subsequently executed by the grantee, the latter relates back to the former, and they amount to a mortgage; so that a record of the deed, as a *deed*, is not enough to protect the grantee against a subsequent *bona-fide* purchaser. *Chancery*, 1816, *Dey v. Dunham*,† 2 *Johns. Ch.*, 182. Compare *Mills v. Comstock*, 5 *Id.*, 214; and see *Jackson v. Van Valkenburgh*, 8 *Cow.*, 260.

32. A conveyance and separate defeasance, constituting a mortgage, must be registered as a mortgage in order to avail against a subsequent *bona-fide* purchaser for value. (1 *Rev. L.*, 878, § 8.) *Supreme Ct.*, 1829, *Brown v. Dean*, 8 *Wend.*, 208.

33. **A mortgage recorded as an absolute deed**, but not as a mortgage, is not to be deemed recorded. *Ct. of Errors*, 1823, *James v. Morey*, 2 *Cow.*, 246, 816; reversing *S. C.*, *sub nom. James v. Johnson*, 6 *Johns. Ch.*, 417.

34. **A second mortgagee**, who has neglected to have his mortgage registered, will not be relieved against a prior unregistered mortgage, unless he shows, from non-delivery of possession, or other circumstances, that imposition has been, or might be, practised upon him, by or with the concurrence of the first mortgagee, which could not be detected or guarded against, by the exercise of ordinary diligence. Where several equitable interests, affecting an estate, are otherwise equal, they will attach according to priority of time. [2 *Eq. Cas. Abr.*, 606, pl. 41; 2 *Vern.*, 525; 1 *Bro. P. C.*, 66; 2 *P. Wms.*, 492, 495.] *Chancery*, 1817, *Berry v. Mutual Ins. Co.*, 2 *Johns. Ch.*, 608.

35. The statute does not render a registry of a mortgage indispensable. The omission to register only exposes the mortgagee to the hazard of losing his lien by a subsequent *bona-fide* purchaser, or a postponement of it to a subsequent registered mortgage. A second mortgage unregistered will not gain preference; a mortgagee is not a purchaser within the sense of section 2 of the act. *Id.*

36. **Deed subsequent to mortgage.** Where a deed is taken *bona fide*, and for a valuable consideration, subsequent to a mortgage by the same grantor, and which mortgage is not registered or recorded, the deed takes preference of the mortgage, though the latter be first recorded. *Supreme Ct.*, 1822, *Jackson v. Campbell*, 19 *Johns.*, 281.

37. The same principle is to be applied under the act relating to military bounty-lands. *Chancery*, 1835, *Hawley v. Bennett*, 5 *Paige*, 104.

38. Under the act for the recording of deeds, however, of two deeds, the one first recorded would take precedence. *Supreme Ct.*, 1822, *Jackson v. Campbell*, 19 *Johns.*, 281.

39. **Deed prior to mortgage.** A *bona-fide* purchaser, without notice of an unregistered mortgage, holds the land discharged of its lien; and a subsequent registry of the mortgage cannot affect his title, nor the title of his grantees with notice of the mortgage. *Supreme Ct.*, 1827, *Jackson v. McOheaney*, 7 *Cow.*, 860.

* Reversed on other grounds, 18 *Johns.*, 544.

† Reversed on another point, 15 *Johns.*, 555.

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40. The acknowledgment and registry of a mortgage are not necessary to its validity, as between the original parties. *Supreme Ct.*, 1825, Jackson v. Colden, 4 *Cow.*, 266. To similar effect, 1858, Watson v. Campbell, 28 *Barb.*, 421.

41. Where two mortgages are taken and recorded simultaneously, the recording acts have no application, and the priority must be determined by equitable rules. Thus where the owner of land, being indebted to his vendor for the purchase-money, conveyed, and took from the purchaser two mortgages, which were recorded at the same time; and assigned one of them to the grantor, to secure his unpaid purchase-money, and afterwards assigned the other for value to a third person;—*Held*, that the former mortgage was entitled to priority. The vendor's lien should be protected, and the latter assignee must be deemed to have taken the mortgage subject to the equity of the former. *Ct. of Errors*, 1827, Stafford v. Van Rensselaer, 9 *Cow.*, 816; affirming S. C., *Hopk.*, 569.

42. Power. In the provision of the act relating to mortgages (1 *Laws*, 10, ed. of 1789),—requiring that all powers to mortgages for making sales in fee shall be recorded as deeds usually are,—the latter words refer to mortgage deeds; and a record of the power as a part of the mortgage in which it is contained, is enough. *Ct. of Errors*, 1804, Bergen v. Bennett, 1 *Cal. Cas.*, 1; 1823, Wilson v. Troup, 2 *Cow.*, 195; affirming S. C., 7 *Johns. Ch.*, 25.

43. Were it otherwise, the omission to record the power does not affect the validity of the sale under the power, as against the mortgagor. *Id.* To similar effect, *Supreme Ct.*, 1825, Jackson v. Colden, 4 *Cow.*, 266.

44. An assignment of a mortgage is not required by the registry act to be recorded. The only effect of omitting to give notice would be to protect the mortgagor in any payments he may make to the mortgagee. *Ct. of Errors*, 1823, James v. Morey, 2 *Cow.*, 246; reversing S. C., *sub. nom.* James v. Johnson, 6 *Johns. Ch.*, 417.

45. An assignment of a mortgage must, if under seal, be considered a writing concerning real estate; and, although recording is not essential to its validity, it may be recorded, and if duly proven so as to be entitled to record, it is admissible in evidence. *Supreme*

Ct., 1828, Roberts *ads.* Jackson, 1 *Wend.*, 478.

46. A separate defeasance of a bond and mortgage, providing that they shall be void on the performance of a condition by the mortgagor, need not be recorded. The assignee of the bond and mortgage takes it, as assignee, not of lands, but of a chose in action, and subject to all equities. *Ct. of Errors*, 1807, Clute v. Robison, 2 *Johns.*, 595.

47. Fraudulent purchasers. Where several persons jointly and through the agency of one of their number fraudulently procured a conveyance from one who had already conveyed to another and taken back a purchase-money mortgage, which was on record, such prior conveyance, however, not being on record;—*Held*, that the second deed, though first recorded, was void, and the grantees must release to the prior grantee. *Chancery*, 1820, Lupton v. Cornell, 4 *Johns. Ch.*, 262.

48. The first judge of a county, being counsellor, &c., is *ex officio* a commissioner of the Supreme Court, and a conveyance acknowledged or proved before him may be recorded in any county, without a clerk's certificate of his official character. *Supreme Ct.*, 1826, Jackson v. Chapin, 5 *Cow.*, 485; 1828, Jackson v. Phillips, 9 *Id.*, 94.

III. UNDER THE REVISED STATUTES.

49. Every conveyance of real estate (including every written instrument creating, alienating, mortgaging, or assigning any interest in real estate, or affecting the title, except wills, leases for not more than three years,* and contracts of sale), must be recorded in county clerk's office,† and if not, is void as against subsequent purchaser in good faith for value, whose conveyance is first duly recorded. 1 *Rev. Stat.*, 756, § 1; *Id.*, 762, § 38.

50. Lease. An instrument giving possession of timber lands for less than three years, on rent, with a right to distrain, and giving the right to cut and remove timber during the term,—*Held*, a lease for not more than three years, within the exception of the re-

* Except, also, leases for lives or years in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware, and Schenectady. 1 *Rev. Stat.*, 763, § 42.

† By local provisions a separate office of register of deeds is created and regulated for the following counties: NEW YORK, *Const.*, art. x., § 1; 1 *Rev. Stat.*, 5 ed., 869, 897; KINGS, *Id.*, 5 ed., 897-899; WESTCHESTER, *Id.*, 899, 900.

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ording act. *Chancery*, 1840, *Beebe v. Coleman*, 8 *Paige*, 392.

51. The assignment of a mortgage is a conveyance of an interest in real estate, within 1 Rev. Stat., 762, §§ 87, 88, and the record of it is constructive notice to subsequent assignees. *Chancery*, 1844, *Vanderkemp v. Shelton*, 11 *Paige*, 28; reversing S. C., *Clarke*, 321.

52. A sale of growing trees, by writing, is not within the statute, and the purchaser will hold against a subsequent purchaser of the land without notice. *Supreme Ct.*, 1847, *Warren v. Leland*, 2 *Barb.*, 618.

53. Powers to assign mortgages not within the statute. *A. V. Chan. Ct.*, 1840, *Williams v. Birbeck*, *Hoffm.*, 359.

54. Power to convey. By 1 Rev. Stat., 762, § 89, the recording of a power to convey lands is permitted, and the record is evidence, but is not notice. *Ib.*

55. That a power and its revocation need only be recorded in one county. *Ib.*

56. Subsequent. The sole object and effect of the recording acts is to protect subsequent purchasers and incumbrancers against previous deeds, mortgages, and liens which are not recorded; and the recording of a deed, or mortgage, is constructive notice to those only who subsequently acquire some interest or right in the property, under the mortgagor or grantor. *Chancery*, 1847, *Stuyvesant v. Hall*, 2 *Barb.* *Ch.*, 151; affirming S. C., *sub nom.* *Stuyvesant v. Hone*, 1 *Sandf. Ch.*, 419. *Supreme Ct.*, 1849, *Truscott v. King*,* 6 *Barb.*, 346; 1856, *Hall v. Nelson*, 23 *Id.*, 88.

57. The recording of a deed is constructive notice to all the world of its existence and effect, as well those who may thereafter claim under a different source, as those who may claim from the same source. *Supreme Ct.*, 1849, *Schutt v. Large*, 6 *Barb.*, 373.

58. Simultaneous acts. Where a trustee, or agent, takes two mortgages on the same property, at one time, for different *cestuis que trust*, or principals, the accidental recording of one before the other gives it no priority. It is only a subsequent mortgagee, whose mortgage obtains priority by being first recorded. *Chancery*, 1841, *Rhoades v. Canfield*, 8 *Paige*, 545.

59. Where A., holding a contract to purchase land, transferred his interest to B., a

third person, and procured the vendor to convey to B., who executed at the same time a mortgage to the vendor for purchase-money, and one to A. for the price of his interest in the contract, expressing it to be for purchase-money, and the latter mortgage was recorded first,—*Held*, that the assignee of the latter mortgage in good faith and for value was entitled to priority of lien. As between the parties or those having notice, a court of equity would postpone the latter; but its priority of record gives it preference in the hands of such an assignee. *Supreme Ct.*, *Chambers*, 1848, *Corning v. Murray*, 8 *Barb.*, 652.

60. Unrecorded assignment of recorded mortgage. A mortgage was given which was never recorded, and a subsequent mortgagee, who had notice of the prior mortgage, but recorded his own mortgage, assigned the latter to one who purchased in good faith, but did not record his assignment. The latter mortgage was foreclosed without making the former mortgagee a party; and the purchaser, who had notice of the first mortgage, at the master's sale, recorded his deed. *Held*, that the purchaser took subject to the first mortgage. *Supreme Ct.*, 1848, *Fort v. Burch*, 5 *Den.*, 187.

61. At what time to be deemed void. Although the recording act makes an unrecorded conveyance void as against the subsequent purchaser in good faith for value, whose deed is recorded first, it does not avoid the former as of a time prior to the execution of the latter. It does not transfer to the subsequent purchaser rights—*e. g.*, rents—which were vested in the owner holding under the unrecorded deed prior to the execution of the second conveyance. *N. Y. Superior Ct.*, 1849, *Strong v. Dollner*, 2 *Sandf.*, 444.

62. Lease. Where a lessee conveys the premises without reference to the lease, the fact that the lease was not recorded does not qualify the assignee's liability on its covenants. *Supreme Ct.*, 1855, *Jacques v. Short*, 20 *Barb.*, 269.

63. Subsequent grantee with notice. The omission to record an instrument does not prejudice the right of the grantee as against a subsequent grantee, with notice. *Supreme Ct.*, *Sp. T.*, 1858, *Haywood v. Shaw*, 16 *How. Pr.*, 119.

64. Real estate, and purchasers, as used in the statute defined. 1 *Rev. Stat.*, 762, §§ 36, 37.

* Reversed on another point, though approved as to this, *Ct. of Appeals*, 1852, 6 *N. Y.* (2 *Seld.*), 147.

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65. That in equity, the vendee in a contract of sale, who has paid the consideration, should be held to be a purchaser within 1 Rev. Stat., 762, § 87, relative to recording deeds. *A. V. Chan. Ct.*, 1844, *Warner v. Winslow*, 1 *Sandf. Ch.*, 480.

66. **Who are subsequent purchasers.** Since the surrender and cancelling of a deed does not revest the title in the grantor, a second deed by the grantor after such surrender, does not, though recorded, avail against the grantee in the first deed. The statute was made to protect innocent purchasers against the frauds of sellers; to prevent those who once had title to land from making successive sales, and thereby defrauding one or more of the purchasers [15 *Wend.*, 588, 594; 15 *Johns.*, 555, 568; 2 *Sugd. on Vend.*, 222]; and it applies only to successive purchases from the same seller. *Supreme Ct.*, 1844, *Raynor v. Wilson*, 6 *Hill*, 469; but compare *Schutt v. Large*, 6 *Barb.*, 378.

67. **A purchaser at sheriff's sale**, without notice, and whose deed is recorded, is protected by the recording acts against a prior conveyance by the defendant in the execution, made before the judgment, but unrecorded. *Supreme Ct.*, 1882, *Jackson v. Chamberlain*, 8 *Wend.*, 620.

68. **A junior mortgagee**, with notice of a prior unrecorded mortgage, cannot gain priority by recording his mortgage. *Supreme Ct.*, 1848, *Fort v. Burch*, 5 *Den.*, 187.

69. — **assignee of.** Under 1 Rev. Stat., 756, § 1, a *bona-fide* assignee of such a mortgage, without notice, cannot gain such priority, without having his assignment recorded before the prior mortgage. *Id.*

70. **Grantee with notice.** A. conveyed to B., who purchased for value without notice of a prior unrecorded conveyance to C., and B.'s deed was recorded; D., having notice of the unrecorded conveyance to C., took a conveyance from B. and recorded it. *Held*, that D. was not protected by the recording acts. The statute protects none but innocent and *bona-fide* purchasers and holders. *Supreme Ct.*, 1849, *Schutt v. Large*, 6 *Barb.*, 378.

71. **Precedent debt.** One who, without notice of a prior unrecorded mortgage, takes a conveyance of land, in payment of an existing debt, or as a security therefor, without giving up any security, divesting himself of any right, or doing any act to his own prejudice, on the

faith of the title, before he has notice of the mortgage, is not a *bona-fide* purchaser for a valuable consideration, within the meaning of the recording acts. *Chancery*, 1833, *Dickerson v. Tillinghast*, 4 *Paige*, 215; 1836, *Evertson v. Evertson*, 5 *Id.*, 644. *A. V. Chan. Ct.*, 1844, *Westervelt v. Haff*, 2 *Sandf. Ch.*, 98. *Supreme Ct., Sp. T.*, 1848, *Stuart v. Kissam*,* 2 *Barb.*, 498. *S. P., Ct. of Errors*, 1822, *Coddington v. Bay*, 20 *Johns.*, 687 (*q. v.*, *BILLS, NOTES, AND CHECKS*, 510). *Supreme Ct.*, 1854 [citing 18 *Barb.*, 372], *Woodburn v. Chamberlain*, 17 *Barb.*, 446. Compare, however, *Schutt v. Large*, 6 *Id.*, 378; *Warner v. Winslow*, 1 *Sandf. Ch.*, 480.

72. It will not constitute a *bona-fide* purchaser, that the creditor bids off the premises and applies the bid on his judgment. That is a precedent debt, and the consideration is not advanced on the faith of the purchase. [1 Rev. Stat., 746, § 1; 4 *Paige*, 215; 20 *Johns.*, 687.] *Supreme Ct.*, 1850, *Wright v. Douglass*,† 10 *Barb.*, 97. *S. P., Chancery*, 1837, *Arnold v. Patrick*, 6 *Paige*, 810.

73. Those who take a conveyance which is not absolute, but in the nature of a security, for a consideration consisting in part of a precedent debt, must be considered *bona-fide* purchasers only to the amount they paid or advanced in consequence of receiving the deed. [2 *Hill*, 301.] *Supreme Ct., Sp. T.*, 1852, *Merritt v. Northern R. R. Co.*, 12 *Barb.*, 605.

74. **Subsequent mortgagee or purchaser with notice.** N.'s mortgage was prior in date and recorded before one executed to H., but was acknowledged one day later; and N. knew when he took his that the mortgage to H. had been given. N. foreclosed his mortgage by advertisement and bought in the land, and sold it for a reduced price without warranty to one who had notice of H.'s claim, and paid nothing down. *Held*, that the latter was not a *bona-fide* purchaser. *Supreme Ct.*, 1853, *Harris v. Norton*, 16 *Barb.*, 264.

75. **The bona-fide mortgagee of a fraudulent grantee**, whose mortgage is recorded before a sheriff's deed obtained by a creditor of the grantor, on a judgment rendered after the recording of the fraudulent deed, is entitled to a preference. The fact that a part of the loan

* Reversed in part, 11 *Barb.*, 271.

† Reversed on other grounds, 7 *N. Y. (8 Seld.)*, 564

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secured by the mortgage was paid a few days after the recording of the sheriff's deed, does not affect the case. *Chancery*, 1841, Ledyard v. Butler, 9 *Paige*, 182.

76. A mortgage by a purchaser, before he receives a deed, is merely an equitable lien, and recording it before the date of the deed is not constructive notice to subsequent purchasers from him. *Chancery*, 1840, Farmers' Loan & Trust Co. v. Maltby, 8 *Paige*, 861.

77. Record not notice to prior mortgagees. A mortgagee, prior to executing a release of a portion of mortgaged premises, is not bound to search the records as to any conveyances by the mortgagor subsequent to his own mortgage. The record is not constructive notice to him. Subsequent purchasers are alone benefited by the registration act, so as to take preference of an unrecorded deed; and on the other side, subsequent purchasers are alone affected by the statute, so as to be bound by a registered deed. *A. V. Chan. Ct.*, 1841, Talmadge v. Wilgers, 4 *Edw.*, 289, note; S. C., 1 *N. Y. Leg. Obs.*, 42. To similar effect, *Ct. of Appeals*, 1858, Howard Ins. Co. v. Halsey, 8 *N. Y. (4 Seld.)*, 271; affirming S. C., 4 *Sandf.*, 565. *V. Chan. Ct.*, 1844, Wheelwright v. Depyster, 4 *Edw.*, 282.

78. The record of a subsequent deed, or mortgage, or the filing of a notice of the pendency of a suit to foreclose such mortgage, is not notice to a prior mortgagee [1 *Johns. Ch.*, 414; 4 *Ves.*, 389; 1 *Sch. & Lef.*, 90; 10 *Ohio*, 80]; and if such mortgagee release a portion of the premises from the lien of his mortgage, without actual notice of such deed or mortgage, his lien on the residue is not impaired. *Chancery*, 1847, Stuyvesant v. Hall, 2 *Barb. Ch.*, 151; affirming S. C., *sub. nom.* Stuyvesant v. Hone, 1 *Sandf. Ch.*, 419.

79. — nor to purchaser of prior mortgage. The recording of deeds and mortgages is not notice to one who purchases a prior recorded mortgage. *A. V. Chan. Ct.*, 1846, King v. McVickar, 3 *Sandf. Ch.*, 192.

80. The recording of an assignment of a mortgage is not, in itself, notice to a mortgagor, his heirs, &c., so as to invalidate payments. 1 *Rev. Stat.*, 768, § 41. *N. Y. Life Ins. & Trust Co. v. Smith*, 2 *Barb. Ch.*, 82.

81. The recording of an assignment of a bond and mortgage is notice only to subsequent assignees, or purchasers from the assignor; and payment to the mortgagee, after assign-

ment, but without actual notice thereof, is valid, though the assignment be recorded. [1 *Rev. Stat.*, 768, § 42.] *Chancery*, 1848, Reed v. Marble, 10 *Paige*, 409; 1847, *N. Y. Life Ins. & Trust Co. v. Smith*, 2 *Barb. Ch.*, 82.

82. Under 1 *Rev. Stat.*, 762, the record of an assignment of a junior mortgage is notice to a purchaser, on the foreclosure of a prior mortgage. *Chancery*, 1844, Vanderkemp v. Shelton, 11 *Paige*, 28; reversing S. C., *Clarke*, 321.

83. Separate books to be used for absolute conveyances and mortgages. 1 *Rev. Stat.*, 756, § 2.

84. Defeasible deed. Under 1 *Rev. Stat.*, 756, § 3, if an absolute deed is given, and a separate written defeasance, so as to constitute a mortgage, both must be recorded in the book of mortgages, in order to protect the mortgagees. *Chancery*, 1882, Grimstone v. Carter, 3 *Paige*, 421.

85. Recording as a deed an absolute deed intended as a mortgage, is a nullity, where there is no written defeasance. But, upon the mortgagee's acquiring the equity of redemption, the record of the deed becomes operative, as if the deed had been in fact absolute, and was delivered and recorded before payment of consideration. *A. V. Chan. Ct.*, 1844, Warner v. Winslow, 1 *Sandf. Ch.*, 480.

86. Instruments deemed recorded by, and in the order of, delivery to clerk. Clerk to record and indorse date, &c. 1 *Rev. Stat.*, 760, §§ 24, 25.

87. The record of an instrument under the statute, is notice, from the date of the record; that is, from the time of its reception by the clerk for record. *A. V. Chan. Ct.*, 1840, Williams v. Birbeck, *Hoffm.*, 859.

88. Judgments in partition, and wills which are proved, may be recorded. *Law of 1846*, 204, ch. 182.*

89. To entitle a conveyance to be recorded, it shall be acknowledged by the party or parties executing it, or proved by a subscribing witness. 1 *Rev. Stat.*, 756, § 4.

As to What officers may take proofs, &c., see ACKNOWLEDGMENT OF DEEDS.

90. How a deed acknowledged in, and according to the laws of, another State, may, when the parties executing the same are dead, be qualified for record, or to be read in evidence in this State. *Laws of 1858*, 409, ch. 259.

* Declared by *Laws of 1851*, 555, ch. 277, to apply to the register of deeds in New York.

The Doctrine of Notice.

91. Under the Laws of 1856, 84, ch. 61,—providing that acknowledgments of deeds may be taken out of this State before persons authorized to take acknowledgments by the law of the place where they reside, and requiring a certificate that such person was so authorized to be annexed, under the name and seal of the clerk of the county, register, recorder, or prothonotary, or of the clerk of the County Court, clerk of the district court, or clerk of the Court of Common Pleas of the county in which such officer resides,—it is not the duty of a recording officer of this State to record a deed acknowledged out of this State before a person whose authority is certified to by the clerk of the circuit court of his county. *Supreme Ct., Sp. T., 1858, People v. Register of N. Y., 6 Abbots' Pr., 180.*

92. In such a case, it is not competent to resort to the laws of the other State to show that such clerk of the circuit court is, *ex officio*, clerk of the county; but the certificate must show on its face, and without extrinsic proof, all that is required by the statute. [24 Wend., 87; 2 Serg. & R., 457; 2 Yeat., 220; 4 Wash. C. C., 718; 8 Bibb, 370.] *Id.*

93. The recording officer may refuse to register a deed acknowledged before one who had no title to the office by virtue of which he claimed to take the acknowledgment. *Supreme Ct., 1882, People v. Brown, 7 Wend., 498.* Compare, however, *Parker v. Baker, 8 Paige, 428.*

94. That a deed executed by attorney, and acknowledged by him, or proven to have been executed by him, is entitled to record. *Chancery, 1836, Lovett v. Steam Saw-mill Association, 6 Paige, 54; 1848, Johnson v. Bush, 3 Barb. Ch., 207.*

95. Corporation. Proof by the president of a corporation, signing its deed, that the seal is its seal, and was affixed by its authority, entitles it to record. He may be deemed the party executing it, or the subscribing witness, within the statute. *Chancery, 1836, Lovett v. Steam Saw-mill Association, 6 Paige, 54; and see Johnson v. Bush, 3 Barb. Ch., 207, 238.*

96. The provision of Laws of 1833, 896, ch. 271, § 9,—authorizing the proof and acknowledgment of written instruments except bills, notes, and wills,—has not altered the law requiring a clerk's certificate in order to entitle a conveyance of real estate acknowledged or proven before a commissioner of

deeds, to be read in evidence or recorded in another county than the one where the commissioner resided. *Ot. of Appeals, 1847, Wood v. Weiant, 1 N. Y. (1 Comst.), 77.*

As to the Effect of the record as evidence, see EVIDENCE, 1561-1576.

IV. THE DOCTRINE OF NOTICE.

97. Priority of registry is of no avail against actual notice of a previous unregistered mortgage. *Chancery, 1817, Berry v. Mutual Ins. Co., 2 Johns. Ch., 608. Supreme Ct., 1812, Jackson v. Sharp, 9 Johns., 168.*

98. At law. The question of notice, or fraud on the part of the subsequent purchaser, is cognizable at law as well as in equity. *Supreme Ct., 1818, Jackson v. Burgott, 10 Johns., 457. S. P., Ot. of Errors, 1880, Tuttle v. Jackson, 6 Wend., 218; reversing S. C., 9 Cow., 238.*

99. If one affected with notice, conveys to one without notice, the latter is protected equally as if no notice had ever existed. [2 Vern., 384; 2 Fonb., 153; Amb., 818; 1 Johns., 573.] *Supreme Ct., 1811, Jackson v. Given, 8 Johns., 187.* Followed, in case of mortgages, 1828, *Jackson v. Van Valkenburgh, 8 Cow., 260.* To the same effect, *Chambers, 1848, Corning v. Murray, 3 Barb., 652. Chancery, 1887, Varick v. Briggs, 6 Paige, 328.*

100. Notice of trust. A purchaser from one who was a trustee, is not chargeable with notice of the trust, by the registry of a deed between third persons reciting that the trustee had executed a declaration of the trust. *Chancery, 1815, Murray v. Ballou, 1 Johns. Ch., 566.*

101. Witness of deed with notice of contents. The rule that a prior mortgagee or incumbrancer who witnesses a subsequent conveyance or mortgage, knowing its contents, without disclosing his own incumbrance, will be postponed or barred, does not apply, where the prior mortgage is duly registered, for then the subsequent mortgagee is charged with notice. To affect the right of such prior mortgagee, actual fraud must be charged and proved. *Chancery, 1819, Brinkerhoff v. Lansing, 4 Johns. Ch., 65.*

102. That a recital of a mortgage in another deed is no evidence of its existence, as an outstanding mortgage; for where a mortgage is paid, no release is necessary to reconvey the title. *Supreme Ct., 1820, Jackson v. Davis, 18 Johns., 7.*

103. What is sufficient notice. An agent

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employed to take a mortgage, had heard generally of a prior mortgage, given some years before, and searched the records and found none, but saw an absolute conveyance which was in fact intended as a mortgage, but did not see the defeasance which was recorded with the conveyance. *Held*, that this was not notice; and that the mortgage taken by him and duly recorded had priority. Notice to put a party upon inquiry merely, is not sufficient to break in upon the recording acts. There must be such notice as will, with the attending circumstances, amount to evidence of fraud. [2 Johns. Ch., 182; 3 Ves., 478; 2 Atk., 275; 8 Johns., 141; 10 Id., 457; 18 Id., 555.] *Supreme Ct.*, 1828, *Jackson v. Van Valkenburgh*, 8 *Cow.*, 260.

104. In general, whatever is sufficient to put upon inquiry is equivalent to actual notice. *Ct. of Appeals*, 1857, *Williamson v. Brown*, 15 *N. Y.* (1 *Smith*), 854. *A. V. Chan. Ct.*, 1840, *Williams v. Birbeck*, *Hoffm.*, 359.

105. A purchaser of land which had been mortgaged to the clerk of the Court of Chancery, who has knowledge that the mortgage existed, though it appears to have been satisfied, is bound to know that in some cases the clerk cannot legally discharge an investment of a fund without the special order of the court, and is put upon inquiry as to the authority of the clerk. *A. V. Chan. Ct.*, 1846, *Walworth v. Farmers' Loan & Trust Co.*, 4 *Sandf. Ch.*, 51. *Approved, Ct. of Appeals*, 1848, 1 *N. Y.* (1 *Comst.*), 438.

106. Actual possession of the premises at the time, is good constructive notice to the purchaser to make it his duty to inquire as to the rights of the person in possession. [4 *N. H.*, 262; 2 *Mass.*, 506.] *Ct. of Errors*, 1830, *Tuttle v. Jackson*, 6 *Wend.*, 218; reversing *S. C.*, 9 *Cow.*, 238. *Chancery*, 1832, *Grimstone v. Carter*, 3 *Paige*, 421. *Supreme Ct.*, 1850, *Wright v. Douglass*,* 10 *Barb.*, 97; 1851, *Troup v. Hurlbut*, *Id.*, 354. *A. V. Chan. Ct.*, 1840, *Williams v. Birbeck*, *Hoffm.*, 359.

107. Thus if a deed has been actually or constructively delivered before a judgment against the grantor, and the purchaser is in actual possession at the time of the sheriff's sale, such sale does not divest his title, though the sheriff's deed be put on record before his. If the subsequent purchaser knows of the un-

registered conveyance at the time of his purchase, he cannot protect himself against that conveyance; and whatever is sufficient to make it his duty to inquire as to the rights of others, is considered legal notice to him of those rights. *Ct. of Errors*, 1830, *Tuttle v. Jackson*, 6 *Wend.*, 218; reversing *S. C.*, 9 *Cow.*, 238.

108. If a purchaser of land is in possession under his contract to purchase, a subsequent mortgagee or grantee has constructive notice of his equitable rights, and takes the land subject to his prior equity. [5 Johns. Ch., 29; 4 Litt., 317; 1 *Monr.*, 201.] *Chancery*, 1830, *Gouverneur v. Lynch*, 2 *Paige*, 300; 1832, *Grimstone v. Carter*, 3 *Id.*, 421.

109. But the mortgagee has a lien on the unpaid purchase-money from the time of the recording of the mortgage. *Chancery*, 1830, *Gouverneur v. Lynch*, 2 *Paige*, 300.

110. That the fact that after foreclosure and sale, and the delivery of an absolute master's deed to the purchaser, the mortgagor was allowed to retain possession, is not notice to the purchaser's grantee, of a parol defeasance between the purchaser and mortgagor. *V. Chan. Ct.*, 1840, *Sornberger v. Webster*, *Clarke*, 188.

111. Where during the possession the possessor's title was divested, and he continued to occupy without making any claim adverse to the one who acquired title;—*Held*, that his possession was not notice of his claim that the legal owner held in trust for him. *A. V. Chan. Ct.*, 1845, *N. Y. Life Ins. & Trust Co. v. Cutler*, 8 *Sandf. Ch.*, 176.

112. The possession of the purchaser's tenant, is notice to a subsequent mortgagee of the vendor. *Chancery*, 1848, *Bank of Orleans v. Flagg*, 3 *Barb. Ch.*, 316.

113. The act of a railroad corporation staking out its way and setting some fence posts,—*Held*, not such a possession as to constitute notice. *Supreme Ct.*, *Sp. T.*, 1852, *Merritt v. Northern R. R. Co.*, 12 *Barb.*, 605.

114. That a grantee is chargeable with notice of what appears by the terms of the deed to his grantor. *Chancery*, 1839, *Jumel v. Jumel*, 7 *Paige*, 591.

115. Notice to the agent employed in the transaction, is notice to the principal. [3 Atk., 646; 1 Ves., 64; Amb., 436; 18 Ves., 120.] *Supreme Ct.*, 1812, *Jackson v. Sharp*, 9 *Johns.*, 168; 1816, *Jackson v. Leonard*, 18 *Id.*, 180; *S. P.*, 1828, *Jackson v. Van Valkenburgh*, 8

* Reversed on other points, 7 *N. Y.* (3 *Seld.*), 564.

The Doctrine of Notice in respect to Records.

Cow., 260; 1838, *Jackson v. Leek*, 19 *Wend.*, 339. *A. V. Chan. Ct.*, 1844, *Westervelt v. Haff*, 2 *Sandf. Ch.*, 98.

116. Where an agent comes to the knowledge of a fact, while he is concerned for the principal, this operates as constructive notice to the principal himself; for, upon general principles of policy, it must be taken for granted that the principal knows whatever the agent knows. [Stor. on Ag., § 140; 1 T. R., 12; 18 *Wend.*, 518; 2 *Hill*, 461; 4 *Paige*, 137; 3 *Atk.*, 26; 2 *Vern.*, 574, 609; 2 *Ball & B.*, 491; *Pal. on Ag.*, Law Lib. ed., 262, n. 1.] *Ct. of Appeals*, 1854, *Ingalls v. Morgan*, 10 *N. Y. (6 Seld.)*, 178; affirming *S. C.*, 12 *Barb.*, 578.

117. The mortgagee and his agent knew, at the time of the negotiation for the loan for which the mortgage was given, that the mortgagor was not then the owner of the property, but that he was about to purchase it, and the agent knew the price of the property, and that the mortgagor had no cash to pay for it but the loan which he was to procure from the mortgagee, and that there was a prior mortgage on the property. All parties were present at the delivery of the deed by the vendor, and the delivery, by the purchaser and mortgagor, of the purchase-money mortgage for a part of the consideration; and the payment of the sum lent by the mortgagee to the mortgagor was the only amount in cash paid on the transaction. *Held*, that the mortgagee, through his agent, must be deemed to have had notice of the purchase-money mortgage, and that the same, although recorded subsequently to his mortgage, had priority over it. *Supreme Ct.*, *Sp. T.*, 1858, *Haywood v. Shaw*, 16 *How. Pr.*, 119.

118. The principal not chargeable with notice to his agent of facts transpiring in his agency for other persons. *Graves v. Mumford*, 26 *Barb.*, 94.

119. A corporation taking mortgages subsequent in date to an unrecorded deed of the mortgaged premises, are not charged with constructive notice of such deed, by the fact that the grantor and mortgagor was, at the date of the deed, and at the time of executing the mortgages, a director in the corporation, where he did not act in the transaction as their agent. *Supreme Ct.*, *Sp. T.*, 1856, *La Farge Fire Ins. Co. v. Bell*, 22 *Barb.*, 54.

120. *Cestui que trust*. That where the *cestui que trust* has notice, notice to the trustee

is not necessary. *Chancery*, 1839, *Jumel v. Jumel*, 7 *Paige*, 591.

121. *Assignment with schedule*. A debtor conveyed all his estate, real and personal, in trust for all his creditors, and the schedule of property annexed specified the land which the debtor had previously mortgaged to D., as "lots on, &c., the title to which is in D."

Held (in *Chancery*), that the assignee was a *bona-fide* purchaser within the statute [*Prec. in Chan.*, 810], and that the notice was not enough. 1816, *Dey v. Dunham*, 2 *Johns. Ch.*, 182.

Held (by the Court of Errors, reversing the decree), that the notice was sufficient, and that the assignee gained no priority by recording the deed before the mortgage was recorded. The words in the schedule were as effectual as if recited in the assignment, and a person who takes a conveyance, with notice of a prior unregistered mortgage, is not, within the meaning of the registry act, a *bona-fide* purchaser, who can gain priority by having his deed first recorded. *Ct. of Errors*, 1818, *Dunham v. Dey*, 15 *Johns.*, 555.

122. *That purchasers or incumbrancers, having constructive notice of an assignment, are put upon inquiry as to all claims and rights under it.* *Supreme Ct.*, 1855, *Briggs v. Palmer*, 20 *Barb.*, 392; but compare *Briggs v. Davis*, 20 *N. Y. (6 Smith)*, 15; 21 *N. Y. (7 Smith)*, 574.

123. *The doctrine of constructive notice, discussed.* *Stuyvesant v. Hall*, 2 *Barb. Ch.*, 151; *Williamson v. Brown*, 15 *N. Y. (1 Smith)*, 354.

As to *Acknowledgment*, and the powers of *Commissioners of deeds*, see those titles.

As to *Effect of the record as evidence*, see *EVIDENCE*.

As to *Filing chattel mortgages*, see *CHATTEL MORTGAGES*.

RECOUPMENT.

1. *In general*. The facts, that the damages claimed by defendant are unliquidated,—or that they are claimed, not on the ground of fraud, but for mere breach of contract,—or that plaintiff is suing, not on the original contract for breach of which defendant seeks to recoup damages, but on a note given for the

Who may Recoup.

Subjects of

consideration of it, do not prevent a recoupment. *Supreme Ct.*, 1842, *Batterman v. Pierce*, 8 *Hill*, 171.

2. The cases specified in which, prior to the Code, the defendant was allowed to recoup his damages. *Murden v. Priment*, 1 *Hill*, 75.

3. Recoupment and set-off under the Code of Procedure,—discussed. *Vassear v. Livingston*, 18 *N. Y.* (8 *Kern.*), 248.

4. **Who may recoup.** The sheriff having levied an execution upon some materials intended for manufacture, an agent of the execution debtor placed them in the hands of a manufacturer to be finished, on an agreement with the sheriff that they should be finished, and then sold, and the proceeds, after paying the necessary advances for completing them, should be applied to the execution. The manufacturer sued the agent to hold him personally liable for the work done; and refused to give up the goods. *Held*, that the agent having no property in the goods, could not claim to set off their value against the demand. *Ct. of Errors*, 1834, *Butts v. Collins*, 18 *Wend.*, 139; affirming *S. C.*, 10 *Id.*, 899.

5. **Sealed contract.** Under 2 Rev. Stat., 406, § 77,—providing that the presumption of a consideration arising upon a sealed instrument may be rebutted,—the defendant may recoup damages for a failure of consideration, in an action upon a sealed, as well as upon an unsealed instrument. *Supreme Ct.*, 1843, *Van Epps v. Harrison*, 5 *Hill*, 68; *S. P.*, 1835, *Johnson v. Miln*, 14 *Wend.*, 195.

6. **Notice.** The defendant cannot recoup damages unless he has given notice of his claim to do so, accompanying his plea. *Ct. of Errors*, 1844, *Trowbridge v. Mayor, &c.*, of Albany, 7 *Hill*, 429. *Supreme Ct.*, 1829, *Burton v. Stewart*, 8 *Wend.*, 236; 1843, *Barber v. Rose*, 5 *Hill*, 76.

7. **Notice,—Held**, unnecessary. *King v. Paddock*, 18 *Johns.*, 141.

8. **Another suit pending.** A defendant is not precluded from claiming recoupment of damages by the fact that he has previously commenced a direct action for such damages. But if he elects to recoup, his direct action may be stayed. *N. Y. Superior Ct.*, 1851, *Fabbriotti v. Launitz*, 3 *Sandf.*, 743.

9. **Damages after suit brought.** The defendant cannot recoup for damages accrued after the suit commenced. *Supreme Ct.*, 1848, *Harger v. Edmonds*, 4 *Barb.*, 256.

10. **A balance cannot be certified in favor of a defendant on a recoupment.** *Supreme Ct.*, 1835, *Sickels v. Pattison*, 14 *Wend.*, 257.

11. **Sale of lands.** The vendor of land knew that the vendee desired it as the site of a town; and made false representations as to its character and quality,—*e. g.*, that it was level, and required no grading, &c.,—whereby vendee was induced to pay more than he otherwise would. *Held*, that the vendee could recoup damages for the fraud of the vendor, in the action brought by the latter for the price of the land. *Supreme Ct.*, 1843, *Van Epps v. Harrison*, 5 *Hill*, 68.

12. The vendee was induced to purchase at an enhanced price, by a statement of the vendor that he himself had paid more for the land than was the fact. *Held*, that the vendee had a good cause of action for fraud, and could recoup his damages thereupon, in the vendor's action for the price. *Id.* Compare *Sandford v. Handy*, 23 *Wend.*, 260; *Davis v. Meeker*, 5 *Johns.*, 354.

13. **Sale of chattels.** Where goods are sold under a warranty as to quality, and are found defective, the purchaser may keep them, and yet recoup his damages for breach of warranty, in the vendor's action for the price. *N. Y. Com. Pl.*, 1855, *Warren v. Van Pelt*, 4 *E. D. Smith*, 202. *S. P.*, *Supreme Ct.*, 1820, *King v. Paddock*, 18 *Johns.*, 141. *Ct. of Errors*, 1831, *Reab v. McAlister*, 8 *Wend.*, 110; and see *Burton v. Stewart*, 3 *Id.*, 236.

14. Keeping the goods, delaying to give notice of the defect, &c., may furnish a strong presumption against the alleged breach of warranty, but cannot bar the buyer from suing for, or recouping his damages for such breach, if proved. *Ct. of Appeals*, 1856, *Muller v. Eno*, 14 *N. Y.* (4 *Kern.*), 597.

15. In an action for the price of a chattel, the defendant may prove a deceit in the sale,—*e. g.*, that plaintiff on selling a horse represented it sound, though he knew it to be otherwise,—either as a defence, or in abatement of the damages. *Supreme Ct.*, 1816, *Beecker v. Vrooman*, 18 *Johns.*, 302; *S. P.*, 1818, *Sill v. Rood*, 15 *Id.*, 280; 1829, *Spalding v. Vandercook*, 2 *Wend.*, 431; 1833, *Judd v. Dennison*, 10 *Id.*, 512.

16. **Note given for price.** In an action by the seller of goods, upon a note given for the price, the buyer may recoup damages for the failure of the seller to deliver them within the

Contingent Profits.

Carrier.

time stipulated. *N. Y. Superior Ct., Sp. T., 1851, Fabbriotti v. Launitz, 3 Sandf., 743.*

17. The plaintiff sold standing wood at auction, and stipulated that the purchasers should have two winters and one summer to get it away, and that in the mean time he would insure them against any damage by the burning of his adjoining fallow. Defendant purchased, and gave his note at one year, for the price; and his wood was burnt upon the ground, in consequence of the burning of plaintiff's fallow. *Held*, in an action upon the note by the plaintiff, the original payee, that defendant was entitled to recoup. *Supreme Ct., 1842, Batterman v. Pierce, 3 Hill, 171.*

18. In a suit in equity to compel a buyer of goods to perfect a security agreed to be given for the price,—*e. g.*, to compel him to indorse a bill transferred in payment of the price, but without the requisite indorsement,—the buyer may set up fraud, or deceit, or breach of warranty, as ground for allowing him a deduction upon the price. *V. Chan. Ct., 1832, Lewis v. Wilson, 1 Edw., 305.*

19. The doctrine of recoupment is confined to damages for non-performance of the very contract sued upon. Where under a contract for the sale of goods to be delivered at different times and in different quantities, separate deliveries are made, they are regarded as separate contracts; and in an action for the price of the goods last delivered, there can be no recoupment on account of inferior quality of the goods delivered previously. *N. Y. Superior Ct., 1848, Seymour v. Davis, 2 Sandf., 289; 1850, Deming v. Kemp, 4 Id., 147.*

20. **Contingent profits.** In an action to recover the contract price for building a vessel, the defendant may recoup damages for defects in the vessel, in so far as she does not conform to the building contract; and for repairs rendered necessary by her failure to conform to it; but not for expected profits of trips prevented by the delay. *Supreme Ct., 1839, Blanchard v. Ely, 21 Wend., 342; S. P., 1858, Horner v. Wood, 16 Barb., 386.*

21. **Labor.** Where a party has an action for work and labor on a contract not fully performed, the other party may recoup his damages for the non-performance. *Supreme Ct., 1835, Sickels v. Pattison, 14 Wend., 257.*

22. In actions to recover for services, the employer may recoup his damages sustained through the negligent or unskilful manner in

which plaintiff performed the work. *Supreme Ct., 1817, Grant v. Button, 14 Johns., 377; 1838, Still v. Hall, 20 Wend., 51; Ives v. Van Epps, 22 Id., 155.*

23. Where there are deficiencies in work done under a contract, although the defendant accepts the work, he may claim damages for the deficiencies by way of recoupment. *N. Y. Com. Pl., 1857, Bloodgood v. Ingoldsby, 1 Hill., 888.*

24. In an action upon notes given to plaintiff for his wages as a workman in defendant's iron works, the defendant may recoup damages for the plaintiff's destroying and injuring drawings, plans, models, &c., in the factory, contrary to his duty. *Supreme Ct., 1850, Allaire Iron Works v. Guion, 10 Barb., 55.*

25. But as damages allowed by way of recoupment are only such as arise from plaintiff's breach of contract, the deduction must be limited to the actual loss. Nothing can be allowed for malice. *Id.*

26. **Labor and materials.** That in an action for labor and materials the defendant may claim a reduction from the contract price, by showing imperfection in the articles made and delivered, notwithstanding they have been employed in the construction of a building for defendant. *N. Y. Com. Pl., 1854, Norris v. La Farge, 8 E. D. Smith, 375.*

27. In an action against a jeweller to recover damages for using base metal in the manufacture for the plaintiff of articles for which the plaintiff furnished pure metal, the defendant is entitled to recoup from the value of the pure metal, and the sum paid him for his services, the value of the articles as manufactured, which were retained by the plaintiff. *N. Y. Com. Pl., 1855, Harris v. Bernard, 4 E. D. Smith, 195.*

28. **Carrier.** In an action to recover freight, the owner of the goods cannot claim to recoup the amount he has paid as an additional premium of insurance in consequence of a deviation by the vessel, on her voyage. *N. Y. Com. Pl., 1852, Nye v. Ayres, 1 E. D. Smith, 532.*

29. **Hiring of chattels.** Where one hires a horse for a journey, and the horse falls lame without fault of the bailee, he may, in a suit by the bailor for the hire, recoup expenses to which he has been put in taking care of the horse and completing the journey. *Supreme Ct., 1848, Harrington v. Snyder, 3 Barb., 380.*

Hiring Chattels.

Landlord and Tenant.

30. In an action for the hire of a vessel, although upon a charter-party under seal, the defendant may show a fraudulent misrepresentation of her capacity made by plaintiff at the time of her hiring, as a ground of reducing the recovery. *Supreme Ct.*, 1835, *Johnson v. Miln*, 14 *Wend.*, 195.

31. Landlord and tenant. In an action for rent, or for use and occupation, the tenant may recoup damages for the landlord's breach of an agreement to repair; though he cannot set them off, under the statute. [Distinguishing 4 *Wend.*, 506; 12 *Id.*, 529; 15 *Id.*, 559; and following 4 *Id.*, 483; 8 *Id.*, 109; 25 *Id.*, 672.] *Supreme Ct.*, 1844, *Whitbeck v. Skinner*, 7 *Hill*, 53; S. P., 1848, *Dorwin v. Potter*, 5 *Den.*, 306. *Ct. of Appeals*, 1849, *Nichols v. Dusenbury*, 2 *N. Y. (2 Comst.)*, 283.

32. But he can recoup only the amount the repairs would have cost, and not special damages. *Supreme Ct.*, 1848, *Dorwin v. Potter*, 5 *Den.*, 306.

33. In an action for rent, the tenant cannot recoup damages for tortious acts of workmen employed by the landlord, entering under a privilege reserved to the latter, to make repairs. *N. Y. Superior Ct.*, 1848, *Cram v. Dresser*, 2 *Sandf.*, 120.

34. Acts of the landlord, disturbing the tenant in the beneficial enjoyment of the demised premises, cannot be set up as a ground of recoupment, unless such acts amount to an eviction. *Ct. of Appeals*, 1859, *Edgerton v. Page*, 10 *Abbotts' Pr.*, 119; S. C., less fully, 20 *N. Y. (5 Smith)*, 281; affirming S. C., 1 *Hill*, 320; 5 *Abbotts' Pr.*, 1; 14 *How. Pr.*, 116.*

35. In an action by the lessor for rent, the lessee may recoup damages for a breach of a covenant for quiet enjoyment. The cases holding that the tenant cannot, in an action for rent, set up a breach by plaintiff of a covenant in the same lease [2 *Wend.*, 407; 12 *Id.*, 529; 15 *Id.*, 559], have been disapproved. It is now well established, that in an action for breach of a contract, the defendant may show that the plaintiff has not performed the same contract on his part, and may recoup his damages for such breach, whether liquidated or not. [22 *Wend.*, 155; 3 *Hill*, 171.] *Ct. of Appeals*, 1855, *Mayor, &c., of N. Y. v. Mable*, 18 *N. Y. (3 Kern.)*, 151.

* The decision at special term is reported, 12 *How. Pr.*, 58.

36. In an action for rent, the tenant may show he was induced to enter into the lease by a fraudulent misrepresentation by the lessor,—e. g., that the premises leased comprehended land not in fact included,—and he may recoup his damages thereby sustained. *Supreme Ct.*, 1841, *Allaire v. Whitney*, 1 *Hill*, 484. *Ct. of Appeals*, 1848, *Whitney v. Allaire*, 1 *N. Y.*, 805; affirming S. C., 4 *Den.*, 554.

REDEMPTION.

1. Only one entitled to the legal estate of the mortgagor, or claiming a subsisting interest under him, can sue in equity for a redemption of a mortgage. *Ct. of Errors*, 1812, *Grant v. Duane*, 9 *Johns.*, 591.

2. A junior mortgage not yet payable gives no right to sue to be enabled to pay and be subrogated to a prior mortgage, unless shown to be necessary for protection. Subrogation proceeds on the ground of necessity for protection; and this exists when, in order to make the junior claim beneficial or available, it is necessary to disengage the property from the previous incumbrance. *N. Y. Com. Pl., Sp. T.*, 1855, *Jenkins v. Continental Ins. Co.*, 12 *How. Pr.*, 66.

3. A junior incumbrancer by mortgage has a right to redeem from a senior mortgagee, and have an assignment of the security to protect and enforce his own rights, instead of having it declared satisfied. *So held*, in a peculiar case. *Supreme Ct.*, 1848, *Pardee v. Van Anken*, 3 *Barb.*, 534; S. C., 6 *N. Y. Leg. Obs.*, 378.

4. Of the right of redemption, and the distinction between redemption by the owner of the fee and by the owner of a less estate. *Id.*

5. Must redeem whole. In general, one having an equity of redemption in a portion of mortgaged premises must redeem the whole. [12 *Ves.*, 48; 4 *Kent's Com.*, 163; 2 *Hoffm. Ch. Pr.*, 157.] The mortgagee may insist upon a full redemption, and the rule is undoubtedly mainly for his benefit. *Supreme Ct.*, 1858, *Boquet v. Coburn*, 27 *Barb.*, 230.

6. Redemption of a part, allowed in a peculiar case. *Id.*

7. Mode. If the property is sold under the power, and the mortgagor comes into equity for relief, it must be by a bill to redeem; he cannot have a decree merely for a resale. [5 *Johns. Ch.*, 35.] *V. Chan. Ct.*, 1833, *Goldsmith v. Osborne*, 1 *Edw.*, 560.

The Right to Redeem, among Creditors.

8. The assignees of a term for years may, to protect their estate, redeem a mortgage given by their lessor prior to the lease, even though the leasehold premises consist of but a part of the lands covered by the mortgage. And on redemption, the redeeming party has a right to an assignment of the mortgage redeemed, and, if it be recorded, a right to require the mortgagee to acknowledge the assignment. *Ct. of Appeals*, 1853, *Averill v. Taylor*, 8 *N. Y.* (4 *Seld.*), 44.

9. On a bill to redeem, further time should not be given for the payment of the money. *Chancery*, 1819, *Brinckerhoff v. Lansing*, 4 *Johns. Ch.*, 65.

10. The practice in reference to allowances of time on a bill to redeem, stated at length. *Perine v. Dunn*, 4 *Johns. Ch.*, 140.

11. Under the Bankrupt Act (*U. S. Stat.*, 1841, § 8),—which provides that “no suit shall be maintainable by or against the assignee, or any person claiming an adverse interest, touching the property and rights of property of the bankrupt, unless brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued,”—*Held*, that where the equity of redemption of the mortgagor was transferred to his assignee, and the mortgage was foreclosed, the assignee not being a party, a purchaser at the assignee’s sale, subsequent to the foreclosure and sale under the mortgage, had a right to redeem even after the lapse of the two years. *Supreme Ct., Sp. T.*, 1853, *Burnham v. De Bevoise*, 8 *How. Pr.*, 159. Compare, however, *Cleveland v. Boerum*, 27 *Barb.*, 252; affirming *S. C.*, 23 *Id.*, 201; 3 *Abbotts’ Pr.*, 294; *q. v.*, *LIMITATIONS*, 292.

12. *Dowress*. The mortgagee in lawful possession, or one in possession under foreclosure and a sale, by a suit to which the wife of the owner of the equity of redemption was not a party, may defend such possession at law against her claim to dower, for he has the legal title, and her claim is subordinate thereto, so long as the mortgage-debt is unpaid; but she is entitled to redeem, and may maintain a suit therefor. *N. Y. Superior Ct.*, 1858, *Wheeler v. Morris*, 2 *Bow.*, 524.

13. The right of a dowress to redeem, discussed. *Bell v. Mayor, &c.*, of *N. Y.*, 10 *Paige*, 49.

14. *Mortgage and judgment*. Where there were two mortgages, and the prior mortgagee

held a judgment younger than the second mortgage under which he had sold and become purchaser of the equity of redemption;—*Held*, that on his bill to foreclose the right of the second mortgagee, the latter was entitled to redeem on payment of his mortgage alone without the judgment. *Chancery*, 1818, *McKinstry v. Mervin*, 8 *Johns. Ch.*, 466.

15. *Tacking*. Where a subsequent judgment or mortgage creditor offers to redeem, the mortgagee cannot tack a debt due to him from the mortgagor, secured by another mortgage on different property, nor any other debt which is not a charge upon the premises sought to be redeemed, and of which such creditor was not bound to take notice. *Chancery*, 1821, *Burnet v. Denniston*, 5 *Johns. Ch.*, 35.

16. That creditors, by judgment or mortgage, whose liens attach intermediate a prior mortgage and a statute-foreclosure of it, may redeem. *Chancery*, 1833, *Benedict v. Gilman*, 4 *Paige*, 58; 1834, *Vroom v. Ditmas, Id.*, 526.

17. A judgment-creditor of one who had conveyed by an absolute deed, with a parol agreement that it shall stand as security, permitted to redeem. *Chancery*, 1834, *Van Buren v. Olmstead*, 5 *Paige*, 9.

18. If a junior judgment-creditor takes a conveyance from the purchaser on a statute-foreclosure, and then conveys with warranty, his right to redeem is extinguished. *Chancery*, 1834, *Vroom v. Ditmas*, 4 *Paige*, 526.

19. That a judgment-creditor, though he has not made his lien specific by a sale of the land, is entitled to redeem from a mortgagee in possession under a foreclosure to which such judgment-creditor was not a party. *Ct. of Appeals*, 1852, *Brainard v. Cooper*,* 10 *N. Y.* (6 *Seld.*), 356.

20. That a judgment-creditor of the mortgagor of leasehold premises may file his bill to redeem, after execution returned unsatisfied. *A. V. Chan. Ct.*, 1840, *Quin v. Brittain*, *Hoffm.*, 358.

21. A judgment-creditor who has sold mortgaged premises at a sheriff’s sale, and who has purchased the property and received a sheriff’s deed, may pay off a previous mortgage, and thus wipe away all incumbrances; but he is not entitled, on payment of the amount due, to demand an assignment of the bond and*

* The court were equally divided.

In Actions at Common Law;—In what Cases allowed.

mortgage. The court has no power to compel one person to sell or assign to another a security or chose in action, unless such transfer is shown clearly to be indispensable to the attainment of complete justice, the protection and preservation of some unquestionable right, or the prevention of some manifest wrong. *Supreme Ct., Sp. T., 1852, Dauchy v. Bennett, 7 How. Pr., 375*; distinguishing *Pardee v. Van Anken, 3 Barb., 534*; *S. O., 6 N. Y. Leg. Obs., 378*.

22. Affidavit. Under the Laws of 1836, 798,—permitting redemption by mortgagees, and requiring the production of an affidavit of the amount due, or to become due, made by the mortgagee, "his assignee, attorney, or agent,"—the mortgagor may be the "agent" of the mortgagee, and his affidavit is sufficient. *V. Chan. Ct., 1840, Angur v. Winslow, Clarke, 258*.

23. Accounting. The right to redeem chattels, as much as that to redeem real property, carries with it the right to an accounting for profits up to the time of the decree. *Supreme Ct., 1859, Pratt v. Stiles, 17 How. Pr., 211*; *S. O., 9 Abbotts' Pr., 150*.

As to the right of Judgment-creditors and others to redeem from judicial sales, see EXE-CUTION.

As to the right of a Mortgagor to redeem from the mortgagee, see MORTGAGE.

REFERENCE.

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I. IN ACTIONS AT COMMON LAW.

1. *In what Cases allowed.*

1. An action of covenant is not referable where it embraces sundry items of special damages but no account. *Supreme Ct., 1830, Thomas v. Reab, 6 Wend., 503*.

But a long account may exist where covenant is the remedy. 1833, *Bloore v. Potter, 9 Wend., 480*.

2. Where there is no account between the parties, in the ordinary acceptance of that term, the cause cannot be referred, although there may be many items of damage. [6 Wend., 503; 19 Id., 21, 108.] *So held*, in an action of covenant to recover many years' rent, payable in fowls, &c., defendant not claiming payments, but only that he never was liable. *Supreme Ct., 1844, Van Rensselaer v. Jewett, 6 Hill, 378*; *Sp. T., 1856, Dewey v. Field, 18 How. Pr., 437*. *N. Y. Superior Ct., Sp. T., 1856, McCullough v. Brodie, Id., 346*.

3. An action in tort, though it may involve many items of damage is not referable, and a reference by consent is an arbitration, and puts the cause out of court. *Supreme Ct., 1837, Silmsr v. Redfield, 19 Wend., 21*.

The same principle applies under the Code. *Sp. T., 1850, McMaster v. Booth, 4 How. Pr., 427*; *S. O., 3 Code R., 111*.

4. An action of tort could not (before the act of 1845) be referred. *Supreme Ct., 1846, Beardsley v. Dygert, 3 Den., 380*; and see *Harris v. Bradshaw, 18 Johns., 26*.

5. A cause which involves both a long account, and damages for breach of special agreement, may be referred, and the referees pass upon both. *Supreme Ct., 1840, Lee v. Tillotson, 24 Wend., 337*.

6. Collateral account. It is not a case proper for a reference within the act, when the accounts will arise collaterally, and are not the immediate object of the suit. *Supreme Ct., 1801, Todd ads. Hobson, 3 Johns. Cas., 2 ed., 517*.

7. The following are not accounts. Four items. *Parker v. Snell, 10 Wend., 577*.

One bill of fifty items delivered at one time. *Swift v. Wells, 2 How. Pr., 79*.

A bill of seven items upon only two different dates. *Smith v. Brown, 3 How. Pr., 9*.

One bill of lading, of eleven different items. *Miller v. Hooker, 2 How. Pr., 171*.

8. In an insurance case turning solely on

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a great number of items of injury, and on the amount of the loss, there being no question of law, a reference was ordered. *Samble v. Mechanics' Fire Ins. Co.*, 1 *Hall*, 560.

9. In cross-suits, where one had been referred, in which all might be obtained that could be gained by a reference in the other, the latter was refused. *Codwise v. Hacker*, 2 *Cai.*, 251; S. C., *Col. & C. Cas.*, 401.

A joint reference ordered in cross-suits. *Hart v. Trotter*, 4 *Wend.*, 198.

10. **Consent.** An action does not lie upon a report of referees pursuant to a rule by consent in assumpsit, for the consent precludes the objection that the case did not require the examination of long accounts. It is not an award, but a report, and judgment may be had upon it. *Supreme Ct.*, 1820, *Harris v. Bradshaw*, 18 *Johns.*, 26.

11. **Point of law.** A reference will not be granted, where it appears that questions of law will arise. *Supreme Ct.*, 1801, *De Hart v. Covenhoven*, 2 *Johns. Cas.*, 402; 1804, *Codwise v. Hacker*, 2 *Cai.*, 251; S. C., *Col. & C. Cas.*, 401; 1805, *Low v. Hallett*, 3 *Cai.*, 82; 1807, *Adams v. Bayles*, 2 *Johns.*, 374; 1845, *Ives v. Vandewater*, 1 *How. Pr.*, 168.

12. Affidavit to oppose on this ground must set forth the point. *Supreme Ct.*, 1810, *Salisbury v. Scott*, 6 *Johns.*, 829; 1808, *Lusher v. Walton*, 1 *Cai.*, 150; S. C., *Col. & C. Cas.*, 206.

To the contrary, 1805, *Low v. Hallett*, 3 *Cai.*, 82; and see *Adams v. Bayles*, 2 *Johns.*, 374.

13. The court must be satisfied that they will be questions of real difficulty. *Supreme Ct.*, 1826, *Anonymous*, 5 *Cow.*, 428. Compare *Shaw v. Ayrs*, 4 *Id.*, 52.

14. **Unauthorized reference.** A submission of the suit, and all matters in difference, to arbitrators generally, without any stipulation to enter judgment upon their determination, is a discontinuance. [2 *Wend.*, 506; 18 *Johns.*, 22.] *Supreme Ct.*, 1884, *Towns v. Wilcox*, 12 *Wend.*, 508.

So is the reference of a referable cause to less than the legal number of referees. 1829, *Rathbone v. Lownsbury*, 2 *Wend.*, 595.

For other cases, see **ARBITRATION**.

2. Appointment of Referees.

15. The circuit judge may order a reference like the Supreme Court, but the court

may review it and revoke it.* [6 *Wend.*, 508; 25 *Id.*, 687.] *Supreme Ct.*, 1844, *Van Rensselaer v. Jewett*, 6 *Hill*, 373.

16. **Moving.** Notice of motion to refer is not confined to first day of term; it may be given afterwards, on showing excuse. *Supreme Ct.*, 1808, *Bedle v. Willett*, 1 *Cai.*, 7; S. C., *Col. & C. Cas.*, 148.

17. An affidavit to move for reference must be made by the party, or give an excuse for the omission. *Supreme Ct.*, 1843, *Wood v. Crowner*, 4 *Hill*, 548; 1845, *Mesiok v. Smith*, 2 *How. Pr.*, 7; 1846, *Ross v. Beecher*, 2 *Id.*, 157; *Little v. Bigelow*, *Id.*, 164.

18. The fact that plaintiff resided in a remote part of the county, and could not conveniently come up to make affidavit, is not sufficient excuse. *Supreme Ct.*, 1846, *Little v. Bigelow*, 2 *How. Pr.*, 164.

19. The affidavit need not state the venue. *Supreme Ct.*, 1824, *Cleveland v. Strong*, 2 *Cow.*, 448; 1827, *Feeter v. Harter*, 7 *Id.*, 478.

It must state that issue is joined. 1824, *Jansen v. Sappen*, 3 *Id.*, 84.

— in law as well as in fact. 1846, *Dutcher v. Wilgus*, 2 *How. Pr.*, 180.

20. Pendency of demurrer going to the whole cause of action precludes the motion. *Supreme Ct.*, 1824, *Jansen v. Tappen*, 3 *Cow.*, 339.

21. **Nominating.** A notice of motion to refer must name referees. *Supreme Ct.*, 1808, *Bedle v. Willett*, 1 *Cai.*, 7; S. C., *Col. & C. Cas.*, 148; *Lusher v. Walton*, 1 *Cai.*, 150; S. C., *Col. & C. Cas.*, 206.

22. The mover is always entitled to nominate two of the three referees. *Supreme Ct.*, 1824, *Backus v. Smith*, 3 *Cow.*, 344.

23. When both parties move, he whose papers are first served has the preference in naming two. *Supreme Ct.*, 1828, *Graham v. Wood*, 1 *Wend.*, 15.

24. On the motion, if the parties are not agreed, each names one and the court the third. *Supreme Ct.*, 1844, *Gott v. Owen*, 7 *Hill*, 155.

25. **Residence.** Referees must reside in the county in which the venue is laid. *Supreme Ct.*, 1882, *Chubb v. Berry*, 7 *Wend.*, 483; 1814, *Sherwood v. Tremper*, 11 *Johns.*, 406.

* Before the Revised Statutes it could not be ordered at circuit. *Williams v. Green*, 3 *Cat.*, 129; S. C., *Col. & C. Cas.*, 470.

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26. Offering, at the notice of motion, to admit the items of the account, is an answer to the motion. *Supreme Ct.*, 1846, *Mullin v. Kelly*, 8 *Hov. Pr.*, 12.

27. Motion to substitute referees where the one who had kept the minutes of the hearing had died, and his representatives refused to deliver them to the others, so that the case might be settled, until his fees were paid,—denied. *Westbrook v. Dubois*, 8 *Hov. Pr.*, 26.

3. The Hearing.

28. Place. For the more convenient examination of witnesses, a party may have an order granting referees leave to meet in a county other than that in which the venue is laid, on terms of paying the expenses of the referees, while attending such meeting. *Supreme Ct., Sp. T.*, 1847, *Pierce v. Voorhees*, 8 *Hov. Pr.*, 111.

29. Time. That in the country, it is not necessary that the referees should be together and commence the hearing within an hour of the time noticed. They may wait till the afternoon for one of their number who is absent. *Small v. Deforest*, 2 *Hov. Pr.*, 176.

30. In action of account, it is not necessary to notify a defendant who has not appeared. *Supreme Ct.*, 1838, *Jacobs v. Fountain*, 19 *Wend.*, 121.

31. Adjournments. Referees have a reasonable discretion as to adjournments, and if they unreasonably refuse one, the report may be set aside. *Supreme Ct.*, 1801, *Forbes v. Frary*, 2 *Johns. Cas.*, 224.

32. Under 2 Rev. Stat., 884, § 43, the referees have no power to adjourn beyond the then next term of the court, on the application of one plaintiff and without the consent of the other. *Supreme Ct.*, 1840, *Jackson v. Ives*, 22 *Wend.*, 687; 1843, *Jackson v. Ives*, 6 *Hill*, 260.

But on their own motion, they may so adjourn, when necessary. 1842, *Exp. Rutter*, 8 *Hill*, 464; S. C., 1 *N. Y. Leg. Obs.*, 178.

33. Terms. Referees may impose terms upon postponing a hearing. *Supreme Ct.*, 1834, *Sickles v. Fort*, 12 *Wend.*, 199.

34. The court will stay the proceedings before referees, on a proper foundation being laid for the application [1 *Johns. Cas.*, 394; 1 *Cal.*, 147],—*s. q.*, on affidavit of the absence from the State of a material witness, who is

expected to return soon. *Supreme Ct.*, 1823, *Sudam v. Swart*, 20 *Johns.*, 476.

So held, notwithstanding defendant's omission to sue out a commission. 1800, *Bird v. Sands*, 1 *Johns. Cas.*, 394; S. C., *Col. & C. Cas.*, 107.

35. After a cause on trial before a referee has been heard and summed up, the referee may, in his discretion, grant a postponement and receive further evidence at another session; and if he refuses to do so, upon the sole ground of a supposed want of power, the court may open the hearing on terms. *Supreme Ct.*, 1843, *Packer v. French*, *Hill & D. Supp.*, 108.

36. The court will not postpone a trial pending before referees, on the ground of the absence of a witness. Any error of the referees in this respect is to be corrected by setting aside their report. *N. Y. Superior Ct.*, 1848, *Langley v. Hickman*, 1 *Sandf.*, 681.

37. All the referees must actually meet and hear the allegations and proofs, though a report by two of them is valid. *Supreme Ct.*, 1814, *McInroy v. Benedict*, 11 *Johns.*, 402; S. P. declared by 2 *Rev. Stat.*, 884, § 46. Compare *Yates v. Russell*, 17 *Johns.*, 461.

38. They cannot act, even to adjourn against objection, unless all attend. *Supreme Ct.*, 1832, *Harris v. Norton*, 7 *Wend.*, 534; and see *Jackson v. Ives*, 22 *Id.*, 687.

39. Limited time. Where an order of reference requires the report to be made within a limited time, the power of the referees ends with that time. *Supreme Ct.*, 1800, *Brower v. Kingsley*, 1 *Johns. Cas.*, 384.

40. Trial at circuit. Though referees have lost all power over a cause by improper adjournment, plaintiff cannot proceed to trial at the circuit, without leave of the court. *Supreme Ct.*, 1843, *Jackson v. Ives*, 6 *Hill*, 260.

41. Oath. Any one of the referees may administer oath to witnesses. 2 *Rev. Stat.*, 884, § 46.

42. Referees' refusal to hear further testimony against or in support of a witness's character,—sustained. *Green v. Brown*, 3 *Barb.*, 119.

43. Death of witness. Where for the accommodation of the referees, at the close of the examination in chief of a witness for the defendant, the plaintiff, without waiving expressly his right to cross-examine, consented to an adjournment, and the witness died before the adjourned day,—*Held*, that it was error for the referees to reject the testimony,

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though they might give it less weight, from the fact that there had been no cross-examination. [Reviewing many cases.] *Ct. of Errors*, 1844, *Forrest v. Kissam*, 7 *Hill*, 463; reversing *S. C.*, 25 *Wend.*, 651.

44. Reopening cause. Referees may open a cause, after it has been submitted, to hear further testimony. *Supreme Ct.*, 1828, *Cleveland v. Hunter*, 1 *Wend.*, 104.

45. Proper order where a cause is referred, and plaintiff neglects to bring it on. *Bissell v. Lee*, 16 *Johns.*, 45.

46. Consideration of testimony. Evidence which the referee admitted on the trial as competent, the referee cannot exclude from consideration as incompetent in making decision. *Supreme Ct.*, 1847, *Meyers v. Betts*, 5 *Den.*, 81.

4. The Report; and Reviewing it.

47. Meeting and report. It is irregular for a majority of the referees to meet, and make their report, without notifying the other; and such report will be set aside. *Supreme Ct.*, 1800, *Brower v. Kingsley*, 1 *Johns. Cas.*, 334.

48. Where, by agreement of the parties, a cause was referred to three referees, who, or any two of them, were to report, and two only of the referees signed the report, which stated, that the subscribers, having heard the allegations and proofs of the parties, &c.,—*Held*, in error on the judgment, that it was to be presumed, that all the referees met and heard the parties, though two only signed the report, nothing to the contrary appearing on the record; and were it otherwise, the objection could be taken only in the court below. *Ct. of Errors*, 1820, *Yates v. Russell*, 17 *Johns.*, 461.

49. Signing. Where two referees agreed to a report, and the third dissented, saying to the others that they could sign the report without him, and it was understood that the cause was determined,—*Held*, that the report, so signed the next day, was good. *Supreme Ct.*, 1845, *Clark v. Fraser*, 1 *How. Pr.*, 98.

50. Finding of usury. Where the question of usury depends on the intent of the lender, a report of referees finding usury "as a matter of law," without any distinct finding of an intention to reserve usury, or evade the statute, is erroneous. *Supreme Ct.*, 1841, *Sizer v. Miller*, 1 *Hill*, 227.

51. Notice of signing and filing a report of referees need not be given to the unsuccessful party or attorney. *Supreme Ct.*, 1845, *Watson v. Morton*, 1 *How. Pr.*, 166.

52. Where referees make a special return of all the facts instead of a report, they may be ordered to report by a day certain. *Supreme Ct.*, 1803, *Hawkins v. Bradford*, 1 *Cal.*, 161; *S. C.*, *Col. & C. Cas.*, 216.

53. The proper course to compel referees to report, is by attachment, not by motion to vacate the order of reference. *Supreme Ct.*, 1808, *Thompson v. Parker*, 3 *Johns.*, 260.

54. Supplementary or amended report not to be required where original report is substantially sufficient. *Cafferty v. Keeler*, 12 *Wend.*, 291.

55. Special report of reason for allowing plaintiff's claim—ordered. [2 *Rev. Stat.*, 884, § 47.] *Stafford v. Bacon*, 6 *Hill*, 264.

56. Mistake. Where referees certify to the court, that they have overlooked a circumstance connected with the accounts submitted, and request that the same may be sent back to them for re-examination, the court will set aside the award, and send back the accounts to the same referees. *N. Y. Superior Ct.*, 1828, *Brittingham v. Stevens*, 1 *Hall*, 379.

57. Though, in general, a mistake in accounting may always be proved, it cannot be done, after close of proofs, to contradict an item admitted on the hearing. An admission made in the course of the cause, for the purpose of superseding proof, is conclusive. *Supreme Ct.*, 1840, *Clark v. Fairchild*, 22 *Wend.*, 576.

58. Case. The court will not review the proceedings of referees upon a case. A party may move to set aside the report on affidavits, and the court will order a special report if necessary. [2 *Rev. Stat.*, 884, § 47.] *Supreme Ct.*, 1830, *Curtis v. Staring*, 4 *Wend.*, 198. Compare *Coggeshall v. Burling*, 8 *Cow.*, 136.

59. The court will not, on error to the Common Pleas, consider a mere report of the referees, though questions of law are presented by it; but they must be presented by a case showing that the questions, sought to be raised on error, have been passed upon by the court below. *Supreme Ct.*, 1840, *McPherson v. Cheadell*, 24 *Wend.*, 15.

60. A report of referees is equivalent to a verdict within 2 *Rev. Stat.*, 209, § 20; and a case made to review it became settled at least

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after twenty days from the day of serving notice of settlement. *Supreme Ct.*, 1846, Methodist Episcopal Church v. Tryon, 2 *Hov. Pr.*, 182.

61. Conclusive. The report of a referee, like the verdict of a jury, is conclusive where there is no decided preponderance of evidence against it. *Supreme Ct.*, 1842, Eaton v. Benton, 2 *Hill*, 576. Followed, 1847, Esterly v. Cole, 1 *Barb.*, 235; affirmed, *Ct. of Appeals*, 1850, 3 *N. Y.* (3 *Comst.*), 502. *Ct. of Appeals*, 1849, Davis v. Allen, 3 *N. Y.* (3 *Comst.*), 168. *Supreme Ct.*, 1849 [citing, also, 3 *Hill*, 256; 2 *Wend.*, 356], Quackenbush v. Ehle, 5 *Barb.*, 469; 1849, Carley v. Wilkins, 6 *Id.*, 557; *S. P.*, 1848, Green v. Brown, 3 *Id.*, 119; 1850, Durkee v. Mott, 8 *Id.*, 423; 1853, Vansteenburg v. Hoffman, 15 *Id.*, 28; 1853, Woodin v. Foster, 16 *Id.*, 146; *Sp. T.*, 1852, Shuart v. Taylor, 7 *Hov. Pr.*, 251; and see Bearss v. Copley, 10 *N. Y.* (6 *Seld.*), 93.

Compare, as to the inconclusive effect of a referee's report in an equity cause, Burhans v. Van Zandt,* 7 *Barb.*, 91.

62. The report of a referee may be sustained, although he improperly admits some testimony, if, on rejecting that, enough remains to support it. *Supreme Ct.*, 1851, Kemeys v. Richards, 11 *Barb.*, 312.

63. After motion to set aside the report of the referees has been denied, defendant may still be permitted to open the report upon the merits, where his laches are excused. *N. Y. Com. Pl.* (1842?), Peterkin v. Ootheal, 1 *N. Y. Leg. Obs.*, 219.

64. If the cause was not referable, the court cannot review the report. *Supreme Ct.*, 1846, Beardsley v. Dygert, 3 *Den.*, 380.

65. Setting aside. The court refused to set aside the report of referees, on allegations that they disregarded plaintiff's verbal agreement to wait for further testimony, that one of them was at enmity with defendant, and that defendant could introduce testimony to reduce the damages. Combs v. Wyckoff, 1 *Cai.*, 147; *S. C.*, *Col. & C. Cas.*, 203.

66. Report set aside where the facts were intricate and obscure. Allard v. Mouchon, 1 *Johns. Cas.*, 280.

67. Neglect to file. A motion to set aside the report of referees may be heard, though

by the neglect of the party in whose favor the report was made it has not been filed. *Supreme Ct.*, 1800, Thompson v. Tompkins, 1 *Johns. Cas.*, 238.

68. After final judgment entered, it is too late to move to set aside a report. *Supreme Ct.*, 1806, Comstock v. Rathbone, 1 *Johns.*, 138.

69. If the parties refer the cause by consent, after notice of motion on affidavits that the cause is referable, the court will not, on application of the party who swore it was referable, disturb the report on the ground that it was not. *Supreme Ct.*, 1833, Bloore v. Potter, 9 *Wend.*, 480.

70. Place. The court will not set aside report of referees because the referees met in a county different from the venue, where the party was not prejudiced. *Supreme Ct.*, 1807, Newland v. West, 2 *Johns.*, 188.

71. Residence. It is not ground of setting aside a report that the referee resides out of the county. Such objection should be taken, if at all, on the motion for a reference. *N. Y. Com. Pl.*, 1846, Sniffin *ads.* Weeda, 5 *N. Y. Leg. Obs.*, 19.

II. IN SUITS IN EQUITY.

72. Objection to the particular master, if valid, should be made before such master has decided the matter. *Chancery*, 1844, Johnson v. Swart, 11 *Paige*, 385.

73. Reference to a vice-chancellor of exceptions to master's report is irregular if the report was irregular. *Chancery*, 1833, Manhattan Co. v. Evertson, 4 *Paige*, 276.

74. Practice in referring causes and motions to a vice-chancellor or assistant. Ames v. Blunt, 2 *Paige*, 94; Atlantic Insurance Co. v. Lemar, 10 *Id.*, 505; Cowman v. Lovett, *Id.*, 559.

75. Vice-chancellor may execute the reference though the suit is pending before himself. *Chancery*, 1840, Wetmore v. Winans, 3 *Paige*, 370.

76. Suit of infant. Reference ordered, in a suit by next friend, for an infant, to report whether the suit was for infant's benefit. Garr v. Drake, 2 *Johns. Ch.*, 542.

77. In foreclosure cases, where there are absent defendants who have not been personally served, and do not appear, and one defendant has appeared and answered, the court may, on special application of the com-

* Reversed on the merits, *Ct. of Appeals*, 1852, 7 *N. Y.* (3 *Seld.*), 523.

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plainant, order a reference to take proof of the facts stated in the bill, and also, at the same time to compute the amount due upon the mortgage; but with leave to the defendant to apply to dismiss the bill for want of prosecution, if the complainant neglects to procure the master's report without unnecessary delay. *Chancery*, 1886, *Corning v. Baxter*, 6 *Paige*, 178.

78. Where a fund is in court, or in the hands of its officers, it is a matter of discretion, whether to direct a bill to be filed, or order a reference to ascertain the rights of claimants. *Chancery*, 1887, *Sweet v. Jacocks*, 6 *Paige*, 355.

79. On motion for a reference in a divorce case, on the bill being taken as confessed, it must be clearly proved that the subpoena was served within its jurisdiction, and the original affidavit of service must be produced. *V. Chan. Ct.*, 1886, *Shetzler v. Shetzler*, 2 *Edw.*, 584.

80. That in cases of divorce for impotence, if the defendant has not answered upon oath, he, or she, should be examined before the master on oath, touching the truth of the allegations of the bill. *Chancery*, 1886, *Devenbagh v. Devenbagh*, 5 *Paige*, 554.

81. Rule 165—which requires a special affidavit as to cohabitation, &c., on moving for a reference in divorce suits—does not apply to suit founded on the existence of another marriage. *V. Chan. Ct.*, 1881, *Borradaile v. Borradaile*, 1 *Edw.*, 40.

82. In a divorce suit it is the duty of the master to examine witnesses, as to all the material facts charged in the bill, and also whether there has been a condonation; and to report the proofs with his opinion thereon. *Chancery*, 1889, *Dodge v. Dodge*, 7 *Paige*, 589; 1842, *Pugsley v. Pugsley*, 9 *Id.*, 589.

83. Upon a reference to a master in a divorce case, where the charges are admitted by answer or default, the defendant may appear and cross-examine witnesses, and produce witnesses to disprove the charges of the bill, to elicit the truth, in aid of the conscience of the court; and not for the purpose of protecting any rights of the defendant. But the wife must cross-examine, in such a case, at her own expense; and the master is not bound to take the testimony for her without compensation. *Chancery*, 1847, *Perry v. Perry*, 2 *Barb. Ch.*, 285.

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84. On a petition to substitute trustees, a reference as to the fitness of the proposed substitutes, and as to the necessity of security, should be ordered. *V. Chan. Ct.*, 1889, *Matter of Stuyvesant*, 8 *Edw.*, 299.

85. In a creditor's suit the examination should be referred to a master near the defendant's residence, except under special circumstances. *Chancery*, 1841, *Bank of Monroe v. Keeler*, 9 *Paige*, 249.

86. That under the judiciary act, the court had no authority to make a compulsory order for a reference in an equity cause, except of such matters as were, under the former practice, usually referred to a master. *Supreme Ct., Sp. T.*, 1847, *Stewart v. Gardner*, 8 *How. Pr.*, 156.

87. Judicial sale. In foreclosure cases, where a controversy exists between different defendants, in relation to the order in which the several portions of the premises should be sold, instead of directing a sale by the sheriff, the court should refer it to some suitable person to make the sale, and directing the referee to sell according to the equitable rights of the parties. *Supreme Ct., Sp. T.*, 1847, *Knickerbacker v. Eggleston*, 8 *How. Pr.*, 180.

88. Substance of an order of reference to appoint a receiver in a creditor's suit, where the defendant appears but does not give the consent under Rule 191; and what questions defendant is bound to answer on his examination before master,—stated. *Green v. Hicks*, 1 *Barb. Ch.*, 809.

89. In a suit for specific performance, where the description of the premises was ambiguous, the court, on ordering a referee to report on the title, directed that proof as to the identity of the premises be taken at the same time. *V. Chan. Ct.*, 1840, *McWhorter v. McMahan*, *Clarke*, 400; affirmed, *Chancery*, 1843, 10 *Paige*, 886.

90. General principles on which examinations before a master are to be conducted, regulating and settling the practice, as to the mode of taking testimony, on an order of reference to a master. *Remsen v. Remsen*, 2 *Johns. Ch.*, 495.

91. Upon a bill taken as confessed, and an order of reference thereon to a master, such allegations of the bill as are distinct and positive, are to be taken as true, without proof. Indefinite allegations, and such demands of the complainant as are uncertain, must be estab-

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lished by proof. *Chancery*, 1824, *Williams v. Corwin*, *Hopk.*, 471.

92. Master's summons, requisites of. *Manhattan Co. v. Evertson*, 4 *Paige*, 276.

93. If service is on the solicitor, and the client is absent, the solicitor must attend, or the client must pay costs of proceedings to compel attendance. *Chancery*, 1841, *Stow v. Pearce*, 9 *Paige*, 867.

94. Although a complainant obtains a reference, yet the master may grant a summons under it to a defendant, for a witness to be examined. [Rule 102.] *V. Chan. Ct.*, 1839, *Fream v. Dickinson*, 3 *Edw.*, 300.

95. Master cannot issue a summons on a reference, till decree or order directing such reference is entered, and an authenticated copy brought into his office. *Chancery*, 1843, *Quackenbush v. Leonard*, 10 *Paige*, 181.

96. Appointing receiver. On the examination of the defendant before the master, under the order for the appointment of a receiver, his counsel cannot cross-examine him, but may cross-examine the witnesses. [1 *Paige*, 122.] *A. V. Chan. Ct.*, 1840, *Lee v. Huntoon*, *Hoffm.*, 447.

97. — settle issues. In affidavits as to witnesses, presented upon a reference to a master to settle issues to be tried by a jury and to determine in what county the trial should be had, the matters expected to be proved must be stated. *Chancery*, 1840, *Meach v. Chappell*, 8 *Paige*, 135.

98. A defendant cannot assume the prosecution of a decree upon the reference, unless it has been committed to him by order upon notice to the complainant. *Chancery*, 1841, *Holley v. Glover*, 9 *Paige*, 9; and see *Quackenbush v. Leonard*, 10 *Id.*, 181.

99. Ex-parte affidavits are not admissible on a reference to examine into an alleged contempt, unless special leave is given. *Chancery*, 1839, *Cumming v. Waggoner*, 7 *Paige*, 608.

100. Mode of accounting and making rests in a suit for an account, against a creditor. *Rhineland v. Barrow*, 17 *Johns.*, 588; affirming, in part, *S. O.*, 1 *Johns. Ch.*, 550.

101. In taking the accounts of co-trustees, it is proper to state the account of each separately, even if they are eventually liable to be charged for the defaults of each other in misapplying the funds. The consent of the parties, on the reference, is equivalent to a special

provision in the order for such mode of stating the accounts. *Chancery*, 1844, *Spencer v. Spencer*, 11 *Paige*, 299.

102. Method of proceeding on an accounting before a master. *Story v. Brown*, 4 *Paige*, 112.

103. That in stating an account between partners, the true dates, as furnished by the books themselves, ought to be assumed. *Chancery*, 1816, *Stoughton v. Lynch*, 2 *Johns. Ch.*, 209.

104. A party in an account before a master, under the head of general expenses, is not to be allowed any thing without specifying particulars. *Chancery*, 1817, *Methodist Episcopal Church v. Jaques*, 3 *Johns. Ch.*, 77.

105. Where one party produces a paper to charge the other, the latter may use it in his discharge. But where the discharges are inaccurate in some instances, and are destitute of precision and certainty as to place and circumstances, the whole may be rejected. *Id.*

106. Where the charges in the bill were specific, setting forth the items of the account, with their dates,—*Held*, that on an order of reference for an account, other matters were not open to inquiry. The general charge in the bill, and prayer for a full accounting "concerning the premises" must be referred to the charges in detail. *Chancery*, 1818, *Consequa v. Fanning*,* 3 *Johns. Ch.*, 587.

107. An objection to the master's report on an accounting, is waived, if not raised until the hearing. [8 *Johns. Ch.*, 366.] *Chancery*, 1820, *Smith v. Smith*, 4 *Johns. Ch.*, 445.

108. Remedy for neglect to prosecute reference. *Quackenbush v. Leonard*, 10 *Paige*, 181.

109. Report. When the court refers it to a master to examine and report as to the existence or non-existence of a fact, or as to any other matter, it is his duty to draw the conclusion from the evidence produced before him, and to report that conclusion only. And it is irregular and improper for him to set forth the evidence in his report, without the special direction of the court. [8 *Brown's Ch. Cas.*, 510, n.; 6 *Ves.*, 605; 1 *West*, 9; 1 *Newl. Pr.*, 555.] *Chancery*, 1832, *Matter of Hemip*, 8 *Paige*, 805.

110. It is irregular to insert fractions of a

* Reversed on the merits, *Ct. of Errors*, 1820, 17 *Johns.*, 511.

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cent in a master's report. *Chancery*, 1847, *Dumont v. Nicholson*, 2 *Barb. Ch.*, 71.

111. Upon a reference on default in a foreclosure-suit against non-resident defendants, the master must "report the proofs and examinations had before him." [2 *Rev. Stat.*, 186, § 129.] A mere report of his conclusions is not enough. *V. Chan. Ct.*, 1840, *Anonymous*, *Clarke*, 428.

112. The statute requiring the master's report to state the proofs, as against a non-resident, where the bill has been taken as confessed (2 *Rev. Stat.*, 188, § 188), applies only where the bill seeks the payment of a debt from his property, or the performance by him of a duty. *V. Chan. Ct.*, 1842, *Totten v. Stuyvesant*, 8 *Edw.*, 500.

113. The master's report on the reference of a divorce case, must find the marriage with the defendant, the adultery charged, and no condonation. [7 *Paige*, 589.] *V. Chan. Ct.*, 1840, *Dobbs v. Dobbs*, 8 *Edw.*, 377.

114. In divorce cases the original depositions must be filed with the report. *V. Chan. Ct.*, 1884, *Fairbanks v. Fairbanks*, 2 *Edw.*, 208.

115. **Reviewing.** The cause was submitted to two members of the bar and a merchant as referees, by order of the court, upon consent, with directions to decide all questions in dispute, "as well matters of law as of fact." *Held*, that the court should not interfere with the decision except on clear grounds. *Chancery*, 1814, *Roosevelt v. Thurman*, 1 *Johns. Ch.*, 220.

As to abrogation of practice as to Reference to take testimony, see CONSTITUTIONAL LAW, 849.

116. **Exceptions.** A defendant who has appeared (in a foreclosure cause), cannot except to the master's report of the amount due, on the ground that the solicitor was examined instead of the complainant, for that part of the reference concerns the absentees exclusively. *Chancery*, 1846, *Delaney v. Carroll*, 6 *Ch. Sent.*, 87.

117. Since, under the statute, the master on a reference in divorce cases does not decide on the guilt but only takes and reports proofs, exceptions cannot be taken to his report. *Chancery*, 1848, *Renwick v. Renwick*, 10 *Paige*, 420.

118. The remedy for omission to file the master's report in due time, is not exception,

but an application to the court to set aside for irregularity. *Chancery*, 1842, *Seymour v. Brewster*, 2 *Ch. Sent.*, 63.

119. A master's report cannot be excepted to for mere omission to report as to some matters directed by the order of reference. The remedy is to move that the report be referred back. *Chancery*, 1845, *Stevenson v. Gregory*, 1 *Barb. Ch.*, 72.

120. No exception can be taken to the report of a master, unless the objection was made to him previous to his signing his report. *Chancery*, 1817, *Methodist Episcopal Church v. Jaques*, 3 *Johns. Ch.*, 77; *S. P.*, 1821, *Minuse v. Cox*, 5 *Id.*, 441; 1823, *Slee v. Bloom*, 7 *Id.*, 137.

121. **Error apparent on the face of the report**, in a matter of mere computation, may be corrected by the court, although no exceptions have been filed. [1 *Ves.*, 189; 2 *Munf.*, 285; 1 *Barb. Ch. Pr.*, 557.] *Chancery*, 1848, *Bogert v. Furman*, 10 *Paige*, 496.

122. **An exception to a master's report**, as to the manner of computing interest, must state in what manner the interest should be computed; so that if allowed, the master will know how to correct his report. *Chancery*, 1842, *Matter of Crittenden*, 2 *Ch. Sent.*, 38.

123. One who neglects to examine a witness he has produced before a master, as to an item which the witness alone could explain, cannot afterwards except to the report as incorrect with regard to that item. *Chancery*, 1818, *Barrow v. Rhinelander*, 3 *Johns. Ch.*, 614.

124. It is too late to object to the regularity of a report after excepting to such report. *Chancery*, 1844, *Johnson v. Swart*, 11 *Paige*, 385.

125. **Exceptions**, which are repetitions of others, sometimes allowed. *Methodist Episcopal Church v. Jaques*, *Hopk.*, 453.

126. **Practice, on exceptions to a master's report**, on the review by him, and on exceptions to the amended report. *Clark v. Willoughby*, 1 *Barb. Ch.*, 68.

127. **Order to master to furnish certified copies of minutes and testimony**, where, from the multiplicity of facts, discrimination was difficult,—granted, at the applicant's expense. *Jaques v. Methodist Episcopal Church*, 2 *Johns. Ch.*, 543.

128. **Deposit unnecessary**, on excepting to master's report. *Stafford v. Rogers*, *Hopk.*, 98.

In Actions under the Code of Procedure;—In what Cases ordered;—By Consent;—Compulsory Reference.

III. IN ACTIONS UNDER THE CODE OF PROCEDURE.

1. In what Cases ordered.

A. By Consent.

129. All issues referable by written consent of the parties. *Code of Pro.*, § 270.

130. That a reference is proper when the parties consent. [Const., art. 1, § 2.] *Supreme Ct.*, *Sp. T.*, 1850, Anonymous, 8 *Code R.*, 189.

131. Written. It is not necessary to a valid reference of an action, that the parties or their attorneys subscribe a writing consenting to the reference. If an order of reference is entered, with their consent, in open court, it is a "written consent." *Supreme Ct.*, 1858, *People v. McGinnis*, 1 *Park. Cr.*, 387.

132. The written consent to refer, under the Code (§ 270), may be written by the parties, or by their attorney, or by the clerk of the court entering their consent in the minutes of the clerk, or the referee, who stand in the place of the court, entering it in their minutes. The parties may also, by their acts, waive any further writing than such as existed in the minutes of the referee, if more were otherwise necessary. [7 *How. Pr.*, 41.] *Supreme Ct.*, *Sp. T.*, 1852, *Leaycroft v. Fowler*, 7 *How. Pr.*, 259.

133. Waiver. Where counsel have agreed, in open court, upon a reference of a cause, and have consented to an order, and have appeared and proceeded before the referee, this is a waiver of the necessity of written consent to the order of reference; and the court will not afterwards entertain the objection that the consent was not in writing. [6 *Hill*, 47; 24 *Wend.*, 387; 5 *Hill*, 468; 8 *Comst.*, 511.] *Supreme Ct.*, *Sp. T.*, 1851, *Keator v. Ulster & Delaware Plank-road Co.*, 7 *How. Pr.*, 41; *Gen. T.*, 1853, *People v. McGinnis*, 1 *Park. Cr.*, 387; and see *Diddell v. Diddell*, 8 *Abbotts' Pr.*, 167, 171, *note*.

134. Action for a divorce for adultery, is referable, by consent. *Supreme Ct.*, 1853, *People v. McGinnis*, 1 *Park. Cr.*, 387.

135. Where, on motion to confirm the report of a referee, in an action for divorce, on the ground of adultery, it did not appear by the moving papers that a jury trial had been waived, and consent to the reference given in writing, and filed, as required by section 266 of the Code;—*Held*, that the reference was irregular, and confirmation must be denied.

Supreme Ct., *Sp. T.*, 1856, *Diddell v. Diddell*, 8 *Abbotts' Pr.*, 167.

136. In an action for divorce for adultery, where the adultery is denied by the answer, the court cannot permit the case to be referred to a referee to take and report testimony to the court. There must be a feigned issue. [2 *Rev. Stat.*, 145, § 40.] *Supreme Ct.*, *Sp. T.*, 1849, *Whale v. Whale*, 1 *Code R.*, 115.

137. Order, oath. If, on a stipulation to refer, the parties appear and proceed before the referee, without objection, the referee has jurisdiction, though he had not been sworn, and no rule of court had been entered. The court will enter an order of reference *nunc pro tunc*, if necessary. *Supreme Ct.*, 1851, *Whalen v. Supervisors of Albany*, 6 *How. Pr.*, 278.

The contrary *held*, where infants were parties. *Supreme Ct.*, *Sp. T.*, 1850, *Litchfield v. Burwell*, 5 *How. Pr.*, 341; *S. C.*, 9 *N. Y. Leg. Obs.*, 182.

138. Want of preliminary decree. Where parties have, by stipulation, appointed a referee to take an account, no objection can be taken to his report, on the ground that no preliminary decree for an account had been made. *Supreme Ct.*, 1851, *Ludington v. Taft*, 10 *Barb.*, 447.

139. Departure from consent. In a case in which the plaintiff has a right to a jury trial, unless referred by consent, in writing, if a stipulation is entered into to refer the cause to A., an order entered referring it to B., without consent of the plaintiff, is a nullity. The court has no jurisdiction to make such order. [8 *Barb.*, 262.] *Supreme Ct.*, *Sp. T.*, 1852, *Haner v. Bliss*, 7 *How. Pr.*, 246.

140. Substituting. That if a cause not referable without consent, is referred upon consent to a referee named by one of the attorneys, the court ought not to substitute a new referee without the same consent. *Supreme Ct.*, *Sp. T.*, 1857, *Billings v. Vanderbrek*, 15 *How. Pr.*, 295.

B. Compulsory Reference.

141. Carriers. An order of reference is unauthorized in an action to recover damages for the loss of goods delivered to the defendants, as common carriers, where the case does not involve the examination of a long account. *Supreme Ct.*, *Sp. T.*, 1852, *Hewitt v. Howell*, 8 *How. Pr.*, 346.

In Actions under the Code of Procedure;—In what Cases ordered;—Compulsory Reference.

142. Action to set aside assignment. An issue of fact in an action against a judgment-debtor and his assignee, to set aside an assignment for fraud, and not involving the examination of a long account, cannot be referred except by consent. If such consent is withheld, the action must be tried by the court, unless the court order it to be tried by a jury. A reference to take and certify the evidence, is not authorized. *Supreme Ct., Sp. T., 1855, Draper v. Day, 11 How. Pr., 489.*

143. In an action for specific performance, the question whether a good title can be made, is generally one for a referee, and so also the accounting. But, by consent, those matters may be inquired into by the court. *Supreme Ct., 1857, Wright v. Delafield, 28 Barb., 498. (Reversed, 25 N. Y., 266.)*

144. In causes of an equitable nature, where facts other than those presented by the issues in the pleadings are necessary to be known to the court, in order to enable them to frame the proper decree, the court have power, not only by the Code, but as a court of equity, to order a reference for the purpose. The former practice in this respect is not inconsistent with the Code. *Supreme Ct., Sp. T., 1858, Elmore v. Thomas, 7 Abbotts' Pr., 70.*

145. Thus where in an action brought by a married woman, by her next friend, the answer did not claim affirmative relief; but the referee to whom the cause was referred, reported that the defendant was entitled to judgment for the recovery of a deposit paid by him in the transaction sued upon, and for costs;—*Held*, on defendant's motion, 1. That the proper course was to refer it to the same referee to ascertain and report upon the facts stated in the moving papers, and to report a particular description of the plaintiff's real estate, in order to a final decree. 2. That the next friend should be required to show cause why he should not pay the defendant's costs. *Ib.*

146. In an action to dissolve a partnership, and for an accounting, an averment in the answer, that the accounts had been adjusted, and the parties had not taken any new contracts since, does not make it improper to refer the cause. The partnership did not then terminate, and the plaintiff is entitled to an accounting from that time. *N. Y. Com. Pl., 1858, Kennedy v. Shilton, 1 Hill., 546; S. C., 9 Abbotts' Pr., 187, note.*

147. In an action against a husband and wife, in which judgment was sought against the separate property of the wife, the summons and complaint were served personally upon the wife, but upon the husband by publication, and neither appeared. Plaintiff obtained an order of reference, and upon the report, the court ordered judgment for the plaintiff. *Held*, that though the reference was irregular as against the husband, he having been served by publication [§ 246, subd. 3], it was regular as to the wife, and that she could not have the proceedings set aside. *Supreme Ct., Sp. T., 1855, Chapman v. Lemon, 11 How. Pr., 285.*

148. "Where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct reference in the following cases: 1. Where the trial of an issue of fact shall require the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or, 2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect; or, 3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action." *Code of Pro., § 271.*

149. Fraud. Under the broad provision of the Code (§ 271), a reference may be ordered in an action grounded on fraud, if the trial will require the examination of a long account. *N. Y. Superior Ct., 1851, Sheldon v. Wood, 3 Sandf., 739.*

150. Motion for provisional remedy. Where an issue requires the examination of a long account, the court may, on the hearing of a motion for a provisional remedy, made on the pleadings, direct a reference to hear and decide the issue in the action. [Code, § 271.] *Supreme Ct., Sp. T., 1856, Jackson v. De Forest, 14 How. Pr., 81.*

151. Contingency. A reference can only be compelled where the court can see that the trial must necessarily involve the examination of a long account. It is not sufficient that, in case an issue is determined in plaintiff's favor, the examination of such an account will be requisite. *Supreme Ct., Circuit, 1854, Keeler v. Poughkeepsie & Salt Point Plank-road Co., 10 How. Pr., 11; S. P., Sp. T., 1848, Sheldon v. Weeks, 7 N. Y. Leg. Obs., 57.*

152. Issue tried before accounting. Where

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no accounts will be necessary unless plaintiff succeeds on an issue,—*e. g.*, an issue whether there is a partnership or not,—the issue should be tried by the court before a reference is ordered. *Supreme Ct., Sp. T.*, 1852, *Graham v. Golding*, 7 *How. Pr.*, 260.

153. Where the right of the plaintiff to recover at all upon any of the grounds claimed, depends upon the ascertainment of the amount, as well as sufficiency of the defendant's alleged advances, which advances are wholly denied by the plaintiff, a reference may be proper in the first instance, reserving the other issues in the action for trial by jury on the coming in of the report. [7 *How. Pr.*, 261; 1 *Code R.*, 118.] An order for such reference is in the discretion of the court [1 *Code R.*, N. S., 384], and is not appealable. *N. Y. Com. Pl.*, 1854, *Smith v. Dodd*, 3 *E. D. Smith*, 348.

154. In an attorney's action to recover compensation for his services, a reference may be had to ascertain the amount he will be entitled to recover, if at all, reserving the question of the right to recover. *N. Y. Superior Ct., Chambers*, 1852, *Bowman v. Sheldon*, 1 *Duer*, 607; S. C., 11 *N. Y. Leg. Obs.*, 219.

155. Reference ordered, where the question was whether a partnership existed, but to determine the question the examination of a long account was necessary. *Supreme Ct., Sp. T.*, 1850, *Mills v. Thursby*, No. 1, 11 *How. Pr.*, 118.

156. Where, in a cause submitted for decision upon the pleadings, it appears that the plaintiff is entitled to an account, but there are questions of fact material to the taking of such account, and no difficult questions of law, it may be referred to a referee to take proofs, and then upon the pleadings and proofs to take a final account. *Supreme Ct., Sp. T.*, 1854, *Van Zant v. Cobb*, 10 *How. Pr.*, 348.

157. **New trial.** The fact that the action has once been tried by jury, is no objection to referring it upon the ground of its involving the examination of a long account. *N. Y. Superior Ct.*, 1852, *Brown v. Bradshaw*, 1 *Duer*, 635; S. C., 8 *How. Pr.*, 176.

158. In an equitable action to set aside a conveyance on the ground of fraud, the court ordered the issue to be tried by a referee, where the circuit calendar was crowded. *Supreme Ct., Sp. T.*, 1854, *McMahon v. Allen*, 10 *How. Pr.*, 384.

159. **What is a long account.** An account, though containing many items, yet

being of a single purchase, and made at one time, is not a long account so as to warrant a reference. *Supreme Ct., Sp. T.*, 1850, *Stewart v. Elwell*, 8 *Code R.*, 139.

160. Many items of damage,—*e. g.*, in an action against a sheriff for a false return,—are not an account. *Supreme Ct., Sp. T.*, 1856, *Dewey v. Field*, 18 *How. Pr.*, 437.

161. That the account intended by the Code is the same as that of the Revised Statutes. *N. Y. Superior Ct., Sp. T.*, 1856, *McCullough v. Brodie*, 18 *How. Pr.*, 346. *Supreme Ct., Sp. T.*, 1856, *Dewey v. Field*, *Id.*, 437.

162. **Appeal.** The question whether the trial of an issue of fact will involve the examination of a long account, is a question of fact to be determined summarily upon the application to refer. If there is sufficient evidence to authorize the court so to find, granting a reference rests in its discretion, and the order is not appealable. *Supreme Ct.*, 1853, *Dean v. Empire State Mutual Ins. Co.*, 9 *How. Pr.*, 69.

163. The allegation in the moving affidavit made by the attorney, that the trial would necessarily involve the examination of a long account, is sufficient evidence to authorize the court to order a reference. *So held*, in an action on two insurance policies. *Id.*

164. **Question of fact not in the pleadings.** In proceedings supplementary to judgment, the defendant appeared and was examined, and a receiver of his property appointed. Subsequently an order was made that he show cause why he should not be punished for misconduct in not delivering his property to the receiver, or why such further order as was proper should not be made. On the return of the order to show cause, he denied the alleged contempt; and thereupon it was referred to a referee to examine whether he was guilty of contempt, either in disposing of his property contrary to the prohibition of the original order for his examination, or in refusing to deliver his property to the receiver. *Held*, that the order of reference was authorized by section 271, subd. 3, of the Code; and the defendant not having appealed from it, but having been examined under it, could not object to its regularity, nor to that of proceedings regularly had under it. That order directed an investigation as to the commission of a contempt, by disposing of his property in violation of the injunction, and the defendant could not now object that such contempt was not specified in

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the order to show cause. *N. Y. Superior Ct., Sp. T., 1855, Watson v. Fitzsimmons, 5 Duer, 629.*

165. On failure to answer or on issue of law. In actions where judgment on failure to answer is to be had by application to the court, if taking an account or proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may order reference for that purpose. Where the action is for the recovery of money only, or of specific real or personal property, with damages, &c., the court may, if the examination of a long account be involved, order a reference. *Code of Pro., § 246, subd. 2.*

So in case of judgment for plaintiff on issue of law. *Id., § 289.*

166. Tort. A reference to assess damages on defendant's default, in an action for an assault is irregular. Damages in such cases must be assessed by a sheriff's jury. *N. Y. Com. Pl., Sp. T., 1852, Boyce v. Comstock, 1 Code R., N. S., 290.*

167. Ex parte. A reference, under section 246, subd. 2, may be ordered *ex parte* if the defendant has not appeared in the action. *Supreme Ct., 1850, Conway v. Hitchins, 9 Barb., 878.*

168. In an action for a divorce on the ground of adultery, an order of reference on the default of the defendant to answer will not be made, where the complaint contains no specification of the person with whom, or the place where the offence was committed. [2 Paige, 118; 2 Johns. Ch., 324; 2 Barb. Ch. Pr., 256.] *N. Y. Superior Ct., 1852, Heyde v. Heyde, 4 Sandf., 692.*

169. In foreclosure. In an action to foreclose a mortgage, when the defendant appears, but makes default in answering, and the plaintiff gives due notice of an application to the court for the relief demanded in the complaint, or for judgment, the court when so applied to may, instead of itself computing the amount due on the plaintiff's mortgage, refer it to the clerk, or to some other suitable person then in court, to make such computation. *Supreme Ct., Sp. T., 1857, Kelly v. Searing, 4 Abbots' Pr., 354.*

170. Such reference may be immediately proceeded with, and report being made to the court, judgment may be rendered thereon. The court does not lose control of the main application, by such a reference. *Id.*

171. Such a reference is not such a new or independent proceeding as to require to be on

a new notice to the defendant (under *Code, § 414*). *Id.*

172. Such a reference need not, under Rule 85, be executed in the county in which the action is triable. *Id.*

173. The present and former rules of the Supreme Court relating to reference in foreclosure-suits—reviewed. *Id.*

174. In a suit for the foreclosure of a mortgage, against several defendants, one of them appeared, but failed to answer, while the others joined issue. The cause being before the court in its order on the calendar, upon notice of application for relief as against the non-answering defendant, but there being no one in attendance on his behalf, and upon notice of trial as against the others, an order of reference of "the matter in controversy" was made. The referee proceeded to report not only upon the "issue" in the cause, but also upon the plaintiff's right to relief as against the non-answering defendant; and upon the report the plaintiff entered judgment as of course, for foreclosure and sale, and against the non-answering defendant for any deficiency. That defendant moved to set aside the judgment for irregularity. *Held, 1.* That the reference was regular as to the defendants who joined issue. *2.* That as against the defendant who did not answer, it was irregular, there being no issue between him and plaintiff, to direct any other reference than one to ascertain and report the amount due for the information of the court. *3.* That the defect might be cured after judgment and sale, by a reference to compute the amount due, the judgment to stand until the coming in of the report, and then to be modified conformably thereto. *Supreme Ct., 1857, Oram v. Bradford, 4 Abbots' Pr., 198. Compare McCrackan v. Valentine, 9 N. Y., 42.*

175. Issue of law. If judgment be for defendant on an issue of law, and if taking an account or proof of fact be necessary to enable the court to complete the judgment, reference or assessment by jury may be ordered. *Code of Pro., § 269.*

176. Damages, upon undertaking given on obtaining injunction, may be ascertained by reference. *Code of Pro., § 222; as to which, see INJUNCTION, 388, 390, 482, 485; and UNDERTAKING.*

177. Motions, when may be referred. Under section 271, subd. 8, on a motion to discharge an attachment made on affidavits contradicting non-residence, a reference may

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be ordered. *N. Y. Superior Ct.*, 1849, Killian v. Washington, 2 *Code R.*, 78.

178. Motion for order directing clerk to enter on the docket of a judgment that it is secured on appeal, may be referred. *Supreme Ct., Sp. T.*, 1856, Munn v. Barnum, 2 *Abbotts' Pr.*, 409.

179. Where, on an order to show cause why a party should not be punished for contempt in resisting the service of process, the opposing affidavits render it clear that the party was innocent of any intention to resist service, the court will not direct a reference to enable the moving party to introduce proofs of such intention. *N. Y. Superior Ct., Sp. T.*, 1857, Conover v. Wood, 5 *Abbotts' Pr.*, 84.

180. On motion to vacate an order of arrest, if the ground of arrest and the cause of action are not the same, and the affidavits are conflicting, the court may order a reference. *Supreme Ct., Sp. T.*, 1857, Barron v. Sanford, 6 *Abbotts' Pr.*, 320, note; 8 *C.*, 14 *How. Pr.*, 448.

181. But not except in a very special case, such as where the judge himself cannot come to a satisfactory, definite conclusion upon the facts as made out. *N. Y. Superior Ct., Sp. T.*, 1858, Stelle v. Palmer, 7 *Abbotts' Pr.*, 181.

182. Reference to take deposition. When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpoenaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue. Fees of such referee three dollars per day. *Code of Pro.*, § 401, last paragraph.

As to references in Proceedings supplementary to execution, see SUPPLEMENTARY PROCEEDINGS.

183. Reference of petition of infant for sale of estate. *Rules 67 and 70 of 1858.*

2. Mode of Appointment of Referee. Removal.

184. Naming. Under section 229 of the Code of 1848, the two referees named by the parties named a third, who thereupon became a competent referee without an order of court. *Renouil v. Harria*, 2 *Sandf.*, 641; 8 *C.*, 1 *Code R.*, 125.

185. Referees, how chosen. In all cases of reference, the parties, except when an infant is a party, may agree in writing upon one or not more

than three persons, and a reference shall be ordered to him or them, and no other; and if the parties do not agree, the court shall appoint one or not more than three, who shall be free from exception. No one to be appointed to whom all parties object, except in actions for divorce. No judge to sit as referee, in action in his court, not already referred. *Code of Pro.*, § 278.

186. Rules respecting the nomination of referees. *I. Dist.*, 1856, 18 *How. Pr.*, 846.

187. A reference of "this cause" is a reference of the "whole issue." *N. Y. Superior Ct.*, 1849, *Renouil v. Harria*, 2 *Sandf.*, 641; 8 *C.*, 1 *Code R.*, 125.

188. That an irregularity in the appointment of a referee is waived by trying the cause before him without objection. *Id.*

189. A motion to refer may be made immediately on receiving a reply without waiting to see if defendant will amend his answer. *Supreme Ct., Sp. T.*, 1849, *Enos v. Thomas*, 4 *How. Pr.*, 290.

190. The old practice, in moving a cause for reference, should be adhered to; and it devolves on the opposing party to show that difficult questions of law will arise. *Supreme Ct., Sp. T.*, 1855, *Barber v. Cromwell*, 10 *How. Pr.*, 351; 8 *P.*, 1856 [citing, also, 6 *Johns.*, 329; 5 *Cow.*, 428; 4 *Id.*, 52], *Dewey v. Field*, 13 *Id.*, 487.

191. Removal. A referee unimpeached, should not be removed, on the defendant's motion, for the reason that he and the plaintiff's attorney occupy the same office, the defendant having known this when he consented to the appointment. *N. Y. Com. Pl.*, 1851, *Perry v. Moore*, 2 *E. D. Smith*, 32.

3. The Hearing. Powers of Referee.

192. In general. Referees appointed under the Code, have power to administer oaths in proceedings before them, and have generally the powers now vested in a referee by law. *Code of Pro.*, § 421.

193. Appointing the hearing. Under 2 *Rev. Stat.*, 384, § 43,—which requires the referees to appoint a time and place for the hearing,—it is not essential that referees should do so in writing. *Onevgo County Ct.*, 1853, *Stephens v. Strong*, 8 *How. Pr.*, 339. *Supreme Ct., Sp. T.*, 1859, *Sage v. Mosher*, 17 *Id.*, 367.

194. Short notice. Where a referee proceeds upon too short notice of hearing, parties who appear on such notice and ask and obtain an adjournment, thereby waive the

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irregularity. [1 Anst., 76; 1 Str., 155; 10 Mod., 86; 1 Barb. Ch. Pr., 589; 8 Madd. Oh., 434; 2 Johns. Oh., 242; 4 Paige, 288; Id., 439; 10 Wend., 560.] *N. Y. Com. Pl., Sp. T.*, 1854, *Wetter v. Schlieper*, 7 *Abbotts' Pr.*, 92.

195. Misinformation from referee. The fact that after a party has received due notice of trial before a referee, the referee informs him that he has made no appointment for the day noticed, and cannot try the cause on that day, does not avoid the regularity of the proceedings of the adverse party, who, without knowing that the party has been misled, attends on the day, and in his absence procures a judgment. If the attorney receives notice of trial before a referee, he is bound to attend to it, and attend to it at the time and place of the hearing. Misinformation from the referee may furnish a good ground for an adjournment, but not for disregarding the notice of trial. *Supreme Ct., Sp. T.*, 1859, *Sage v. Mosher*, 17 *How. Pr.*, 367.

196. Discovery. The court may grant to the referee to hear and determine an action against a trustee for an account, power to compel the production of books and papers. *N. Y. Superior Ct.*, 1851, *Fraser v. Phelps*, 4 *Sandf.*, 682.

197. Before a referee has reported, the court will not interfere on motion in respect to his taking testimony. *Supreme Ct.*, 1848, *Schermerhorn v. Develin*, 1 *Code R.*, 28.

198. Reception of evidence. A referee cannot admit evidence, professing to do so absolutely, and then reject it upon making up his decision or report upon the whole case. If evidence so treated was incompetent, and the case not clearly and indisputably proven without it, a new trial must be awarded. *Supreme Ct.*, 1850, *Allen v. Way*, 7 *Barb.*, 585.

199. Mode of accounting. An order of reference in an action under the Code of Procedure, for an accounting, directed the account of the defendant, an agent, to be taken in the "usual manner." *Held*, that he was bound to bring in before the referee a sworn account, including both debits and credits, in the manner prescribed by Rule 107 of the late Court of Chancery, and to submit to such examination as was allowed by that rule. [4 Paige, 112.] The provision of the Code (§ 389) prohibiting any examination of one party by the other, except as there authorized, only applies to examination for purposes of discovery. *N.*

Y. Superior Ct., 1851, *Wiggin v. Gans*, 4 *Sandf.*, 646.

200. Variance. Referees authorized to disregard variance which could not have misled. *Harmony v. Bingham*, 1 *Duer*, 209.

201. Where there is a variance between the pleading and the proofs, on a trial before a referee, instead of dismissing the complaint, he should, if the evidence is sufficient, give his decision, leaving it to the discretion of the court to amend the pleadings in support thereof. *N. Y. Superior Ct.*, 1857, *Hart v. Hudson*, 6 *Duer*, 294.

202. The provisions of section 272 of the Code, as amended in 1857,—clothing referees with power to allow amendments to any pleading,—do not authorize a referee to strike out the name of a party. The name of a party is not properly a part of the pleading. *Supreme Ct., Sp. T.*, 1858, *Billings v. Baker*, 6 *Abbotts' Pr.*, 218.

203. A referee has no power to punish for a contempt; and cannot, therefore, strike out plaintiff's complaint for refusing to testify when subpoenaed. *Supreme Ct., Sp. T.*, 1858, *Bonesteel v. Lynde*, 8 *How. Pr.*, 226.

204. "The trial by referees shall be conducted in the same manner and on similar notice as a trial by the court. They shall have the same power to grant adjournments and to allow amendments to any pleadings and to the summons, as the court upon such trial, upon the same terms and with the like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance, or refusal to be sworn or testify, as is possessed by the court." *Code of Pro.*, § 272; as amended, 2 *Laws of 1857*, ch. 723, § 11.

205. Section 272 gives the referee complete jurisdiction over the cause, as much so as any judge could possess at special term for its trial. The mode of conducting its trial, therefore, must be within the discretion of the referee, so far as relates to all questions within the ordinary discretion of a judge on the trial of a cause. In an equitable case in which there are issues to be tried, and also an account to be taken, it is competent for the referee to go on and try the whole cause, and take and state the account without first reporting upon the issues; and when no request was made for such separate report, no exception lies to his course in so doing. *Supreme Ct.*, 1856, *Palmer v. Palmer*, 13 *How. Pr.*, 368.

In Actions under the Code of Procedure;—The Hearing. Powers of Referees.

206. After the referee, to whom it has been referred to try the whole issues in the cause, has made and delivered a final report, it is irregular to refer the cause back to him to take evidence and report upon a matter omitted in the trial,—*a. g.*, in an action for redemption, to take an accounting of rents and profits,—and then to enter judgment upon both reports. A judgment so entered should be reversed on appeal. The proper practice would be to apply for a new trial on the ground of the omission on the first trial. *Supreme Ct.*, 1859, *Pratt v. Stiles*, 17 *How. Pr.*, 211; *S. C.*, 9 *Abbotts' Pr.*, 150.

207. Reopening. Where a cause has been submitted to a referee, he may, upon his own motion, reopen the case, to hear further testimony on a particular point. *N. Y. Com. Pl.*, 1854, *Duguid v. Ogilvie*, 3 *E. D. Smith*, 527; *S. C.*, 1 *Abbotts' Pr.*, 145.

208. If referees, on the report being sent back for revision and correction, go beyond the errors complained of, and reopen the case as to other items, they are bound to hear further testimony. *Supreme Ct.*, 1851, *Gould v. Castillon*, 12 *Barb.*, 126.

209. Dismissal of complaint. The referee can only try the issues referred to him, and should not dismiss the complaint for plaintiff's failure to appear and proceed. *Supreme Ct.*, *VII. Dist., Sp. T.*, 1851, *Holmes v. Slocum*, 6 *How. Pr.*, 217. *N. Y. Com. Pl.*, 1852, *Mathews v. Jones*, 1 *E. D. Smith*, 429. To the contrary, *Supreme Ct., V. Dist., Sp. T.*, 1852, *Williams v. Sage*, 1 *Code R., N. S.*, 358. *Onwego County Ct.*, 1858, *Stephens v. Strong*, 8 *How. Pr.*, 339.

210. Since either party may notice and bring on the trial of a cause before a referee, as if the trial was before the court, the defendant, where he has noticed the cause, cannot charge delay or default upon the plaintiff for not bringing on the hearing. [*Code*, § 272; 1 *Code R., N. S.*, 358.] *Supreme Ct., Sp. T.*, 1853, *Thompson v. Krider*, 8 *How. Pr.*, 248. *Onwego County Ct.*, 1858, *Stephens v. Strong*, *Id.*, 339.

211. If the plaintiff makes default on the day of hearing, and the referee reports against him, the proper judgment is merely one dismissing the complaint, not an absolute judgment, as on a verdict. *N. Y. Superior Ct.*, 1852, *Salter v. Malcolm*, 1 *Duer*, 596.

212. Nonsuit. On a hearing before referees, plaintiff may submit to a nonsuit or

dismissal of complaint, or may be nonsuited, or complaint be dismissed as on a trial, at any time before final submission to the referees for decision. In which case, the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant. *Rule 82 of 1858.*

213. Reference ordered, on failure to answer, to be executed in county where action is triable, unless otherwise ordered. *Rule 24 of 1858.*

214. Power of referee, after judgment in foreclosure. When, in an action of foreclosure, a decree has been made upon pleadings and proofs, appointing a referee to compute the amount due, to examine the plaintiff as to payments, and to take proof of the allegations of the bill as against an absent defendant, and directing a sale of the premises on the confirmation of the report, the parties who have appeared and answered are concluded by such decree as to the issues in the pleadings; and the referee has no power to examine the plaintiff as to any facts, except those relative to payments on the mortgage; nor to examine the absent defendant, in behalf of his co-defendants, as to a defence of fraud set up in the answer. Such matters must be set up before decree. *Ct. of Appeals*, 1858, *McCrackan v. Valentine*, 9 *N. Y. (5 Seld.)*, 42.

215. Under an order of reference in foreclosure, the first duty of the referee, after computing the amount due, is to ascertain whether the mortgaged premises are so situated that they can be sold in parcels, without injury to the interests of the parties. [*Rev. Stat.*, pt. 3, ch. 1, art. 6, § 164.] The inquiry is simply, How can the premises be sold so as to produce the most money? [*Id.*, § 165.] *Supreme Ct., Sp. T.*, 1858, *Gregory v. Campbell*, 16 *How. Pr.*, 417.

216. On deciding whether a sale of the whole premises in one parcel, in the first instance, or only of a part, should be had, the court will look not only to the referee's report but also to the pleadings, and will receive other evidence in its discretion, and will consider any stipulations offered, and admissions of the parties, or of other persons presented to it on the hearing. *Id.*

217. References in foreclosure regulated. *Rules 71, 72, 75, 76, of 1858.*

—in partition. *Id.*, 78, 79.

—in divorce suits. *Id.*, 86–88.

In Actions under the Code of Procedure;—The Report.

4. The Report.

218. Facts and conclusions. A referee's report must set out the facts proved, and his conclusion of law. *Supreme Ct., Chambers*, 1848, *Doke v. Peek*, 1 *Code R.*, 54; *Deming v. Post*, *Id.*, 121.

219. The report of a referee must state all the material facts put in issue and found by him. The unsuccessful party has a right to have these, as well as his conclusions of law, placed upon the record. [Code, §§ 272, 281, 348.] *Supreme Ct., Sp. T.*, 1852, *Van Steenburgh v. Hoffman*, 6 *How. Pr.*, 492.

220. Under § 272 (as amended in 1851), the report of a referee, after a trial before him, must, without any special order, state separately the facts found and the conclusions of law. *N. Y. Superior Ct.*, 1852, *Church v. Erben*, 4 *Sandf.*, 691. *Rule 82 of 1858.*

221. That issues on which no evidence is offered, need not be noticed in the report. *Supreme Ct.*, 1855, *Ingraham v. Gilbert*, 20 *Barb.*, 151.

222. That a referee in supplementary proceedings must report the facts, instead of merely the evidence. *Supreme Ct., Chambers*, 1850, *Dorr v. Noxon*, 5 *How. Pr.*, 29.

223. In an action against copartners, for a dissolution of the firm, and to have an accounting, the appointment of a receiver, and the defendants pay a sum specified, the report of a referee stating the facts found by him and his conclusion that a certain amount is due to the plaintiff for which he is entitled to judgment, is erroneous. The referee should go on and take an account; and the plaintiff's remedy, if any thing is found due him, is by application to the court for the appointment of a receiver and a sale of the partnership effects. *N. Y. Com. Pl.*, 1852, *Kapp v. Barthan*, 1 *E. D. Smith*, 622.

224. When due. Unless otherwise ordered, referees to deliver report within sixty days from final submission of the action, on default thereof, referee entitled to no fees, and the action to proceed as though no reference had been ordered. *Code of Pro.*, § 273.

225. Delivery. Where the party in whose favor the referee makes his report, neglects to take up the report, the referee should not deliver the report to the other party on payment of his fees; if he does so, the latter may be compelled to file it, by motion, and the referee

ordered, on his failing to file it, to make and deliver a new one. *N. Y. Com. Pl.* (1852?), *Richards v. Allen*, 11 *N. Y. Leg. Obs.*, 159.

226. Notice. That where all the issues are referred, the prevailing party need not give notice of the report or furnish a copy. [Code, §§ 278, 272.] *Supreme Ct., Sp. T.*, 1852, *Van Steenburgh v. Hoffman*, 6 *How. Pr.*, 492; but see *Rule 82 of 1858.*

227. Filing. Confirming. Under the provisions of Rule 82 of the Supreme Court, in respect to proceeding upon the reports of a referee, other than for trials of issues. *Held*, 1. That all reports must be filed, and a note of the day of filing made by the clerk. 2. That in all cases where any of the defendants appear to be entitled to notice, such reports cannot be confirmed until eight days after service of notice of filing the same. 3. That all the parties who have appeared in the cause or proceeding may consent in writing to waive the delay of eight days, and have the same confirmed at once. 4. That in cases where no one appears for the defendant, the report may be presented to the court for the final order of confirmation and judgment, without waiting eight days. *Supreme Ct.*, 1858, *Somers v. Milliken*, cited in 7 *Abbotts' Pr.*, 524.

228. That a motion to set aside a provisional remedy, made before obtaining the report of the referee, must be decided irrespective of the referee's finding. *Supreme Ct., Sp. T.*, 1859, *Rigney v. Tallmadge*, 17 *How. Pr.*, 556.

229. Further report. That where the referee has failed to state the facts found and his conclusions of law *separately*, the proper course is for either party to obtain an order that the referee make a further report, correcting the defect. *Supreme Ct.*, 1855, *Snook v. Fries*, 19 *Barb.*, 313.

230. It is improper to move for a further or amended report from a referee, on the ground that he has omitted to pass upon all the facts proved on the trial. If he has neglected to find all the issues referred to him, the remedy is by motion for a new trial, like the old practice of issuing a *venire facias de novo*, where a verdict was imperfect or did not find the whole matter put in issue. After the referee has made his report, all that the general term can do is to determine, whether

1. He has passed upon all the material issues.
2. His findings are supported by the evidence.

In Actions under the Code of Procedure;—Confirming. Reviewing. Setting Aside.

8. His legal conclusions from the facts are in accordance with the law. If he has erred in either of these particulars, a new trial is the proper remedy. *Supreme Ct.*, 1855, *Lakin v. N. Y. & Erie R. R. Co.*, 11 *How. Pr.*, 412; and see *Patterson v. Graves, Id.*, 91.

231. An order setting aside the judgment and requiring a further report ought not to be made, except as to questions specifically raised by the pleadings. When a referee has passed upon all the issues formed by the pleadings, so far as is material to a decision of the cause, stating the general facts found in respect to them and his conclusions of law separately, he has discharged his whole duty in respect to form. If his general facts are not warranted by, or are contrary to, evidence, the remedy of the party aggrieved for presenting the error is, by making a case within ten days after notice of the judgment. [Code, §§ 272, 268; 11 *How. Pr.*, 418.] *Supreme Ct.*, 1856, *Marston v. Johnson*, 18 *How. Pr.*, 93.

232. It has been the practice, both before and since the Code, where the referee does not pass upon all the issues in the cause, to refer the cause back to him for a further report; and since the Code, where he has not found the facts separately from the evidence necessary to a proper disposition of all the issues in the cause, the practice has been the same. [12 *Wend.*, 291; 6 *How. Pr.*, 492; 12 *Barb.*, 126, 127; 2 *Sandf.*, 641; 4 *Id.*, 691; 1 *Code R.*, 54, 61, 121; 1 *Whitt. Pr.*, 714.] The application to set aside the report for either of the causes above stated must be made on motion to the court at special term, and such errors ought not to be entertained on appeal from the judgment. [But see 11 *How. Pr.*, 412.] *Supreme Ct.*, 1856, *Hulce v. Sherman*, 18 *How. Pr.*, 411.

5. Confirming. Reviewing. Setting Aside.

233. Confirmation necessary where a report is required for the purpose of enabling the court to make some discretionary order or some decree thereon,—e. g., on a reference to compute damages on an undertaking,—whether the order directing the reference be made upon decree or upon an interlocutory application, the report requires confirmation before it is adopted as the foundation of such future order or decree. *Supreme Ct., Sp. T.*, 1850, *Griffing v. Slate*, 5 *How. Pr.*, 205.

234. The only mode of reviewing a ref-

eree's decision after judgment, is by appeal. [Laws of 1849, 680, § 828.] *Supreme Ct.*, 1850, *Enos v. Thomas*, 5 *How. Pr.*, 361.

234 a. Exceptions, on a reference to take and state account—e. g., in partnership cases—must be according to the practice of chancery. *Ketchum v. Clark*, 22 *Barb.*, 319.

235. The report of a referee may be reviewed by a case to be heard only at general term. It is almost of course, to allow the case to be incorporated into the record; or a rehearing may be granted, if good reason is shown. *Supreme Ct., Sp. T.*, 1850, *Nones v. Hope Mutual Life Ins. Co.*, 5 *How. Pr.*, 157; S. C., 2 *Code R.*, 101. S. P., *N. Y. Superior Ct.*, 1850, *Haight v. Prince, Id.*, 95; S. C., 2 *Sandf.*, 723, note. Approved, *Leggett v. Mott, Id.*, 720; S. C., 8 *N. Y. Leg. Obs.*, 286.

236. Since the amendment of 1851, a review by a rehearing is not authorized. *Supreme Ct., Sp. T.*, 1851, *Church v. Rhodes*, 6 *How. Pr.*, 281.

237. A report dismissing a complaint on an issue of law, is to be reviewed by appeal, and not by motion to set aside. *Supreme Ct.* (1850?), *Donohue v. Champlin*, 1 *Code R., N. S.*, 188.

238. Appeal. Under the Code, as amended in 1851 and 1852, the report of a referee upon the whole issue cannot be reviewed by a judge at special term, but should be by an appeal to the general term from the judgment entered thereon. *Supreme Ct., Sp. T.*, 1852, *Simmons v. Johnson*, 6 *How. Pr.*, 489.

239. Upon a reference of a mere collateral matter, the report must be presented at special term; and exceptions not taken before the referee cannot be filed. *N. Y. Superior Ct.*, 1858, *Belmont v. Smith*, 1 *Duer*, 673; S. C., 11 *N. Y. Leg. Obs.*, 216. See, also, *Rule 82 of 1858*.

240. Motion to set aside. A review of a referee's report finding the facts upon the evidence, must be sought by a motion to set aside a report—i. e., for a new trial. [3 *Code R.*, 118, 141, 192; 1 *Id.*, N. S., 67; 4 *How. Pr.*, 435, 418.] *N. Y. Com. Pl.*, 1852, *Morgan v. Bruce*, 1 *Code R., N. S.*, 364.

241. The appeal, or rehearing, given by the Code to review the report of referees, does not abrogate the power of the court to entertain a motion to set the report aside. That is incident to the power of the court to supervise its officers, and, in such case, a judge may stay

In Actions under the Code of Procedure;—Compensation of Referees.

the entry of judgment on the report. *Supreme Ct.*, 1850, *Crist v. Dry Dock Bank*, 3 *Code R.*, 141; and see *Id.*, 118.

242. If a party is dissatisfied with the report of a referee, his remedy is by special motion to set aside or correct the same. *Supreme Ct.*, 1855, *Ingraham v. Gilbert*, 20 *Barb.*, 151.

243. Mode of reviewing. *Code of Pro.*, § 272. *Rule 33 of 1858.*

244. Weight of evidence. The rule that the report of a referee is not to be set aside unless plainly against the weight of evidence, applies only where the grounds of his decision are explicitly stated, or are apparent on the face of the report. Where several distinct and alternative questions, both of law and of fact, have been submitted to him, and his report is general, the report cannot be sustained if it does not correspond with the court's views of the law and merits of the case. *N. Y. Superior Ct.*, 1850, *Soranton v. Baxter*, 4 *Sandf.*, 5.

245. Erroneous ruling as to proof may be disregarded, if not effectual. *N. Y. Superior Ct.*, 1850, *Morris v. Husson*,* 4 *Sandf.*, 98.

246. Where testimony, irrelevant and inadmissible in substance, has been received by a referee upon the hearing, its exclusion from his consideration after the cause is submitted, is no ground for setting aside the report. *N. Y. Com. Pl.*, 1851, *Brown v. Colie*, 1 *E. D. Smith*, 265.

247. Irregularities of referees. It is sufficient ground for setting aside a report, that the referee received explanations from the witness of one party in the absence and without the consent of the other. [*Grah. Pr.*, 818, 628; 4 *How. Pr.*, 258.] *Supreme Ct.*, *Sp. T.*, 1851, *Dorlon v. Lewis*, 9 *How. Pr.*, 1.

248. Preparing an opinion and submitting it to the attorney before deciding the case, and giving a decision after being assured by the attorney that no judgment would be entered on it, are irregularities for which the report should be set aside. *Id.*

249. Where the referee assured defendants that he should decide in their favor, and received his fees, and afterwards suspended his decision, then assured the other party that the decision would be for him, and finally promised both parties that he would re-examine the case;—*Held*, that his report should be set

aside. *Supreme Ct.*, *Sp. T.*, 1855, *Roosa v. Saugerties & Woodstock Turnpike-road Co.*, 12 *How. Pr.*, 297.

250. If the report of referees is defective, in omitting to state the facts found, and a further report cannot be had,—*e. g.*, where two of the referees have left the State,—the court should set it aside on motion. *Supreme Ct.*, *Sp. T.*, 1857, *Peck v. Yorks*, 14 *How. Pr.*, 416.

251. New trial. Where the report of a referee to whom the cause had been referred, was set aside on motion by an order simply granting a new trial;—*Held*, that the same referee, due notice having been given, might proceed; and his duties and powers were the same as if he had not previously reported. *Supreme Ct.*, *Sp. T.*, 1852, *Shuart v. Taylor*, 7 *How. Pr.*, 251.

252. New referee. Where a new trial is granted upon an appeal from a judgment founded on the report of a referee, if either party desires it, the cause should be tried before a new referee. *Supreme Ct.*, *Sp. T.*, 1854, *Schermerhorn v. Van Alen*, 18 *How. Pr.*, 82.

253. A new trial on the ground of error in matters of law, may properly be ordered to be had before the same referee. *Supreme Ct.*, *Sp. T.*, 1857, *Billings v. Vanderbrek*, 15 *How. Pr.*, 295.

254. Motion. Where a reference is made, not at the hearing, but on motion,—*e. g.*, a reference to assess the damages sustained by an injunction,—the report can be confirmed only by special motion, or on petition. *Supreme Ct.*, *Sp. T.*, 1850, *Griffing v. Slate*, 5 *How. Pr.*, 205; but see *Rule 32 of 1858.*

255. Where an action by or against an executor, &c., is referred, it is proper, though not indispensable, to present to the court, on moving for costs, the certificate of the referee. *Supreme Ct.*, *Sp. T.*, 1856, *Mersereau v. Ryerss*, 12 *How. Pr.*, 800.

6. Compensation of Referees.

256. Fees three dollars a day; but the parties may agree in writing on any other rate. *Code of Pro.*, § 313.

257. In an action to redeem, in which the plaintiff succeeds, he is liable for the referee's fees, although the report finds a sum to be due from him to the defendant. The defendant is not to be deemed the prevailing party because he establishes his claim against the plaintiff, on the accounting before the referee.

* Affirmed, *Ct. of Appeals*, 1853, 8 *N. Y.* (4 *Seld.*), 304.

Registry.	Relation.	Release.
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Supreme Ct. (1858?), *Judson v. Gray*, 17 *How. Pr.*, 289; affirmed, *Ct. of Appeals*, 1859, *Id.*, 296.

258. In such a case, the plaintiff's attorney obtained from his client a promissory note for the referee's fees, promising in consideration thereof that he would advance the fees to the referee. *Held*, that the referee could recover the fees in an action against the attorney, founded on this promise. Such a promise made for the benefit of the referee, though not to him, and founded on a sufficient consideration, and having been adopted by him, was a cause of action against the defendant without reference to any dealings in respect to the note, subsequent to suit brought. *Id.*

259. *Deputy.* A referee is not entitled to charge for services of a third person before whom the parties agree to proceed with the reference, in the referee's absence. *N. Y. Com. Pl.*, 1859, *Shultz v. Whitney*, 17 *How. Pr.*, 471; *S. C.*, 9 *Abbott's Pr.*, 71.

REGISTRY.

RECORDING DEEDS; SHIPPING.

RELATION.

1. That where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other act shall have relation. [*Vin. Abr.*, tit. *Rel.*, 290; 1 *Johns. Cas.*, 81; *Id.*, 85, n.; 8 *Cal.*, 262; 2 *Johns.*, 520; 4 *Id.*, 284; 12 *Id.*, 140; 15 *Id.*, 809.] *Supreme Ct.*, 1824, *Jackson v. Ramsay*, 8 *Cow.*, 75.

2. *Original valid act.* In all cases where a subsequent act is held to relate back to a thing antecedent, there must be something to which relation may be had; something inchoate, imperfect; but still something. Relation cannot be had to a void act. *Supreme Ct.*, 1828, *Doe v. Howland*, 8 *Cow.*, 277; *S. P.*, 1819, *Jackson v. Stevens*, 16 *Johns.*, 110. *A. V. Chan. Ct.*, 1845, *Williamson v. Field*, 2 *Sandf. Ch.*, 588, 588.

3. The doctrine of relation is a fiction of law, and cannot defeat intermediate collateral acts which are lawful, and especially if they concern strangers. [16 *Vin. Abr.*, 298; 18 *Co.*, 21; 11 *Id.*, 51.] *Supreme Ct.*, 1805,

Case v. De Goes, 3 *Cai.*, 261; 1809, *Jackson v. Bard*, 4 *Johns.*, 280; 1815, *Heath v. Ross*, 12 *Id.*, 140; 1826, *Jackson v. Douglass*, 5 *Cow.*, 458. *Ct. of Errors*, 1822 [citing, also, 18 *Vin.*, 287], *Jackson v. Davenport*, 20 *Johns.*, 587; affirming *S. C.*, 18 *Id.*, 295.

4. A stranger cannot be made a trespasser by relation. It is a general rule of the doctrine of relation, that it shall not do wrong to strangers. [16 *Vin. Abr.*, 298; 18 *Coke*, 21.] *Supreme Ct.*, 1805, *Case v. De Goes*, 3 *Cai.*, 261. Followed, 1815, *Wickham v. Freeman*, 12 *Johns.*, 188; but compare *Morgan v. Varick*, 8 *Wend.*, 587.

RELEASE

1. Who may give a release. Where several plaintiffs must join in bringing an action, a release by one of them is a bar to it. *Supreme Ct.*, 1816, *Austin v. Hall*, 13 *Johns.*, 286; 1818, *Decker v. Livingston*, 15 *Id.*, 479.

2. Thus, in an action by tenants in common for a trespass on land of which they are co-heirs, a release by one of them is a bar. *Supreme Ct.*, 1816, *Austin v. Hall*, 13 *Johns.*, 286.

3. So one of two tenants in common of land, before distress and avowry for rent, may receive the whole rent, and discharge the lessee; for before avowry the rent rests in personality. *Supreme Ct.*, 1818, *Decker v. Livingston*, 15 *Johns.*, 479. Compare *Sherman v. Ballou*, 8 *Cow.*, 304.

4. A release by one of two joint-creditors,—*e. g.*, partners,—is binding upon the other. *Supreme Ct.*, 1808, *Pierson v. Hooker*, 3 *Johns.*, 68; *S. P.*, 1817, *Bulkley v. Dayton*, 14 *Johns.*, 887.

5. A release executed by one partner, which shows upon its face that it was executed in consideration of his individual debt, is void as against the other partner. *Supreme Ct.*, 1826, *Gram v. Cadwell*, 5 *Cow.*, 489.

6. A release to a witness by one joint plaintiff of all demands except those for which the witness is jointly liable with the defendants,—*Held*, sufficient to restore his competency. *Supreme Ct.*, 1817, *Bulkley v. Dayton*, 14 *Johns.*, 887.

7. When a release by an ultimate grantee of the covenant of the original grantor, will release an intermediate grantor. *Jackson v. Root*, 18 *Johns.*, 60.

What will amount to a Release.

8. That the courts will not sustain a release by the nominal plaintiff, in fraud of rights of party in interest. *Supreme Ct.*, 1848, *Timan v. Leland*, 6 *Hill*, 287.

9. What will amount to a release. The distinction between a release and a receipt,—considered. *Stearns v. Tappin*, 5 *Duer*, 294.

10. An indorsement by the owner of a bond, upon it, to the effect that her executors should discharge it, upon conditions,—*Held*, under the circumstances, a valid conditional release, although never delivered to the obligor. *A. V. Chan. Ct.*, 1845, *Brinckerhoff v. Lawrence*, 2 *Sandf. Ch.*, 400.

11. Upon a general assignment by a firm, the creditors released two partners, and took a covenant from the third to pay their debts out of another fund. *Held*, that all the original debts were released. *Chancery*, 1840, *Hosack v. Rogers*, 8 *Paige*, 229; affirmed on other grounds, 25 *Wend.*, 818.

12. An instrument in the form of an assignment by a municipal corporation of a decree,—*Held*, under the circumstances, operative only as a release. *N. Y. Surr. Ct.*, 1849, *Paiff v. Kinney*, 1 *Bradf.*, 1.

13. An instrument purporting to "exonerate" one of two joint-debtors from the debt; but not under seal, and not stating any consideration,—*Held*, no bar to an action against all the debtors. 1. It was not competent to prove a consideration by parol. 2. The instrument, even if founded on a consideration, not being a technical release, could only operate as a covenant not to sue the individual debtor and could not discharge the co-debtor. *Supreme Ct.*, 1849, *Frink v. Green*, 5 *Barb.*, 455. Compare *infra*, 39–49.

14. Though a release appears on its face to have been executed with a purpose to accomplish an object not effected by it,—*e. g.*, for the purpose of restoring the solvency of a corporation released,—yet if unconditional in terms, and sufficient in form, consideration, &c., it is binding. *Supreme Ct.*, 1854, *De Voss v. Johnson*, 18 *Barb.*, 170.

15. Seal. Notwithstanding the provision of 2 Rev. Stat., 406, § 77,—allowing the presumption of consideration for a sealed instrument to be rebutted,—a release under seal, although for a nominal consideration, operates, as at common law, as a discharge of the debt. If, however, the consideration for the release was merely nominal, the moral obligation to

What may be Released.

pay the debt may remain, and form a sufficient consideration for a new promise. *N. Y. Superior Ct.*, 1856, *Stearns v. Tappin*, 5 *Duer*, 294.

16. A release under seal requires no proof of a consideration to support it. *Supreme Ct.*, 1819, *Pratt v. Crooker*, 16 *Johns.*, 270.

17. A release not under seal and without consideration is void. *Supreme Ct.*, 1816, *Orawford v. Millsapangh*, 18 *Johns.*, 87; 1819, *Seymour v. Minturn*, 17 *Id.*, 169; 1828, *Dewey v. Derby*, 20 *Id.*, 462; 1838, *Bernard v. Darling*, 11 *Wend.*, 28; and see *Harrison v. Close*, 2 *Johns.*, 448; and *Jackson v. Stackhouse*, 1 *Cow.*, 122.

18. Equity will not compel a creditor to affix his seal to a release which he has signed without consideration; even upon averment that the omission was by mistake. *Chancery*, 1820, *Minturn v. Seymour*, 4 *Johns. Ch.*, 497.

19. What may be released. A release, technically, operates only upon a present interest, but when there is a present right to take effect in future,—*e. g.*, where in an action by an administrator the husband of the intestate was offered as a witness for plaintiff, and executed a release,—such right may be presently released. *Supreme Ct.*, 1812, *Woods v. Williams*, 9 *Johns.*, 128; *S. P.*, *Hoes v. Van Hoesen*, 1 *Barb. Ch.*, 379; affirmed, 1 *N. Y. (1 Comst.)*, 120.

20. That a release cannot operate upon a right subsequently acquired. *Dwight v. Peart*, 24 *Barb.*, 55.

21. A mere possibility of a future interest, not capable of being affected by a release. *Edwards v. Varick*, 5 *Den.*, 664.

22. A release may operate as between grantor and grantee, by way of estoppel, though neither is in possession. A contract from the owner, for the purchase of land, part of the purchase-money having been paid, gives the vendee a constructive equitable possession, sufficient to support a release. *A. V. Chan. Ct.*, 1839, *Dias v. Glover*, *Hoffm.*, 71.

23. What demands will be deemed barred. A release to the sheriff by a claimant of property seized and sold on an execution, given after an action had been brought against the purchaser at the sale, and which reserved all rights of action against other persons;—*Held*, no bar to the action against the purchaser. *Supreme Ct.*, 1808, *Wilson v. Reed*, 8 *Johns.*, 175.

In Equity.**Debtors severally liable.**

24. A release executed by a person whose property had been wrongfully taken on attachment against H., to one attaching creditor,—*Held*, not a bar, under the circumstances, to his action against another who had issued an attachment levied on the same goods. *Townsend v. Hoppoch*, 6 *Duer*, 499.

25. **Security.** That a release of a principal debt, releases, also, by operation of law, a security incident to it,—*e. g.*, a mortgage. *Supreme Ct.*, 1823, *Jackson v. Stackhouse*, 1 *Cow.*, 122.

26. **General words.** Where there are general words only, in a release, they shall be construed most strongly against the releasor; but where there is a particular recital and then general words follow, the general words shall be qualified by the particular recital. *Id.*

27. Thus, a release of a judgment, particularly described, and also of all debts, demands, &c., releases only the judgment. *Id.*

28. **In equity**, a general release will be confined in its operation to the demands which appear to have been intended by the parties, notwithstanding general words. *V. Chan. Ct.*, 1831, *McIntyre v. Williamson*, 1 *Edw.*, 34.

29. Where several persons are jointly and severally bound, a release by one is not, in equity, as at law, strictly a release of all. Equity will not extend the operation of a release beyond the clear intention of the parties and the justice of the case, but will construe it to relate only to the particular matter intended to be released. *Chancery*, 1822, *Kirby v. Taylor*, 6 *Johns. Ch.*, 242. Followed, 1824, *Kirby v. Turner*, *Hopk.*, 309.

30. The rule that a release, though general in its terms, is to be restricted, in equity, to such matters as were intended by the parties, is one of construction merely. Where general words are used, the intention to limit the release to a particular debt must be shown by the deed itself, or by the instruments *in pari materia* containing the agreement and release. Extrinsic evidence is incompetent to prove it. *V. Chan. Ct.*, 1834, *Van Brunt v. Van Brunt*, 3 *Edw.*, 14. *S. P.*, *Chancery*, 1846, *Hoes v. Van Hoesen*, 1 *Barb. Ch.*, 379; affirmed, 1 *N. Y. (1 Comst.)*, 120.

31. A release of demands relative to specified transactions, executed with knowledge of frauds committed therein, is a bar to a subsequent bill to account. *Chancery*, 1842, *Parsons v. Hughes*, 9 *Paige*, 591.

32. **Release of dower.** A wife's release to her husband's lessee, of her right of dower, operates merely as a release of dower in the land as against the lessee, not as an abandonment of dower in the rents, as between her and her husband's heirs. *V. Chan. Ct.*, 1837, *Williams v. Cox*, 3 *Edw.*, 178.

33. **Release of lands.** Where the owner of a charge upon the lands of several persons, which charge is primarily chargeable upon the lands of one of them, with full knowledge of the equitable rights of the parties, releases the lands primarily chargeable, he will not be permitted to enforce his charge against the lands which are only secondarily liable. *Chancery*, 1848, *Livingston v. Freeland*, 3 *Barb. Ch.*, 510.

34. **Effect of releasing one of two joint debtors.** A release of one of several joint contractors, or wrongdoers, discharges all. The reason is, that the deed, being taken most strongly against the releasor, is conclusive evidence that he has been satisfied, and after satisfaction, although it moved from only one no foundation remains for an action against any one. *Supreme Ct.*, 1841, *Bronson v. Fitzhugh*, 1 *Hill*, 185; *S. P.*, 1810, *Rowley v. Stoddard*, 7 *Johns.*, 207; 1828, *Catskill Bank v. Messenger*, 9 *Cow.*, 37; 1847, *Hoffman v. Dunlop*, 1 *Barb.*, 185. *Chancery*, 1842, *Parsons v. Hughes*, 9 *Paige*, 591.

35. In order that a release by an obligee to one of several obligors should operate as a discharge of all, it must be a technical release, under seal, not a mere parole agreement to release one. *Supreme Ct.*, 1832, *De Zeng v. Bailey*, 9 *Wend.*, 386.

36. The legal effect of a release of one defendant from a demand against him jointly with another, cannot be controlled by an unsealed agreement by the other,—although delivered at the same time,—that it should not impair his liability. *Supreme Ct.*, 1841, *Bronson v. Fitzhugh*, 1 *Hill*, 185.

37. **Debtors severally liable.** The stockholders of a manufacturing corporation, being only severally liable for debts due from the company at the time of dissolution [24 *Wend.*, 478], a release by a creditor to one stockholder does not operate to discharge the others. *Supreme Ct.*, 1843, *Bank of Poughkeepsie v. Robertson*, 5 *Hill*, 461.

38. Where several persons, being the owners of land chargeable with rent, as tenants in common, make partition between themselves,

Covenant not to Sue.

each assuming the payment of his equitable share of the rent, a release to one of the owners does not extinguish the liability of the others. *Supreme Ct.*, 1854, *Van Rensselaer v. Chadwick*, 24 *Barb.*, 888.

39. A covenant not to sue the covenantee, amounts to a release. It is treated as such to avoid circuity of action. *Supreme Ct.*, 1807, *Cuyler v. Cuyler*, 2 *Johns.*, 186; 1811, *Phelps v. Johnson*, 8 *Johns.*, 54; 1824, *Clark v. Bush*, 8 *Cow.*, 151; 1830, *Brown v. Williams*, 4 *Wend.*, 360. See, also, *Jackson v. Staekhouse*, 1 *Cow.*, 122.

40. This principle applied in a peculiar case. *Cuyler v. Cuyler*, 2 *Johns.*, 186.

41. But a covenant not to sue for a given time does not amount to a defeasance, and cannot be pleaded as such, but is a covenant only for the breach of which the obligor may bring his action. *Supreme Ct.*, 1821, *Chandler v. Herriek*, 19 *Johns.*, 129; S. P., 1831, *Winans v. Huston*, 6 *Wend.*, 471.

42. An agreement which operates to extend the time for payment of a debt for a limited time, should be set up in defence of the action on the debt, if brought within that time. It cannot be the basis of an independent action. *Ct. of Errors*, 1830, *Pearl v. Wells*, 6 *Wend.*, 291.

43. A creditor of a firm joined, as surety, with one of the partners in a bond to the other, indemnifying him against the partnership debts. The bondsmen paid debts of the firm amounting to more than the penalty of the bond; after which suit was brought on behalf of the creditor against the two partners on his demand against the firm. *Held*, 1. The bond, if not discharged, operated as a release. 2. The creditor, being a surety only, was liable only to the amount of the penalty of the bond. Having paid debts to that amount, he was no longer barred by the bond from suing his own claim. *Supreme Ct.*, 1824, *Clark v. Bush*, 8 *Cow.*, 151.

44. Where there is more than one debtor. An agreement or covenant never to sue a sole debtor is held to operate as a release, to avoid circuity of action. But where there are two obligors or promisors, a covenant not to sue one, so far from releasing the demand, has been repeatedly held not to protect the other. Its operation is only as a covenant. *Supreme Ct.*, 1807, *Harrison v. Close*, 2 *Johns.*, 448; S. P., 1810, *Stoddard v. Stoddard*, 7 *Id.*, 207; 1828,

Release to Acceptor—to Drawer.

Catskill Bank v. Messenger, 9 *Cow.*, 87; 1830, *Bank of Chenango v. Osgood*, 4 *Wend.*, 607; 1839, *Couch v. Mills*, 21 *Wend.*, 424.

45. After suit brought upon a joint note the plaintiff covenanted with one maker that he would not sue him thereon, and that if any suit should be brought or continued, the instrument should be deemed a release to him;—*Held*, not a release, and no bar to a continuance of the action. *Supreme Ct.*, 1839, *Couch v. Mills*, 21 *Wend.*, 424; S. P., 1830, *Bank of Chenango v. Osgood*, 4 *Id.*, 607.

46. A release of one of two joint-debtors discharges the original debt as to both; and a covenant not to sue both has the same effect as a release of both, to avoid circuity of action. But a covenant not to sue one of them does not at law operate as a release of the debt as to either; but the original indebtedness remains unchanged. *Chancery*, 1840, *Hosack v. Rogers*, 8 *Paige*, 229.

47. A covenant by a creditor not to collect a joint debt out of the property of one of the joint-debtors is not a technical release, which can be set up by the other debtor in a joint suit against them, even at law. *Chancery*, 1844, *Miller v. Fenton*, 11 *Paige*, 18.

48. In equity, a covenant by a creditor, of receiving part of a demand from one joint-debtor, that he will not enforce the claim against such debtor's individual property, will not release the other debtors, unless the covenantee was primarily liable for the whole demand. *Id.*

49. This principle applied in a peculiar case. *Id.*

50. Release to acceptor of bill. A release of the acceptor of a bill, by the holder, discharges the drawer; and the effect of the release cannot be avoided by a subsequent agreement between the holder and acceptor. *N. Y. Superior Ct.*, 1848, *Mottram v. Mills*, 2 *Sandf.*, 189.

51. — to drawer. As the drawer of a bill is never liable in that character to the acceptor, a release to the drawer of a bill by the acceptor, discharging him from all claim for damages, &c., "as drawer" of the bill, will not bar an action by the acceptor for money paid to take up the bill for the drawer's accommodation. *Ct. of Appeals*, 1849, *Pearce v. Wilkins*, 2 *N. Y. (2 Comst.)*, 469; affirming S. C., 5 *Den.*, 541.

52. — to maker of promissory note. If

Release to Maker of Note.

Act of 1838.

the indorser of a note has given, before maturity of the note, a release of all demands to the maker, he cannot afterwards sue the maker upon the note, for the release discharges it. *Supreme Ct.*, 1807, *Ouyler v. Ouyler*, 2 *Johns.*, 186.

53. But he may, after paying the note, bring his action for money paid; for that is a cause of action arising subsequent to the release. *Id.*

54. So held, where the maker of an accommodation-note gave the indorser a release, and afterwards paid the note and sued for money paid. *Supreme Ct.*, 1819, *Seymour v. Minturn*, 17 *Johns.*, 169.

55. S. made his note for the accommodation of M., who procured it discounted at bank, but the bank did not know that it was discounted for M's. accommodation. M. failed, and S. signed a release of M. from all demands on promissory notes; which the bank also subsequently executed by its seal. S. afterwards paid the bank the amount of the note, and sued M. for the amount so paid. *Held*, 1. The release of M. by the bank did not discharge S.; as they had a right to presume that S. consented to it. The payment by S. was therefore not one made in his own wrong. 2. The release signed by S. did not bar this suit; for it extended only to demands on promissory notes, while the suit was for money paid to M.'s use. *Supreme Ct.*, 1819, *Seymour v. Minturn*, 17 *Johns.*, 169. Followed, 1834, *Keeler v. Bartine*, 12 *Wend.*, 110.

56. Upon the execution of a voluntary assignment by the makers of a note for the benefit of their creditors, the second indorser of the note executed a general release to the makers, and subsequently became fixed with the payment of the note. *Held*, that the release of the note having been executed before the maturity of the note, the second indorser was not barred by it from maintaining his action either against the maker or first indorser. *Supreme Ct.*, 1834, *Keeler v. Bartine*, 12 *Wend.*, 110. *S. P.*, *N. Y. Superior Ct.*, 1848, *Nichols v. Tracy*, 1 *Sandf.*, 278.

57. Intent to preserve liability of indorser. A release to the maker of a note operates as a discharge of the indorser, by construction only. The reason is that by such release, the indorser's remedy against the maker is taken away. Wherever it is the intention of the parties to preserve the liability

of the indorser, it is competent for them to do so. *Supreme Ct.*, 1819, *Bruen v. Marquand*, 17 *Johns.*, 58.

58. A release given to a maker under peculiar circumstances, evincing an intent to preserve the liability of the indorser;—*Held*, no discharge to the latter. *Id.*

59. Where a release given by the holders of a note to one of several joint makers, contained a provision excepting from the release such liability as the maker might be under to the indorser;—*Held*, that the indorser could not set up the release as a bar to the holder's action against him. *Supreme Ct.*, 1804, *Stewart v. Eden*, 2 *Cai.*, 121.

60. Covenant not to sue. The maker and indorser of a note are not joint-debtors. Hence a covenant not to sue the maker operates to discharge the indorser. *Supreme Ct.*, 1830, *Brown v. Williams*, 4 *Wend.*, 360.

61. — not to prosecute judgment. Where the holder of a note has obtained separate judgments against the maker and indorser, they both become principal debtors. A covenant by him afterwards made with the maker that he will not prosecute the judgment against him, does not operate to release or discharge the indorser. Nothing short of payment of the judgment against the former will have that effect. *Ct. of Appeals*, 1851, *Hubbell v. Carpenter*, 5 *N. Y.* (1 *Seld.*), 171.

62. Release to indorser. A release by the holder of a note to the indorser, with the consent of the maker, does not discharge the maker. *Supreme Ct.*, 1819, *Seymour v. Minturn*, 17 *Johns.*, 169.

63. As between the first and subsequent indorsers, the former must be regarded in the light of the principal. A discharge of him, therefore, by the holder operates to release them. *Supreme Ct.*, 1839, *Newcomb v. Raynor*, 21 *Wend.*, 108; *S. P.*, 1830, *Brown v. Williams*, 4 *Id.*, 360.

64. Act of 1838. Partners, upon a dissolution, enabled to make separate compositions with any or all creditors of the firm, which shall be a discharge of the debtor or debtors making the same, and to them only; and shall not discharge other members of the firm. *Laws of 1838*, 243, ch. 257, §§ 1-4.*

65. The above provisions extended to joint-debtors generally. *Laws of 1838*, 243, ch. 257, § 5.

* Amended, *Laws of 1845*, 410, ch. 343; so as to authorize discharge of judgment.

Release to one of several Partners.

Religious Corporations.

66. *It seems*, that even under the provisions of the act of 1838, a release to one of several partners or joint-debtors should be qualified by a reference to the statute, otherwise if absolute in terms, it will discharge all. *Bank of Poughkeepsie v. Ibbotson*, 5 *Hill*, 461; *Hoffman v. Dunlop*, 1 *Barb.*, 185.

67. Under the act of 1838, a partner may make a separate compromise with a creditor of the firm at any time after the termination of the authority of the different partners to bind the firm. A severance of the joint interest of the partners in the partnership effects is not necessary; nor can the compromise be impeded by the fact that the consideration of the release came from partnership funds. *Supreme Ct., Sp. T.*, 1848, *Stitt v. Cass*, 4 *Barb.*, 92.

68. **Construction of release.** An agent compromised a demand due to his principal, and executed a release in his own name. *Held*, that the instrument not purporting to be the deed of the principal was not binding upon him as a release; but that the debtor could avail himself of it in connection with other requisite facts, to show an accord and satisfaction. *Ct. of Errors*, 1839, *Evans v. Wells*, 22 *Wend.*, 324.

69. A release,—*Held*, to import payment. *Warner v. Dunham*, *Hill & D. Supp.*, 206.

70. **The mode of proving**, and the effect, of a release granted by the United States secretary of the treasury, to one of several obligors in a bond to the United States, considered. *Bonchaud v. Dias*, 3 *Den.*, 238.

71. **Validity.** Mutual releases executed to settle old accounts, will not be disturbed in equity, unless fraud or gross mistake is shown. *Ct. of Errors*, 1830, *Wood v. Young*, 5 *Wend.*, 690. See *Mumford v. Murray*, 6 *Johns. Ch.*, 452.

72. A release to a witness is a valid discharge to him, although he was not sworn on the trial. *Supreme Ct.*, 1819, *Pratt v. Crocker*, 16 *Johns.*, 270.

As to releasing a witness, see **WITNESS**.

73. — **how tried.** The court will not try the validity of a release executed by the nominal plaintiff, but alleged to be in fraud of the rights of the real party in interest, upon motion to cancel the release, unless the nature of the case precludes the question being tried by the jury, but will rather leave it to be litigated on the trial of the cause. *Supreme Ct.*, 1843, *Timan v. Leland*, 6 *Hill*, 237.

As to the power of **One partner** to release a demand due to the partnership, see **PARTNERSHIP**.

As to releases by a **Ward** to his guardian, see **GUARDIAN AND WARD**, 185–189.

RELIGIOUS CORPORATIONS.

1. **The exercise of religious profession** and worship forever allowed in this State, to all mankind. *Const. of 1846*, art. 1, § 8.

2. **The statutes** regulating the organization and incorporation of religious corporations, and the manner in which their affairs shall be conducted, which were enacted prior to the revision of the statutes, and are yet in force, will be found collected in either edition of the Revised Statutes. 3 *Rev. Stat.*, 292–304; 2 *Id.*, 5 ed., 604–614.

3. **The Act of 1813**, is still in force. *Supreme Ct.*, 1853, *Voorhees v. Presbyterian Church of Amsterdam*, 17 *Barb.*, 108.

4. **Who constitute the corporation.** A religious corporation, created under the general act, consists not of the trustees as such, but of members of the society. Although the statute (§ 8) declares that the trustees shall be a body corporate, a view of the whole act, as well as the current of authority, and the popular opinion, sustains the view that it is the *society*, not the trustees, which is incorporated; and the members, whether church members or not, are the corporators. The relation of the trustees is not that of a private trustee to the *cestui que trust*, but that of directors to a civil corporation. They are but the managing officers of the corporation, invested, as to the temporal affairs of the society, with the powers specifically conferred by the statute, and with the ordinary discretionary powers of officers of civil corporations. [2 *Paige*, 296; 7 *Id.*, 281; 3 *Den.*, 492.] *Ct. of Appeals*, 1854, *Robertson v. Bullions*, 11 *N. Y. (1 Kern.)*, 243; affirming *S. C.*, 9 *Barb.*, 64.

5. Two congregations agreed to unite and consolidate their property for the common use, and to build, upon a site owned by one of them, a church for the use of the new congregation. After the union, the new society was incorporated. *Held*, that the congregations were merged in the corporation, that the property of both became the property of the corporation, and that the management of it was vested in the trustees, to the exclusion of elders and deacons; and that there was no trust, or covenant, to rebuild the church. *A.*

Formal Requisites of Incorporation.

V. Chan. Ct., 1844, *Cammeyer v. United German Lutheran Churches*, 2 *Sandf. Oh.*, 186.

6. **Society: Church.** The distinction between the religious "society," or corporation, and the "church" connected with it,—considered. *Baptist Church in Hartford v. Witherell*, 3 *Paige*, 296; *Lawyer v. Clipperly*, 7 *Id.*, 281.

7. **Certificate of incorporation** cannot be acknowledged before a commissioner of deeds. *Supreme Ct.*, 1887, *Baptist Society v. Rapalee*, 16 *Wend.*, 605.

8. Certificate of incorporation may be acknowledged before any officer authorized to take acknowledgments or proofs of conveyances. *Laws of 1844*, 247, ch. 158, § 1.

9. Certificates previously so acknowledged, declared valid. *Laws of 1844*, 247, ch. 158, § 2.

10. **Formal requisites of incorporation.** In aid of a suit, upon a contract made with a religious society, which has existed and acted as such for several years, the formal requisites to its organization, under the statute, will be presumed, although they do not appear by the certificate filed. *So held*, where the certificate of organization of an Episcopal church did not show that the rector presided at the first meeting, nor that he was necessarily absent. *N. Y. Superior Ct.*, 1828, *All Saints' Church v. Lovett*, 1 *Hall*, 191.

11. **Free churches.** Incorporation of societies to maintain free churches, authorized. *Laws of 1854*, 494, ch. 218.

12. **Reformed Dutch churches**, incorporation of, authorized. *Laws of 1855*, 76, ch. 90.

13. **Change of name** of religious corporation, authorized. *Laws of 1858*, 667, ch. 323.

14. **Trustees** may purchase and hold grounds for associate-houses or chapels, and for schools, and the persons stately worshipping in such additional houses or chapels may be separately organized. *Laws of 1850*, 196, ch. 122, § 2; as amended, 1860, 889, ch. 225.

15. **Title to property.** The corporation, and not the trustees, holds the real estate; and the alienage of the trustees cannot affect the title of the corporation. *A. V. Chan. Ct.*, 1844, *Cammeyer v. United German Lutheran Churches*, 2 *Sandf. Oh.*, 186.

16. Incorporated religious societies are aggregate corporations, and whatever property they acquire, whether real or personal, is vested in interest in the body corporate. Whatever possession the officers have, is the possession of the corporation. Although called trustees, they do not hold the property in trust. Their name is simply a title of office,

Title to Property—Devises.

and their portion the same as if they were called directors or managers. Their right to intermeddle is an authority, not an estate. *Ct. of Appeals*, 1854, *People v. Fulton*, 11 *N. Y.* (1 *Kern.*), 94.

17. Hence trustees of a religious corporation cannot proceed for a forcible entry and detainer of the corporate property in their own names; the proceeding must be in the name of the corporation. *Id.*

18. When a religious corporation, beneficially interested in lands, should be deemed vested with the title. *Jackson v. Nestles*, 3 *Johns.*, 115, 185.

19. **Devises.** Notwithstanding the provision of section 4 of the act of 1784 (same stat., 2 *Laws of 1813*, 212; 3 *Rev. Stat.*, 295; 2 *Id.*, 5 ed., 607), religious corporations are restricted by the statute of wills, from taking lands by devise. *Supreme Ct.* (1805?), *Jackson v. Hammond*, 2 *Cai. Cas.*, 837. *N. Y. Superior Ct.*, 1849, *Ayres v. Methodist Episcopal Church*, 3 *Sandf.*, 851; *S. C.*, 8 *N. Y. Leg. Obs.*, 17.

20. The history of our statutes regulating the devise of property to religious corporations, considered. *Williams v. Williams*, 8 *N. Y.* (4 *Seld.*), 525, 558.

21. Conveyances and devises of property for religious purposes regulated. *Laws of 1855*, 338, ch. 280; repealed, *Laws of 1862*, 316, ch. 147.

22. **For what uses.** A religious corporation may take by bequest real or personal property to the amount limited by the provisions of the Revised Statutes, for any use necessary for the purposes of the corporation. Such property need not be given generally, for all the purposes of the corporation, but the donor may limit it to one,—*e. g.*, to provide for the support of a minister. *Ct. of Appeals*, 1853, *Williams v. Williams*, 8 *N. Y.* (4 *Seld.*), 525, 558; *Tucker v. Rector, &c.*, of St. Clement's Church, *Id.*, 558; affirming *S. C.*, 3 *Sandf.*, 242; 8 *N. Y. Leg. Obs.*, 257.

23. A religious corporation may accept a legacy, charged with the payment of its income to a third person for life, and may execute the trust. Wherever property is devised to a corporation, partly for its own use and partly for the use of others, the power of the corporation to hold the property for its own use carries with it the power to execute that part of the trust which relates to others. *Chancery*, 1828, *Matter of Howe*, 1 *Paige*,

Effect of Change of Doctrine.

214. Compare *Ayres v. Methodist Episcopal Church*, 8 *Sandf.*, 851; S. O., 8 *N. Y. Leg. Obs.*, 17.

24. Incorporated religious societies are not to be regarded as ecclesiastical corporations in the sense of the English law, but are civil corporations governed by the principles of common law. *Ct. of Appeals*, 1854, *Robertson v. Bullions*, 11 *N. Y. (1 Kern.)*, 248; affirming S. O., 9 *Barb.*, 64.

25. The trustees cannot take a trust for the sole benefit of members of the church, as distinguished from other members of the society, or for the use of a portion of the corporators, to the exclusion of others. And they cannot take a trust limited to the support of a particular faith, or a particular class of doctrines. *Id.*

26. Effect of change of doctrine. That chancery may interfere to control the management of the property of religious corporations in so far as it is to be deemed held by the corporation in trust for a definite purpose, and upon the same principles as apply to trust property generally; but cannot interfere upon the mere ground of error or change of doctrine. *Chancery*, 1832, *Baptist Church in Hartford v. Witherell*, 3 *Paige*, 296. *V. Chan. Ct.*, 1833, *Bowden v. McLeod*, 1 *Edw.*, 588. *A. V. Chan. Ct.*, 1844, *Kinskern v. Lutheran Churches*, 1 *Sandf. Ch.*, 439. *Supreme Ct., Sp. T.*, 1848, *People v. Steele*, 2 *Barb.*, 897; S. O., less fully, 6 *N. Y. Leg. Obs.*, 55; and see *Miller v. Gable*, 2 *Den.*, 492.

27. Where a religious society is organized as a branch or part of an established denomination, and becomes endowed with property given upon the faith of its being so, the trustees at a given time will not be permitted to employ such property in maintaining doctrine and discipline at variance with that of the denomination, even though they are sustained by a majority of the corporators. *Supreme Ct., Sp. T.*, 1848, *People v. Steele*, 2 *Barb.*, 897; S. O., less fully reported, 6 *N. Y. Leg. Obs.*, 55.

28. A payment made to a treasurer of a religious society, cannot be impeached by showing that a portion of the society continuing him in office, have abandoned the religious faith of the society. A court of law can look only to the legal rights of the parties to control the fund in question. So long as the forms and modes of proceeding by the association under whose direction the original con-

Qualifications of Trustees.

tributors placed the fund are strictly complied with in its management and control, a court of law is incompetent to interfere. *Supreme Ct.*, 1832, *Field v. Field*, 9 *Wend.*, 394.

29. Certain members of an unincorporated religious society took an absolute deed of lands bought with funds of the society, and one of them indorsed upon the deed, without the assent of the society, a declaration that he held it in trust for the society upon its members assenting to an open communion. *Held*, that the indorsement was of no force; that upon the subsequent incorporation of the society, the title vested in the corporation, but it was nevertheless proper for chancery, upon the bill of the corporation, to decree a conveyance. *A. V. Chan. Ct.*, 1839, *South Baptist Church v. Yates*, *Hoffm.*, 142.

30. A German Lutheran congregation in the city of New York, was composed in part of English and in part of Germans, and the parties used the building for religious exercises, with different pastors, in different portions of the day. *Held*, that although the English portion had a right to employ a pastor, and to invite individuals to join their congregation, they could not, by agreement with an English corporation of the same persuasion, transfer its minister and congregation to their own church. *V. Chan. Ct.*, 1843, *Cammer v. German Lutheran Churches*, 4 *Edw.*, 228.

31. Inventory. In what cases an account and inventory of the property of the corporation must be exhibited. *Act of 1818*, § 10, 3 *Rev. Stat.*, 297; *Act of 1814*, § 6, 3 *Rev. Stat.*, 301; *Laws of 1842*, 191, ch. 153, §§ 1, 2; 1850, 195, ch. 122, § 1.

32. Qualifications of trustees. The qualifications prescribed by the statute of incorporation for electors of trustees of the society, cannot be abridged or extended by any act of the trustees or of the corporators. Every person qualified under the statute has an incontestable right to vote at the election for trustees. No additional qualification can be imposed by by-laws. *Supreme Ct.*, 1845, *People v. Phillips*, 1 *Den.*, 388.

33. A court of equity cannot prescribe the qualifications of the electors of a religious society, incorporated under the general act, nor remove the trustees. [2 *Johns. Ch.*, 371, 17 *Ves.*, 291.] *Ct. of Appeals*, 1854, *Robertson v. Bullions*, 11 *N. Y. (1 Kern.)*, 243; affirming S. O., 9 *Barb.*, 64; overruling *Lawyer v. Olip-*

Validity of Election.

Conveyances of Real Property.

perly, 7 *Paige*, 281; *Bowden v. McLeod*, 1 *Edw.*, 588; *Kinskern v. Lutheran Churches*, 1 *Sandf. Ch.*, 489.

34. Trustees must belong to the society. If they withdraw from it after election, they thereby cease to be trustees; and though receiving letters of dismissal from the church may not operate of itself as a withdrawal from the society, yet where taking such letters is followed by acts incompatible with the duties of a trustee—*e. g.*, co-operating in the organization of another society, and in attempts to close the place of worship of the former society—the trustee will be held to have vacated his office. *Supreme Ct., Sp. T.*, 1855, *Laight-street Baptist Church v. Noe*, 12 *Hou. Pr.*, 497.

35. **Validity of election.** An election of trustees is not invalidated by the neglect or delay of the inspectors to give the proper certificate. *Supreme Ct.*, 1884, *People v. Peck*, 11 *Wend.*, 604.

36. An election is not necessarily void because the notice given by the trustees to the minister was less than one month, &c., and did not contain the names of the trustees whose seats became vacant, and was not announced for two successive Sabbaths; provided the election was fairly conducted and all in fact had notice. If the omission was fraudulently made, or the election was thereby prejudiced, the omissions invalidate the election. *Ib.*

37. Under the act of 1784, § 8, the appointment of persons, other than elders or church-wardens, to preside at an election of trustees, vitiates the elections, if any such officers were present at the meeting. *So held*, upon *quo warranto*. *Ib.*

38. The "elders" intended by the statute are not the clergy, though popularly called elders, among churches of that denomination; but subordinate officers of the society known as elders. *Ib.*

39. Who may vote for trustees. *Jackson v. Nestles*, 3 *Johns.*, 115, 185.

40. **Friends.** Mode of organizing and conducting their business meetings. *Field v. Field*, 9 *Wend.*, 394.

41. Omission to choose officers at stated annual meeting, does not work a dissolution, if election is held within one year thereafter. *Laws of 1844*, 248, ch. 158, § 8.

42. Of the sufficiency of a certificate of the election of trustees under section 3 of the act

authorizing formation of religious societies. *Methodist Episcopal Union Church v. Pickett*, 19 *N. Y. (5 Smith)*, 482; affirming *S. C.*, 23 *Barb.*, 486.

43. — how tried. Conflicting claims of rival sets of trustees, not triable in action of ejectment, only in *quo warranto*. *Jackson v. Nestles*, 3 *Johns.*, 115, 185.

44. A proceeding on the part of the People of the State is the only one in which the legality of an election to the office of trustee in a religious corporation can be determined. It is not competent to submit that question to arbitration. *Supreme Ct., Sp. T.*, 1857, *Wyatt v. Benson*, 23 *Barb.*, 827; *S. C.*, 4 *Abbotts' Pr.*, 182.

45. In a suit by trustees of a religious corporation,—*e. g.*, on a subscription,—defendant cannot set up that they were irregularly elected, or that the corporate powers have been lost by non-user. The acts of trustees *de facto* are valid until they are ousted at suit of the People. *Supreme Ct.*, 1826, *Trustees of Vernon Society v. Hills*, 6 *Cow.*, 28. Followed, *N. Y. Superior Ct.*, 1828, *All Saints Church v. Lovett*, 1 *Hall*, 191.

46. **Powers of trustees.** A religious corporation can be bound only by the acts of its trustees acting as such. A resolution passed at a general meeting of corporators, though a majority of the trustees are present and concur, is not a corporate act. *A. V. Chan. Ct.*, 1844, *Cammeyer v. United German Lutheran Churches*, 2 *Sandf. Ch.*, 186.

47. Section 1 of the act of 1784 gives the church-wardens and vestry of an Episcopal church an implied power to fix the salary of the rector, which is exclusive. Section 8 does not apply to Episcopal churches. *V. Chan. Ct.*, 1882, *Humbert v. St. Stephen's Church*, 1 *Edw.*, 808.

48. Consent of the trustees of an independent religious society,—*Held*, necessary to the employment of a minister. *N. Y. Superior Ct.*, 1852, *German Reformed Church v. Busche*, 5 *Sandf.*, 666.

49. **Number.** Of the power of a religious society to reduce the number of its trustees. *Wheaton v. Gates*, 18 *N. Y. (4 Smith)*, 395.

50. **Conveyances of real property.** The trustees of a religious corporation, under Laws of 1801 [1 *Kent & R.*, 836, *Webster's ed.*, 1802; re-enacted, 1 *Rev. Laws*, 212; 3 *Rev. Stat.*, 244], have not the power to sell and convey

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by an absolute deed in fee a slip, or pew. Their power is limited to a demise or lease. *Supreme Ct.*, 1849, *Vielle v. Osgood*, 8 *Barb.*, 180; 1858, *Voorhees v. Presbyterian Church of Amsterdam*, 17 *Id.*, 108.

51. The common-law principle that corporations, unless restrained by charter or statute, have power to sell, coextensive with that of natural persons, does not apply to religious corporations under that act. *Supreme Ct., Sp. T.*, 1858, *Montgomery v. Johnson*, 9 *How. Pr.*, 282.

52. **Consent of chancellor.** "It shall be lawful for the chancellor, upon the application of any religious corporation, in case he shall deem it proper, to make an order for the sale of any real estate belonging to such corporation, and to direct the application of the moneys arising therefrom to such uses as the same corporation, with the consent and approbation of the chancellor, shall conceive to be most for the interest of the society to which the real estate so sold did belong." Lands granted by the State for the support of the gospel, excepted. *Laws of 1806*, 860, ch. 48, § 8; same stat., 2 *Laws of 1818*, 218, § 11; 3 *Rev. Stat.*, 298, § 11.

53. **Vice-chancellor** had same authority as chancellor. *De Ruyter v. St. Peter's Church*, 8 *N. Y. (3 Comst.)*, 288.

54. **Power of Supreme Court.** Since the Constitution of 1846, the application for an order authorizing the sale of real property, may be made to the Supreme Court. *Supreme Ct., Sp. T.*, 1857, *Wyatt v. Benson*, 28 *Barb.*, 327.

55. **County Court** may grant such order. *Code of Pro.*, § 80, subd. 9.

56. **Application must be by the corporation.** It is only upon an application by the corporation that an order allowing a religious corporation to dispose of its real estate can be made. The corporation consists, not of the trustees, but of every member of the congregation entitled to vote. The opinions of the trustees in favor of the sale are of no moment except as opinions of so many of the corporators. *Supreme Ct., Sp. T.*, 1857, *Wyatt v. Benson*, 28 *Barb.*, 327; *S. C.*, 4 *Abbotts' Pr.*, 182.

57. While an order authorizing the sale of real property belonging to a religious corporation, and made upon application of the trustees of such corporation, is yet *in fieri* and unexecuted, it is the duty of the court, upon proof that the application was contrary to the views and wishes of a majority of the corporators,

to revoke its consent and to vacate the order. *Id.*

58. History of the law governing the power of religious corporations to dispose of their real estate,—reviewed. *Id.*

59. **Provisional order.** The chancellor may make a provisional order, giving a religious corporation leave to sell its real estate,—*e. g.*, an order that the sale may be made for a certain price, and if a proper site for a new church can be obtained. *V. Chan. Ct.*, 1838, *Matter of Brick Presbyterian Church*, 8 *Edw.*, 155.

60. **Extent of the power.** The act of 1806 (*supra*, 52) operates to give every religious corporation unlimited power to convey real property held by them in trust for the corporators, provided the previous consent of the chancellor, and his direction for the application of the proceeds, has been obtained. *Chancery*, 1838, *Dutch Church v. Mott*, 7 *Paige*, 77.

61. Under the statute allowing the courts to permit a sale of the real property of a religious corporation, the court has no power to approve a sale, for the purpose of closing up the existence of the society, and distributing its property. The trustees have no power to do this, and the court cannot enlarge their powers. *Ct. of Appeals*, 1858, *Wheaton v. Gates*, 18 *N. Y. (4 Smith)*, 395. *S. P.*, *Supreme Ct., Sp. T.*, 1858, *Matter of Reformed Dutch Church*, 16 *Barb.*, 237.

62. **Mortgage.** Although a religious corporation, organized under the act of 1818, is prohibited from selling its real estate, in any other way than the statute provides, yet it may mortgage its property without any order of the court. The giving of a mortgage is not a sale. A sale embraces the idea of a transfer of the legal title of the property sold, from the vendor to the vendee, for a consideration passing from the latter to the former. To be complete, in general, it requires delivery. It was sales in this sense that the statute was designed to restrain. *Supreme Ct.*, 1858, *Manning v. Moscow Presbyterian Society*, 27 *Barb.*, 52; *S. P.*, 1858, *South Baptist Society v. Clapp*, 18 *Barb.*, 85.

63. **Assignment for benefit of creditors.** The charter of St. Peter's Church authorized the trustees "to give, grant, demise, lease, or otherwise dispose of its real and personal estate," provided that nothing in the act contained should authorize the trustees to "sell" the real estate without the concurrence of the

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chancellor, to be obtained according to section 11 of the general act (*supra*, 52). *Held*, that an assignment by the trustees, with the concurrence of the vice-chancellor, of all the real and personal property of the church, in trust to pay its debts, was valid. *Ot. of Appeals*, 1850, *De Ryder v. St. Peter's Church*, 3 *N. Y. (3 Comst.)*, 288; affirming *S. C.*, 3 *Barb. Ch.*, 119.

64. There is no distinction between the power of a religious corporation and of any other, to make an assignment for the payment of debts, except such as arises from the statute requiring the assent of the chancellor to a sale of its real property. *Ib.*

65. Rights of pew-owners. The consent of all the pew-owners, as such, is not necessary to make out a case for granting the trustees leave to sell the church edifice. *V. Chan. Ct.*, 1838, *Matter of Brick Presbyterian Church*, 3 *Edw.*, 155. *Supreme Ct., Sp. T.*, 1853, *Matter of the Reformed Dutch Church*, 16 *Barb.*, 287.

66. It is only where an absolute transfer of the real property of the corporation is contemplated, that the statute requires an order of the chancellor authorizing the sale. A sale of pews is not a sale of real estate, within the act, as the grantee acquires a limited usufructuary right only, and no order is necessary. *Supreme Ct.*, 1826, *Freligh v. Platt*, 5 *Cow.*, 494.

67. The sale of a pew in a church is a sale of an interest in real estate, and the contract must be in writing, and subscribed by the vendor or his agent. *Supreme Ct.*, 1849, *Vielie v. Osgood*, 8 *Barb.*, 180; 1836, *Trustees of First Baptist Church v. Bigelow*, 16 *Wend.*, 28.

68. The right of a pew-owner is a usufructuary right merely; it does not entitle him to an injunction restraining the trustees from pulling down the edifice, when it becomes necessary for the purposes of the society to erect a new one. *V. Chan. Ct.*, 1836, *Heeney v. St. Peter's Church*, 2 *Edw.*, 608. *S. P.*, *Supreme Ct.*, 1853, *Voorhees v. Presbyterian Church of Amsterdam*, 17 *Barb.*, 108; *Bronson v. St. Peter's Church*, 7 *N. Y. Leg. Obs.*, 361.

69. Neither members of a church connected with a religious society, nor pew-owners in the edifice, have, as such, any higher rights than other corporators, upon questions connected with the general temporal concerns of the society. *Chancery*, 1832, *Baptist Church in Hartford v. Witherell*, 3 *Paige*, 296.

70. Pew-holder—*Held*, not liable for assessment levied by the trustees to defray minister's salary; in a peculiar case. *Trustees of First Presbyterian Congregation v. Quackenbush*, 10 *Johns.*, 217.

71. — of vault-owners. Procuring interments of deceased relatives in a church burying-ground, although upon payment of fees to the corporation or its officers, carries merely a privilege of sepulture, and does not vest a title to the land, nor entitle the purchaser to restrain a sale of the ground by the corporation, and a removal of the remains to another place. *V. Chan. Ct.*, 1847, *Windt v. German Reformed Church*, 4 *Sandf. Ch.*, 471.

72. Vault-owners in a churchyard,—*Held* under their deeds, owners of the fee of their lots, and entitled to veto a proposed sale of the property by the trustees. *V. Chan. Ct.*, 1838, *Matter of Brick Presbyterian Church*, 3 *Edw.*, 155.

73. Burial grounds may be purchased and held, and suitable buildings erected. Tenure and use regulated. *Laws of 1842, 191*, ch. 153; 1850, 196, ch. 122, § 8.

74. Minister's salary. If the salary of a minister is not paid out of the revenues of the church as directed by statute, the minister may recover by action against the corporation. *N. Y. Com. Pl.*, 1854, *Ebaugh v. German Reformed Church*, 8 *E. D. Smith*, 60.

75. A written call addressed to a minister, drawn in the form prescribed by the rules of the Presbyterian Church, contained the words "we promise to pay to you the sum of \$500;" was subscribed by three individuals in their own names simply. It appeared, however, that the call was issued as the act of the congregation, that the mode of signing adopted was conformable to the rules and usage of the Church. *Held*, that the subscribers were not individually liable, but were to be deemed to have acted as agents of the congregation. *Supreme Ct.*, 1844, *Paddock v. Brown*, 6 *Hill*, 580.

REMAINDERS.

1. Limitation upon fee. A remainder cannot be limited after an estate in fee. *Ot. of Errors*, 1819, *Jackson v. Robins*, 16 *Johns.*, 587, 589.

2. Where a remainder in fee shall be limited upon any estate, which would be adjudged a fee

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Motion to remove Cause.

tail, according to the law of this State, as it existed previous to July 12, 1782, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker, without issue living at the time of such death. 1 *Rev. Stat.*, 722, § 4.

3. **What is.** "Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name." 1 *Rev. Stat.*, 723, § 11.

4. **Creation and limitation of, regulated.** 1 *Rev. Stat.*, 723-725.

5. **Vesting.** Where a fund is given to the eldest son of A. who shall be living at the death of B., the eldest son of A. has not a mere possibility, but a vested remainder liable to be defeated by his death during B.'s life. It is the present capacity of the individual to take the remainder in possession, if the particular estate should immediately determine, which vests his remainder in interest: and not the absolute certainty that such remainder will ever in fact become vested in possession in him. [16 *Wend.*, 187; *Watk. L. of Conv.*, 123; 5 *Paige*, 466.] And a remainder vested in interest can be transferred. *Chancery*, 1838, *Lawrence v. Bayard*, 7 *Paige*, 70; and see 1 *Rev. Stat.*, 723, § 13.

As to **Divesting title of owners in remainder**, see CONSTITUTIONAL LAW, 184.

6. **Descent.** One who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, has such a seizin in law, where the estate came to him by purchase, as will constitute him a stock of descent. Seizin, as used in the act of 1786, abolishing entails, means seizin of the estate, and does not apply exclusively to lands in possession. *Ct. of Appeals*, 1848, *Wendell v. Crandall*, 1 *N. Y. (1 Comst.)*, 491; affirming *S. C.*, *sub nom. Vanderheyden v. Crandall*, 2 *Den.*, 9. To same effect, *Supreme Ct.*, 1847, *Van Rensselaer v. Poucher*, 5 *Den.*, 85.

For **Other cases** on the subject of remainders, consult ACCUMULATIONS; DEVISE; SUSPENSION OF POWER OF ALIENATION; and WILL.

REMOVAL OF CAUSES.

1. Under the act of Congress of 1789 (*Ingersoll's Abr.*, 87, § 9),—which provides for the removal of causes between citizens of different States from a State court into a United States circuit court,—it devolves upon the

State court to exercise a discretion in the interpretation of the statute, and its application to the case in question. The State court must be satisfied as to the sufficiency of the surety; and that the sum or value in dispute exceeds \$500, a question regulated by the amount claimed in the action. [16 *Pet.*, 104.] And that court is to judge whether the petition has been filed at the time of entering the appearance in that court. *N. Y. Superior Ct.*, 1855, *Cooley v. Lawrence*, 5 *Duer*, 605.

2. **Notice of motion.** The New York Superior Court does not grant an order of removal without notice, or an order to show cause. *N. Y. Superior Ct., Sp. T.*, 1858, *Disbrow v. Driggs*, 8 *Abbotts' Pr.*, 805, *note*.

3. **Petition.** It is no objection to an application to remove a cause from a State court into the circuit court of the United States, that the petition is signed by an attorney of the court, and not by the petitioner himself, nor that the bond is not signed by him, but is signed by sureties only. *N. Y. Superior Ct.*, 1855, *Vandevoort v. Palmer*, 4 *Duer*, 677.

4. When the action is against parties, and is commenced by service on one only, if all the defendants are citizens of another State, and the plaintiff is a citizen of this State, it is not necessary that any defendant should petition except the one served, nor that the bond should be conditioned for the appearance of any defendant except the petitioner. *Id.*

5. A petition verified by an agent,—*Held*, sufficient. *Id.*

6. **Who may move.** The name of one defendant cannot be struck out on motion of the other, without notice to the former; but where the latter is a citizen of another State, and there is no joint trust, interest, duty, or concern, in the subject-matter of controversy, he may be allowed to appear and defend alone, so as to enable him to remove the cause. *Chancery*, 1819, *Livingston v. Gibbons*, 4 *Johns. Ch.*, 94.

7. In an action of tort against several, one only being served, and the others returned not found, the one served may alone petition for a removal. *Supreme Ct.*, 1847, *Norton v. Hayes*, 4 *Den.*, 245.

8. If the capias is served on one only, all the defendants must appear in the State court, when asking for a removal of the cause. Instead of putting in special bail, they may give security to appear and put in bail in the

In what Cases allowed.**Appearance.**

United States court. *Supreme Ct.*, 1845, *Suydam v. Smith*, 1 *Den.*, 268.

9. A suit in equity to enjoin defendant from prosecuting an action which he has brought in a court of law of the State, is in reality an equitable defence to his action, and he is not entitled to have it removed. No proceeding should be removed unless the United States court has jurisdiction of the subject-matter, and power to do substantial justice between the parties. *Chancery*, 1828, *Rogers v. Rogers*, 1 *Paige*, 188.

10. The complainant in a bill of interpleader is not, before being discharged by a decree that the defendants interplead, to be deemed a mere nominal party; and though the defendants are citizens of different States, the cause cannot be removed to the United States court before such decree, if one of the defendants is of the same State with the complainant. [1 *Paine's O. C. R.*, 410.] *V. Chan. Ct.*, 1833, *Leonard v. Jamison*, 2 *Edw.*, 186.

11. Corporation. In an action in which a corporation is a party, if some of the corporators are citizens of the same State with the adverse party, the cause cannot be removed. [8 *Cranch*, 267; 5 *Id.*, 57, 61; 1 *Wheat.*, 91; 3 *Id.*, 591.] *Chancery*, 1821, *North River Steamboat Co. v. Hoffman*, 5 *Johns. Ch.*, 300.

12. A corporation is a citizen of the State where it is created and doing business, within the statute. [14 *How (U. S.)*, 1, 80, 446, 468; 16 *Id.*, 814.] And a railroad corporation of one State, which is authorized by a law of another State to extend its track into the latter, and do business therein, is still a citizen of the former, and not of the latter State. *N. Y. Com. Pl.*, 1856, *Dennistoun v. N. Y. & New Haven R. R. Co.*, 1 *Hill*, 62; *S. C.*, 2 *Abbotts' Pr.*, 415, 278.

13. A suit brought by aliens, jointly with a citizen of the State, against one who is a citizen of the United States and of another State, is not removable under the act. *Id.*

14. The court must be satisfied as to the petitioner's alienage or citizenship in another State, as well as in respect to the amount in controversy. *N. Y. Superior Ct., Sp. T.*, 1858, *Disbrow v. Driggs*, 8 *Abbotts' Pr.*, 805, *note*.

15. Continuing action against joint-debtor. The plaintiff, a resident of this State, sued in a State court three defendants, of whom one was also a resident of this State, and the other two were residents of other States. The ac-

tion was upon a joint indebtedness; and upon service of summons on the resident defendant alone, plaintiff obtained judgment against all, and afterwards served the other defendants with summons to show cause why they should not be bound by the judgment, under section 875 of the Code. *Held*, that the defendants, so summoned, were not entitled to have the cause removed into a Federal court, on the ground of their residence. Such proceeding is not a new action against only the defendants so served, but is a further proceeding in the old action; and where there are several defendants, real parties in interest, each of them must be a resident of a different State from that of the plaintiff, to entitle a defendant to have the cause removed to a Federal court. [14 *Pet.*, 60; 4 *McLean*, 368; 1 *Paine*, 410.] *N. Y. Superior Ct., Sp. T.*, 1859, *Fairchild v. Durand*, 8 *Abbotts' Pr.*, 805.

16. Amount. In assumpsit, where the contrary does not appear, the damages laid in the declaration are presumptively the amount in dispute, and should regulate the action of the State court on a motion to remove the cause. But the presumption is not conclusive, and plaintiff may prevent a removal by amending his declaration so as to reduce the claim to less than that sum. *Supreme Ct.*, 1846, *People v. New York O. P.*, 2 *Den.*, 197. Compare *Disbrow v. Driggs*, 8 *Abbotts' Pr.*, 805, *note*.

17. That neither an outstanding injunction, nor a motion for an attachment for its violation, prevents the removal of the cause. *V. Chan. Ct.*, 1842, *Byam v. Stevens*, 4 *Edw.*, 119.

18. Appearance. Defendant must file his petition for removal at the time of putting in special bail. Giving notice, at the time of putting in bail, of his intention to present his petition at the next term, and filing it then, is not sufficient. The requirement was intended not only to put the defendant to a prompt election, but to give the opposite party early notice. *Supreme Ct.*, 1815, *Redmond v. Russell*, 12 *Johns.*, 158.

19. Whenever that act is done, which according to the practice and rules of the State courts, respectively, amounts to entering an appearance in the court where the suit is brought, then, and at the time of entering such appearance the petition must be filed. *Id.*

20. Neither a mere consent of the plaintiff

Proceedings to Remove.

Removal from District to Circuit Court.

on application of defendant's attorney, that defendant have further time to answer, nor a notice of retainer, amounts to the entering of an appearance, so as to preclude the application to remove the cause under the act of Congress. [5 Duer, 605; 3 Id., 686.] *N. Y. Superior Ct., Sp. T.*, 1858, *Disbrow v. Driggs*, 8 *Abbotts' Pr.*, 305, note.

21. The affidavit, on moving to remove a cause into the United States circuit court, must state that the party is a citizen of another State. To say that he is a resident is not enough. *Supreme Ct.*, 1808, *Corp v. Vermilye*, 8 *Johns.*, 145.

22. The bond to remove a cause from a State court to the circuit court of the United States, should be several as well as joint. *N. Y. Superior Ct.*, 1829, *Roberts v. Canington*, 2 *Hall*, 649.

23. It must be filed at the time fixed in the act, and not afterwards. *Id.*

24. Where in a suit commenced by declaration claiming \$14,000, the defendant was not held to bail, a bond in the penalty of \$1,000 was held sufficient security for defendant's appearance in the circuit court of the United States. *Supreme Ct.*, 1834, *Blanchard v. Dwight*, 12 *Wend.*, 192.

25. Staying proceedings. Where actions of ejectment, after judgment against the casual ejector, are removed from the Supreme Court of this State, into the United States circuit court, the former will stay further proceedings on such judgment. *Supreme Ct.*, 1809, *Jackson v. Stiles*, 4 *Johns.*, 493.

26. Vacating. After an order has once been made in a State court, under the Federal Judiciary Act of 1789, for the removal of a cause to a United States court, any order subsequently made, or any step subsequently taken in the suit, in the State court, is *coram non judice*. [16 Pet., 97; 15 How. U. S., 198.] Hence the State court cannot vacate the order of removal. *Supreme Ct., Sp. T.*, 1855, *Livermore v. Jenks*, 11 *How. Pr.*, 479.

27. If there are two circuits of the United States court within the State, the Supreme Court of the State may remove the cause to either circuit; and where the defendant was arrested in the district which was nearest to the place where the cause of action arose, they sent it there. *Supreme Ct.*, 1845, *Suydam v. Smith*, 1 *Den.*, 263.

28. Where there was no sufficient proof

that convenience required it, the court refused to send the cause to the other district. *Norton v. Hayes*, 4 *Den.*, 245.

29. Neglect to remove. In an action of trespass, against the collector of the port, for seizing the vessel of the plaintiff, against which a libel was filed in the district court of the United States, under a law of the United States, but which had not been heard or determined, on the account of the illness of the judge,—*Held*, that as the public prosecutor might have avoided the delay by removing the libel to the circuit court, defendant was not entitled to an indefinite imparlance until the libel could be decided in the district court. *Supreme Ct.*, 1811, *Hoyt v. Gelston*, 8 *Johns.*, 179.

As to removal from **Inferior courts**, by the old practice, by habeas corpus *cum causa*, see **HABEAS CORPUS**, 61.

As to removal of causes by the Supreme Court to other **State courts**, see **SUPREME COURT**.

REPLEGIANDO.

1. Practice. That the practice upon the writ of de homine replegiando conforms to that pursued in England. *Skinner v. Fleet*, 14 *Johns.*, 268.

2. Mode of procedure upon the writ regulated. 2 *Rev. Stat.*, 561, §§ 15-17; repealed, *Laws of 1840*, 177, ch. 225, § 13. See, also, *Laws of 1834*, 87, ch. 88.

3. Evidence. In a homine replegiando, the confessions of the officers, who had the persons claimed as slaves in their custody when the writ was served, cannot be given in evidence against the party making avowry. *Supreme Ct., N. P.*, 1808, *Asa v. Eithlinger*, *Anth. N. P.*, 99.

4. Submitting to a nonsuit in an action de homine replegiando, is not "prosecuting it with effect," within the terms of a recognizance given on behalf of the party suing out the writ. *Supreme Ct.*, 1799, *Covenhoven v. Seaman*, 1 *Johns. Cas.*, 23; *S. O.*, 2 *Oai. Cas.*, 322.

5. Bail. The condition of the recognizance being forfeited, the bail are not exonerated by a subsequent surrender of the principal, and acceptance by the other party. *Id.*

6. Duty of sheriff. Where a writ has been issued, and the party has been claimed as a

In what Cases it lies.

slave, it is the duty of the sheriff to bring him into court, and return that he is so claimed. He is not authorized to set him at liberty. The party is to enter a recognizance, with sufficient sureties, to the person claiming him to be a slave, to prove his liberty, to appear personally in court and to prosecute his suit with effect. *Supreme Ct.*, 1817, *Skinner v. Fleet*, 14 *Johns.*, 263.

7. Where, instead of so doing, the sheriff allowed the party to go at large,—*Held*, that a bond taken by the sheriff to himself, with sureties, for the prosecution of the suit with effect, and that the party should prove his liberty, and for his return, if return should be adjudged, was of no avail—the sheriff having no right or power to take such a bond—in an action against the sheriff for the escape of the slave, although the bond had been assigned to the plaintiff. *Id.*

As to release from imprisonment on *Habeas corpus*, see *HABEAS CORPUS*.

REPLEVIN.

1. The action of replevin, the sheriff's duty and the proceedings on the bond are regulated in detail by 2 *Rev. Stat.*, 522–583; the provisions of which, except such as relate to the form of the action, and have therefore been superseded by the Code of Procedure, should be consulted in connection with the cases referred to in this title.

2. *Where it lies.* That replevin lies wherever trespass would.* *Supreme Ct.*, 1810, *Pangburn v. Patridge*, 7 *Johns.*, 140; 1828, *Clark v. Skinner*, 20 *Id.*, 465; 1828, *Marshall v. Davis*, 1 *Wend.*, 109; 1829, *Chapman v. Andrews*, 8 *Id.*, 240; 1834, *Rogers v. Arnold*, 12 *Id.*, 80.

3. Replevin lies for any unlawful taking of a chattel. It is not confined to cases of illegal distress. Possession by the plaintiff, and an actual wrongful taking by the defendant, are sufficient to support the action. *Supreme Ct.*, 1810, *Pangburn v. Patridge*,† 7 *Johns.*, 140.

* But see *Roberts v. Randel*, 3 *Sandf.*, 707, where it is said that this language does not mean that the remedies were always concurrent, but that, wherever trespass would lie, and the defendant was in possession of the goods, replevin would lie.

† Qualified, as meaning that it lies where trespass might be brought. *Thompson v. Button*, 14 *Johns.*, 64; and see *Clark v. Skinner*, 20 *Id.*, 465.

4. *Bailor.* Replevin does not lie for goods deposited with the plaintiff by a stranger who has no interest in them. *Supreme Ct.*, 1806, *Harrison v. McIntosh*, 1 *Johns.*, 390.

5. *Custody of the law.* In general, goods in the custody of the law cannot be replevied. *Supreme Ct.*, 1829 [citing 14 *Johns.*, 87; 15 *Id.*, 402; 19 *Id.*, 32; 5 *Mass.*, 288; *Willes*, 672, n. b; 2 *Str.*, 1184; 1 *Ohitt. Pl.*, 160; 1 *Sch. & Lef.*, 320; *Com. Dig. Repl. D.*; 3 *Bl. Com.*, 148; 1 *Wend.*, 109], *Hall v. Tuttle*, 2 *Wend.*, 475.

It makes no difference that the execution under which the goods were taken from defendant has been paid and satisfied. 1818, *Gardner v. Campbell*, 15 *Johns.*, 401.

6. But if the officer, upon an execution against A., seizes the goods of B., the latter may bring replevin. *Supreme Ct.*, 1817, *Thompson v. Button*, 14 *Johns.*, 84.

7. *Wrongful levy.* Replevin lies for plaintiff's property taken from his possession under process against a third party. [14 *Johns.*, 84; 15 *Id.*, 401.] *Supreme Ct.*, 1828, *Judd v. Fox*, 9 *Cow.*, 259.

8. If the judgment or determination on which the process was issued, was void for want of jurisdiction or of authority in the tribunal to pronounce it, replevin lies for property taken by virtue of the process. *Supreme Ct.*, 1821, *Mills v. Martin*, 19 *Johns.*, 7.

9. *Execution against agent.* Replevin lies at the suit of the owner of a chattel, against a sheriff, constable, or other officer, who has taken it from the owner's servant or agent, while employed in the owner's business, by virtue of an execution against such servant or agent; the actual possession of the property, in such case, being considered as remaining in the owner, and not in the defendant in the execution. *Supreme Ct.*, 1828, *Clark v. Skinner*, 20 *Johns.*, 465. Compare *Hall v. Tuttle*, 2 *Wend.*, 475.

10. *Subsequent levy.* To maintain replevin, plaintiff must show a right to have delivery of the property at the time of issuing the writ [8 *Pick.*, 255]; and therefore it does not lie, where the original taking by an officer was unlawful, but, before suit, he levied under a regular execution. *Supreme Ct.*, 1842, *Sharp v. Whittenhall*, 3 *Hill*, 576.

11. *The receiptor of goods*, who takes them from an officer with the owner's consent, is not liable to an action of replevin,

Against whom, and for what, it lies.

though the officer's taking was wrongful. *Supreme Ct.*, 1822, *Chapman v. Andrews*, 8 *Wend.*, 240.

12. A defendant in replevin cannot bring replevin to recover the property again, but is confined to making a claim of property before the sheriff; and, failing that, must wait the issue of the suit. *Supreme Ct.*, 1830, *Morris v. De Witt*, 5 *Wend.*, 71.

13. Tax, &c. Under 2 Rev. Stat., 522, § 4,—which provides that replevin does not lie for property taken by virtue of any warrant for the collection of any tax, assessment, or fine in pursuance of any statute of this State,—the court cannot inquire into the regularity of the proceedings upon which the warrant issued. *Supreme Ct.*, 1832, *People v. Albany C. P.*, 7 *Wend.*, 485.

14. Attachment. Under 2 Rev. Stat., 522, § 5, replevin for goods taken under a justice's attachment will not lie against the depositary of the constable. *Supreme Ct.*, 1850, *Keyser v. Waterbury*, 7 *Barb.*, 650.

15. If a defendant in replevin refuses to deliver the property to the sheriff, after the inquisition, the sheriff may bring replevin. *Supreme Ct.*, 1840, *Baker v. McDuffie*, 28 *Wend.*, 289.

16. Against execution creditor. Replevin will lie against a plaintiff in an execution, by whose direction it is levied upon specific articles of property, which prove not to belong to the defendant in the execution, but are the property of a third person. Evidence of an actual, forcible dispossession of the plaintiff is not necessary; any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damaged, is sufficient. [8 *Wend.*, 618; 6 *Id.*, 368; 7 *Cow.*, 785; 10 *Mass.*, 125.] *Supreme Ct.*, 1838, *Allen v. Orary*,* 10 *Wend.*, 349; S. P., 1836, *Fonda v. Van Horne*, 15 *Id.*, 631. *Ct. of Appeals*, 1848, *Hymann v. Cook*, 1 *How. App. Cas.*, 419.

17. —and officer. A mere levy upon personal property, by an officer, where it is not authorized by law, without either a sale or removal, is a trespass, and replevin lies against the officer and the plaintiff who directed it. *Supreme Ct.*, 1849, *Stewart v. Wells*,* 6 *Barb.*, 79. See, also, *Allen v. Orary*, 10 *Wend.*, 349.

18. A levy and actual sale upon personal property belonging to a person not the defendant in the execution, though without interference with the property, is a trespass, and replevin will lie both against the officer and the purchaser. *So held*, where the purchaser was the plaintiff in the execution. *Supreme Ct.*, 1850, *Neff v. Thompson*, 8 *Barb.*, 218.

19. This is so, although the officer professed to sell only the right of the debtor. Unless the defendant has some right or title which is the proper subject of seizure on execution, the act of buying is a trespass. [1 *Cow. Tr.*, 446.] *Id.*

20. —fraudulent purchasers. Where one of two partners obtains goods by a fraudulent representation as to the solvency and credit of the firm, and afterwards the firm sells the goods, replevin in the *cepit* lies against both. Obtaining goods in this manner does not change the general property, as between buyer and seller, unless the seller elects to consider it as changed; and the general owner of personal property has the constructive possession, though the actual possession be in another, and such owner may maintain replevin. *Supreme Ct.*, 1841, *Cary v. Hotelling*,* 1 *Hill*, 811; *Olmsted v. Hotelling*,* *Id.*, 817.

21. Things fixed to the freehold become personal property, by severance, and are thereafter proper subjects of replevin. *Supreme Ct.*, 1819, *Oresson v. Stout*, 17 *Johns.*, 116.

22. Crops. An owner who has been dispossessed, cannot, after recovering possession, maintain replevin for crops which the wrongdoer has cut and converted, but must bring trespass. *Supreme Ct.*, 1828, *De Mott v. Hagerman*, 8 *Cow.*, 220.

23. Actual possession by the owner, at the time of the wrongful sale, is not necessary to support replevin, provided he has a right of immediate possession. The fact that a bailee or agister was in possession, having a lien, but no right of possession for an unexpired term of time, is not a bar to the owner's action. *Supreme Ct.*, 1850, *Neff v. Thompson*, 8 *Barb.*, 218.

24. One who had a lien on the thing,—e. g., for salvage,—at the time the defendant took it from his possession, may maintain replevin. [7 *Cow.*, 670; 10 *Wend.*, 816; 12 *Id.*, 80.] *Ct.*

* See this case in table of CASES QUESTIONED, Vol. I., *Ante*.

* See these cases questioned in *Roberts v. Randel*, 3 *Sandf.*, 707.

Form of Action.

Defences.

Writ. Bond. Affidavit.

of Appeals, 1858, *Baker v. Hoag*, 7 *N. Y. (8 Sold.)*, 555.

25. *Cepit*: *Detinet*. Though by 2 Rev. Stat., 552, § 1, the remedy by replevin was extended, so as to include cases of the wrongful detention, as well as the wrongful taking of chattels, the distinction between taking and detaining must be kept up in the writ and declaration. If the original taking was lawful, the action must be in the *detinet*. *Supreme Ct.*, 1837, *Randall v. Cook*, 17 *Wend.*, 53.

26. Replevin in the *detinet*, as well as in the *cepit*, will lie upon a tortious taking, for plaintiff may waive the force. *Supreme Ct.*, 1842, *Cummings v. Vorce*, 3 *Hill*, 282. Followed, 1844, *Pierce v. Van Dyke*, 6 *Id.*, 613. *N. Y. Superior Ct.*, 1848, *Zachrisson v. Ahman*, 2 *Sandf.*, 68.

27. In such case a demand before suit is not necessary. *Supreme Ct.*, 1844, *Pierce v. Van Dyke*, 6 *Hill*, 613; 1845, *Stillman v. Squire*, 1 *Den.*, 827. *N. Y. Superior Ct.*, 1848, *Zachrisson v. Ahman*, 2 *Sandf.*, 68.

28. Replevin in the *cepit* will only lie where trespass will lie. It does not lie against one without fault, who obtained the goods from the wrongful taker. [1 *Wend.*, 109; 19 *Id.*, 481; 4 *Barn & A.*, 614; *Vin. Tresp. (M.)*, pl. 11; *Bac. Abr.*, *Tresp. (E.)*, 2; *Bro. Abr.*, *Tresp.*, pl. 48.] *Supreme Ct.*, 1842, *Barrett v. Warren*, 3 *Hill*, 248.

29. The grantee in a sheriff's deed cannot have replevin in the *cepit* for timber cut by the debtor upon the land during the fifteen months allowed for redemption. Replevin in the *cepit* only lies where trespass might be brought; and the debtor is entitled, by statute, to the enjoyment of the land during that period. *Supreme Ct.*, 1846, *Rich v. Baker*, 3 *Den.*, 79.

30. Replevin in the *cepit* lies, only where a present right of possession is shown. [12 *Wend.*, 80; 3 *Hill*, 576; 3 *Pick.*, 255.] *N. Y. Superior Ct.*, 1847, *Redman v. Hendricks*, 1 *Sandf.*, 32.

31. One who having a possession originally lawful, merely refuses to deliver, is not liable in replevin in the *cepit*. *Ct. of Appeals*, 1848, *Hymann v. Cook*, *How. App. Cas.*, 419.

32. *Defences*. In replevin, the property, whether in the defendant or a third person, which is sufficient to sustain a defence, must be such as goes to destroy the interest of the plaintiff, which, if existing, would sustain the

action; or, in other words, such as would defeat an action of trespass or trover. *Supreme Ct.*, 1834, *Rogers v. Arnold*, 12 *Wend.*, 80.

33. The death of an animal replevied, by an inevitable accident, is a good bar to an action on the bond for not restoring it, on a judgment for its return.* *Supreme Ct.*, 1834, *Carpenter v. Stevens*, 12 *Wend.*, 589.

34. Where a bailee has received property from one who is unquestionably, at the time, entitled to the possession, another person entitled to an undivided interest cannot, in replevin, where he has claimed and taken the whole property from the bailee, failing in that, reduce the damages by showing his own title. *Ct. of Appeals*, 1855, *Russell v. Allen*, 13 *N. Y. (8 Kern.)*, 173.

35. *Character of defendant's property*, material in fixing his recovery in replevin. *Russell v. Butterfield*, 21 *Wend.*, 300.

36. *Replevin is local* [1 *Saund.*, 247, n. 1; 2 *Ohitt. Pl.*, 364; 1 *Id.*, 161; 4 *Oow.*, 45] and the writ cannot be executed out of the county. *Supreme Ct.*, 1830, *Williams v. Welch*, 5 *Wend.*, 290.

37. *If a valid bond and affidavit are not delivered*, the writ is a nullity. *Supreme Ct.*, 1834, *Berrien v. Westervelt*, 12 *Wend.*, 194; 1844, *Milliken v. Selye*, 6 *Hill*, 623; 1846, *The same v. The same*, 3 *Den.*, 54.

38. The bond to prosecute the replevin suit [1 *Rev. L.*, 92, § 4; 13 *Edw. I.*, ch. 2] is taken by the sheriff for his indemnity, and at his peril, and is not assignable; and though his action upon it is for the benefit of the defendant in the replevin as well as of himself, it cannot be defeated by a plea *puis* of a subsequent release by such defendant, but the parties sued must make a summary application to the court. *Supreme Ct.*, 1834, *Armstrong v. Burrell*, 13 *Wend.*, 302.

39. Under 2 *Rev. Stat.*, 527, § 29,—which forbids execution of the writ unless there be an affidavit, and a bond with *sureties*,—a bond, with two sureties, is essential, and the sheriff cannot dispense with it. *Supreme Ct.*, 1835, *Smith v. McFall*, 18 *Wend.*, 521; 1836, *Wilson v. Williams*, *Id.*, 581 (explaining *Kesler v.*

* Disapproved, and the contrary asserted [citing 5 *Den.*, 21; 14 *Johns.*, 385; 3 *M. & S.*, 153; 12 *Mass.*, 406; 11 *Pick.*, 222; 9 *Id.*, 822; 15 *Id.*, 71; 21 *Wend.*, 144; 1 *Watts & Serg.*, 563], *N. Y. Superior Ct.*, 1850, *Suydam v. Jenkins*, 3 *Sandf.*, 614.

Writ.	Affidavit.	Arrest.	Claim.
Haynes, 6 <i>Id.</i> , 547; 1889, Whaling v. Shales, 20 <i>Id.</i> , 678.			
40. If he takes insufficient sureties, the remedy is by exception. <i>Supreme Ct.</i> , 1886, Wilson v. Williams, 18 <i>Wend.</i> , 581; 1888, Westervelt v. Bell, 19 <i>Id.</i> , 581.			50. To put the officer in fault for a delivery to the plaintiff, before trial of the claim of property, the defendant should make known his desire to have the claim tried, and within a reasonable time should pay the fees for the trial. <i>Supreme Ct.</i> , 1887, Miller v. Franklin, 17 <i>Wend.</i> , 278.
41. If he takes only one surety the proceedings may be set aside on motion. <i>Supreme Ct.</i> , 1889, Whaling v. Shales, 20 <i>Wend.</i> , 678.			51. The summons is but a notice, and if it apprise the defendant of the proper term when he is to appear, a formal variance between it and the writ is immaterial. <i>Supreme Ct.</i> , 1841, Cutler v. Rathbone, 1 <i>Hill</i> , 204.
42. A writ cannot be quashed before it is returned. The motion should be for a <i>superseas</i> . <i>Supreme Ct.</i> , 1828, Griswold <i>ads.</i> Lewis, 1 <i>Wend.</i> , 292.			52. It need not specify the property; and if it specifies more than was seized, the description may be rejected as surplusage. <i>Supreme Ct.</i> , 1842, Finehout v. Crain, 4 <i>Hill</i> , 587.
43. That under a writ of replevin for "about 400 tons of, &c.," the sheriff cannot be justified in taking more than 450 tons at the most. <i>Supreme Ct.</i> , 1835, De Witt v. Morris, 18 <i>Wend.</i> , 496.			53. Claim. Under 1 Rev. L., 98, § 6, a defendant in replevin may interpose a claim of property, although he be not the possessor. <i>Supreme Ct.</i> , 1882, Mitchell v. Hinman, 8 <i>Wend.</i> , 667.
44. If the property replevied does not belong to the plaintiff, he and those who aid him are not protected by the writ, though the sheriff may be. <i>Supreme Ct.</i> , 1847, Shipman v. Clark, 4 <i>Den.</i> , 446.			54. Practice, where a third person claims property. Lisher v. Pierson, 11 <i>Wend.</i> , 58.
45. Otherwise in a claim and delivery under the Code. <i>N. Y. Superior Ct.</i> , 1855, King v. Orser, 4 <i>Duer</i> , 481.			55. Trial of claim. Under 1 Rev. L., 98, after claim of property by the defendant, and notice, the sheriff cannot take possession or dispossess the defendant, before the claim is tried pursuant to the statute. [Co. Litt., 145, b.; 2 Sell., 153; Dyer, 173; Bac. Abr., tit. Replevin, E., 4; 1 Sch. & L., 827.] <i>Supreme Ct.</i> , 1829, Lisher v. Pierson, 2 <i>Wend.</i> , 845. To the same effect is a further decision in S. C., 1838, 11 <i>Id.</i> , 58.
46. The affidavit, if made by another than the plaintiff, must be made upon knowledge, independent of mere information of the plaintiff. <i>Supreme Ct.</i> , 1841, Cutler v. Rathbone, 1 <i>Hill</i> , 204.			Otherwise, under 2 <i>Rev. Stat.</i> , 525, § 18.
47. Deputation. The delivery of the writ to the special deputy for service, and not the procuring of the deputation, is the commencement of the suit; and a demand before the delivery, but after the deputation, will sustain the action. <i>Supreme Ct.</i> , 1838, Boughton v. Bruce, 20 <i>Wend.</i> , 284.			56. Where the sheriff, having first summoned the defendant, has dispossessed him, it is too late for defendant to make a claim of property; and where the sheriff, at the request of defendant, took possession by removing the goods into another room of the same building, instead of to another place, defendant agreeing that this should have the same effect as a complete removal,— <i>Held</i> , that defendant was dispossessed thereby. <i>Supreme Ct.</i> , 1837, Lisher v. Pearson, 17 <i>Wend.</i> , 518.
48. Arrest. Under the Revised Statutes, if the plaintiff in replevin takes any part of the property, he cannot take the part and also the body of the defendant; but he may have further process for the residue; or, he may decline replevying part, and take the body. <i>Supreme Ct.</i> , 1840, Snow v. Roy, 22 <i>Wend.</i> , 602. Followed, 1842, Finehout v. Crain, 4 <i>Hill</i> , 587.			57. If defendant waives actual seizure, and interposes a claim, the inquisition will be regular. <i>Supreme Ct.</i> , 1840, Baker v. McDuffie, 28 <i>Wend.</i> , 289.
49. Delivery to plaintiff. The sheriff should not deliver the replevied property to the plaintiff until after service of the summons upon defendant. If claim is made, he must not dispossess the claimant, or deliver to the plaintiff, until the claim has been tried. <i>Supreme Ct.</i> , 1832, Mitchell v. Hinman, 8 <i>Wend.</i> , 667.			58. If the jury find for the claimant, the sheriff may nevertheless waive indemnity and deliver the property to the plaintiff. [2 Rev. Stat., 525, § 17.] <i>Supreme Ct.</i> , 1851, Russell v. Gray, 11 <i>Barb.</i> , 541.

Bond.

Liability of Officer.

Recovery.

59. Security. Under 1 Rev. L. of 1818, 92, § 4 (and see 2 Rev. Stat., 528),—which provides that the sheriff shall take security,—he may take such security as he pleases, in his own name and at his own peril. [Gilb. Repl., 75; 1 Saund., 195; 2 Mass., 517.] *Supreme Ct.*, 1821, Gibbs v. Bull, 18 Johns., 485.

60. The condition is not merely for the return of the goods, if a return shall be adjudged, but that the plaintiff will prosecute his suit with effect; and the bond is forfeited, and the defendant entitled to an assignment of it, so soon as he has judgment. [5 Barn. & Cr., 284; Carth., 248, 519; 1 Bos. & P., 140; 2 Wils., 41.] *Supreme Ct.*, 1829, Gould v. Warner, 8 Wend., 54.

61. Sheriff's Liability. After return of *elongata* to a writ of *retorno habendo*, the modern practice is to bring a special action on the case against the sheriff, where he has omitted to take sufficient security. *Supreme Ct.*, 1821, Gibbs v. Bull, 18 Johns., 485.

62. The return is indispensable to charge the sheriff. *Ib.*

63. On a declaration against the sheriff under 1 Rev. L. of 1818, 93, § 8,—which applies only to distresses for rent,—plaintiff cannot claim damages beyond the value of the goods eloigned; for the security required by the section to be taken by the sheriff, is only for the prosecution of the suit, and for the return of the goods, &c. *Ib.*

64. An order that all proceedings subsequent to the issuing of a writ of replevin be set aside, deprives the plaintiff of all protection to his possession under it. *Supreme Ct.*, 1836, Smith v. Snyder, 15 Wend., 824.

65. An exception entered on a replevin bond, with all the notice required by the statute, followed by a neglect of the sureties to justify, will not work their discharge. *Supreme Ct.*, 1841, Van Duyne v. Coope, 1 Hill, 557.

66. Exception to plaintiff's sureties, within twenty days of the return-day, is in season, though more than twenty days after actual return. *Supreme Ct.*, 1842, Pardee v. Buell, 2 Hill, 357.

67. An exception to the sureties is sufficient if filed with the clerk, though not indorsed on the writ. *Supreme Ct.*, 1846, Cusick v. Cohen, 3 Den., 267.

68. A coroner who takes a replevin bond may assign it to defendant, who may sue in

his own name. [2 Rev. Stat., 538, § 64; *Id.*, 441, § 84.] *Supreme Ct.*, 1848, Acker v. Finn, 5 Hill, 298.

69. Sureties. Though the statute requires two sureties in a replevin bond, this is for defendant's benefit, and if he waives the objection that there is only one, the surety cannot afterwards resist a recovery on that ground. *Ct. of Appeals*, 1849, Shaw v. Tobias, 8 N. Y. (3 Comst.), 188.

70. Justifying. In replevin brought in the city of New York, the sureties must justify without formal exception [Laws of 1839, 316]; and if they do not, defendant is entitled to judgment of discontinuance. *Supreme Ct.*, 1844, Weed v. Hinton, 7 Hill, 157.

71. Penalty. The court will deny a motion to increase the penalty of a replevin bond; it is a matter of discretion with the officer, under the statute. *Supreme Ct.*, 1846, Bulmer v. Jenkins, 8 How. Pr., 11.

72. When the action abates by plaintiff's death, the condition of the bond is to be deemed performed. [2 Rev. Stat., 528, § 7; 1 Pick., 284; Carth., 519; 12 Wend., 120.] *Ct. of Appeals*, 1848, Burckle v. Luce, 1 N. Y. (1 Comst.), 168; affirming S. C., 6 Hill, 558. See, also, Webber v. Underhill, 19 Wend., 447.

73. A defendant, succeeding simply on a plea of *non cepit*, is not entitled to judgment for a return. [1 Chitt., 490; 1 Saund., 374, n. 1; 1 Str., 507.] *Supreme Ct.*, 1830, People v. Niagara C. P., 4 Wend., 217. To similar effect, 1834 [citing 3 Wend., 667], Sprague v. Kneeland, 12 Id., 161.

74. Effect of plea of *non cepit* and property in another, by an officer sued in replevin. Skidmore v. Devoy, 1 N. Y. Leg. Obs., 123.

75. A plea of property in a stranger, though defendant does not connect his possession therewith, entitles him to a return. [Many authorities.] *Supreme Ct.*, 1841, Ingraham v. Hammond, 1 Hill, 358.

76. Recovery on several avowries. If defendant puts in two avowries for distinct parcels of rent, and the distress was legal for the one and illegal for the other, and he has a verdict on both, he may have judgment for the damages found on the good avowry on remitting those found on the other. *Supreme Ct.*, 1828, Pemberton v. Van Rensselaer, 1 Wend., 307.

77. In replevin, if either of the avowries

Verdict and Recovery in Replevin.

constitute a good defence to the action, it is sufficient, and judgment of return must be given, though issues of fact have been formed on others. *Ct. of Errors*, 1835, *Jack v. Martin*, 14 *Wend.*, 507; affirming *S. C.*, 12 *Id.*, 811.

78. In replevin for partnership property taken under an execution against one of several partners, the defendant prevailed, on the ground that such a levy was not a trespass. *Held*, that a verdict for defendant for the amount of his execution, being less than the value of the property, was regular; though the money, being substituted for the property, would be subject to the claims of partnership creditors. *Supreme Ct.*, 1884, *Scrugham v. Carter*, 12 *Wend.*, 181.

79. Depreciation. If the defendant in replevin obtains judgment, the decrease in the value of the goods from the time of the replevin, and the interest on their entire value, form a proper measure of damages. *Supreme Ct.*, 1817, *Rowley v. Gibbs*, 14 *Johns.*, 885.

80. General verdict. If pleas of property and *non cepit* are interposed, and plaintiff has a general verdict, he has a right to put it in form, and enter a verdict on each issue. *Supreme Ct.*, 1884, *Sprague v. Kneeland*, 12 *Wend.*, 161; 1889, *Rhodes v. Bunts*, 21 *Id.*, 19.

81. Mitigation. In replevin, where the defendant has judgment of return, the plaintiff may show in mitigation, upon execution of the writ of inquiry, that the defendant has repossessed himself of the property, in whole or in part. *Supreme Ct.*, 1885, *De Witt v. Morris*, 18 *Wend.*, 496.

82. Mode of assessment. Under 2 *Rev. Stat.*, 581, if plaintiff is nonsuited on the trial, or verdict passes against him, so that defendant is entitled to a return, then the jury on the trial assess the value, as well as damages; but if judgment is rendered against plaintiff by discontinuance or nonsuit without trial by jury, then the value and damages must be assessed by a writ of inquiry. *Supreme Ct.*, 1885, *Van Alstine v. Kittle*, 18 *Wend.*, 524. To the same effect, 1845, *Murphy v. Jenkins*, 1 *Den.*, 669.

83. Writ of inquiry was not authorized in replevin before Revised Statutes. *Supreme Ct.*, 1882, *Pike v. Gandall*, 9 *Wend.*, 149.

84. A verdict finding for the defendant, both on an issue of *non cepit*, and on an avowry for a distress, is fatally defective. *Supreme Ct.*, 1844, *Hill v. Stocking*, 6 *Hill*, 277.

85. Success on a bare plea of non deti-
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net does not entitle the defendant to judgment for a return of the property, or for the value of it. [4 *Wend.*, 207; 8 *Id.*, 667; 15 *Id.*, 824; 21 *Id.*, 205.] *Supreme Ct.*, 1844, *Pierce v. Van Dyke*, 6 *Hill*, 618.

86. Special plea. In replevin, plaintiff, in answer to an avowry under a distress-warrant, pleaded a special plea, and also no rent in arrears, and the defendant demurred to the special plea, and the plaintiff had a verdict on the plea of no rent. *Held*, that giving final judgment for the defendant, instead of awarding a *venire de novo*, was error. *Ct. of Errors*, 1844, *Stone v. Matthews*, 7 *Hill*, 428.

87. Where the property was distrained for rent, the landlord, on succeeding in replevin, upon a trial, cannot have judgment in the alternative, but must have his rent assessed by the jury by way of damages. [2 *Rev. Stat.*, 581.] *N. Y. Superior Ct.*, 1848, *Redman v. Hendricks*, 1 *Sandf.*, 82.

88. When defendant succeeds on one avowry, or plea in bar, going to the whole action, he is entitled to judgment, although his others are bad. *Ct. of Appeals*, 1849, *Nichols v. Dusenbury*, 2 *N. Y. (2 Comst.)*, 283.

89. That if a part of the goods be proved to belong to a third person, the defendant is entitled to verdict and judgment for their return. *Supreme Ct.*, 1849, *Morse v. Stone*, 5 *Barb.*, 516.

90. Damages. Whether the judgment for the defendant, in replevin, is for a return of the property, or for its value, he has a right to damages in either case. [22 *Wend.*, 604.] *N. Y. Superior Ct.*, 1850, *Suydam v. Jenkins*, 8 *Sandf.*, 614.

As to **Abatement** of replevin, see **ABATEMENT AND REVIVAL**, 5, 6.

As to **Pleadings**, see **PLEADING, AT COMMON LAW**.

As to the **Present remedy**, see **CHATTELS; and CLAIM AND DELIVERY**.

REPRESENTATIVES.

In Congress, how to be chosen, and to resign. *Laws of 1842*, 129, ch. 180, tit. 6, art. 1.

REPRIEVES.

1. Reprieves, &c., may be granted by governor. *Const. of 1846*, art. 4, § 4: 1 *Rev. Stat.*, 164, § 8, subd. 2.

Residence.	Respondentia.	Revenue Officer.	Reversed Cases.	Reversion.
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2. No judge, court, or officer, other than the governor, shall have authority to reprieve or suspend the execution of any convict sentenced to death, except sheriffs. 2 *Rev. Stat.*, 658, § 15.

3. Sheriffs may suspend execution of convicts who become insane after sentence, or of female convicts who are found quick with child. 2 *Rev. Stat.*, 658, § 18; 659, § 21.

4. Meaning of the word "reprieve," as used in 2 *Rev. Stat.*, 658, § 15,—considered. *Carnal v. People*, 1 *Park. Cr.*, 262.

PARDONS; PUNISHMENT.

RESIDENCE

CONSTITUTIONAL LAW, 102, 104; DOMICIL;
TAXES.

RESPONDENTIA

1. **Deviation.** Under a respondentia bond conditioned for performance of a prescribed voyage, without deviation, and for repayment on the return of the vessel, or at the end of eighteen months, if she did not return before, unless there should be a total loss;—*Held*, that a subsequent agreement of the parties giving leave, on additional premium, to proceed to other ports was merely a permission to deviate, and not a modification; and that the time having expired, and no loss being shown, the obligors were liable. *N. Y. Superior Ct.*, 1829, *Niagara Ins. Co. v. Searle*, 2 *Hall*, 22.

2. **Contribution.** Where a loan on respondentia was made to a part of several owners of a ship and cargo, with the assent of the others, and a part of the loan was appropriated to repairs of the ship in a port of necessity;—*Held*, that on a sale of the ship and cargo, on her return, the lenders were entitled in equity, the cargo being insufficient, to remuneration, *pro tanto*, from the proceeds of the ship, for the part of the cargo taken. *Chancery*, 1882; *American Ins. Co. v. Coaster*, 8 *Paige*, 328.

REVENUE OFFICER

An officer of the revenue seizing goods as forfeited, and causing them to be libelled, &c., has but two pleas in bar to an action by the owner; these are the judgment of the court,

if the goods are condemned, and a certificate of probable cause, if the goods are acquitted. If he can show neither, he must answer for the seizure in an action at common law. *Ct. of Errors*, 1816, *Gelston v. Hoyt*, 18 *Johns.*, 561; affirming S. O., *Id.*, 141. Compare *Van Brunt v. Schenck*, 11 *Id.*, 877.

REVERSED CASES

See table of CASES CRITICISED, Vol. I., *Ante*, xxi.

REVERSION.

1. **Defined.** A reversion, in its legal signification, is applicable only to an estate which remains in the grantor and his heirs, and which is to take effect in possession upon the determination by its own limitation of an outstanding particular estate,—an estate for life or years. A right to enter and resume the possession for the breach of a condition, is not a reversion. *N. Y. Superior Ct.*, 1855, *Phoenix v. Commissioners of Emigration*, 12 *How. Pr.*, 1; affirming S. O., 1 *Abbotts' Pr.*, 466; and see 1 *Rev. Stat.*, 723, § 12.

2. **Action against tenant.** The reversioner may maintain an action for an injury to the freehold committed by the tenant; and it may be brought before the expiration of the term. [14 *East*, 489.] *N. Y. Superior Ct.*, 1858, *Ray v. Ayers*, 5 *Duer*, 494; and see 1 *Rev. Stat.*, 750, § 8.

Consult, also, LANDLORD AND TENANT; LEASE; and TRESPASS.

REVISED STATUTES.

1. **Nature.** That the Revised Statutes are not a mere revision; but are a new code of laws, and were intended by the Legislature to supersede existing laws which were repugnant to them. *Supreme Ct.*, 1838, *Harrington v. Trustees of Rochester*, 10 *Wend.*, 547; but compare *STATUTES*.

2. **General provisions** relating to the time of the Revised Statutes taking effect, to the construction, and to the mode of reprinting. 2 *Rev. Stat.*, 778–780.

3. The word "action," when used in the Revised Statutes, designates a proceeding in a

Revised Statutes.

Revival.

Reward.

Riot.

court of law; but the word "suit" may apply to a proceeding either at law or in equity, unless it is restrained by the context. *Chancery*, 1844, *Didier v. Davison*, 10 *Paige*, 515.

4. **Effect on procedure.** The provisions of the Revised Statutes, modifying practice in actions, take up the proceedings in causes pending where they find them; and where the statutes under which they were commenced are repealed, the subsequent proceedings must be regulated by the Revised Statutes. *Supreme Ct.*, 1880, *People v. Herkimer C. P.*, 4 *Wend.*, 210. Followed, *Chancery*, 1880, *Aymer v. Gault*, 2 *Paige*, 284.

5. **Offences committed under the old statutes** were liable to certain punishments, and no greater can be inflicted; but the prosecution must be conducted by virtue of the statutes in force when the proceedings are had. *Supreme Ct.*, 1880, *People v. Phelps*, 5 *Wend.*, 9.

6. **A penalty or forfeiture** for violation of a statute, incurred before the Revised Statutes took effect, is not affected by them, but may be sued for and recovered as before, except where the penalty or forfeiture has been mitigated by the Revised Statutes. *Supreme Ct.*, 1888, *Myers v. Van Alstyne*, 10 *Wend.*, 98.

7. **By the repealing act** (2 *Rev. Stat.*, 779, § 5), every act, right, suit, or proceeding, done, accrued, or commenced under the old law, remains in force, notwithstanding the repeal, but after the repeal, all future proceedings must be governed by the statutes then in force. The new statute confirms all rights accrued under the old law, but such rights are to be enforced according to the new remedy. *Supreme Ct.*, 1881, *People v. Livingston*, 6 *Wend.*, 526; *People v. Haskins*, 7 *Id.*, 468.*

8. Hence, if an old remedy is indispensable to protect a vested right, it may be resorted to. *Supreme Ct.*, 1881, *People v. Haskins*, 7 *Wend.*, 468.

9. **Consolidation.** Effect of clause inserted in general repealing act, saving statutes consolidated. *Fort v. Burch*, 6 *Barb.*, 60.

As to the **General Principles** of interpretation, see **STATUTES**.

As to the interpretation of **Particular Provisions**, see the appropriate titles of their subjects.

* But compare, as to the application of this principle, *Huntington v. Forkson*, 6 *Hill*, 149.

REVIVAL.

ABATEMENT AND REVIVAL; PARTIES, 385-389, 607-619; **PLEADING, IN EQUITY**, 86-98.

REWARD.

1. **Finder of a thing not entitled to demand a reward.** *Amory v. Flynn*, 10 *Johns.*, 102.

2. **A public offer of a reward** to any person who should find and restore lost property, gives to one who, relying upon such offer, rescues the property, a lien upon it for his compensation. *Supreme Ct.*, 1849, *Baker v. Hoag*, 7 *Barb.*, 118.

3. **Where a reward is offered** for the recovery of property stolen, the person who has acquired a knowledge of the facts necessary to a detection or discovery of the things stolen or lost, and has imparted such knowledge with the intent and for the purpose of bringing about a recovery or restoration of the property, taking upon himself the risk and consequences of a failure, and acting with a view to the benefit of the reward offered for the recovery of the property, if it is thereby recovered, is the one entitled to the reward. [1 *M. & S.*, 108.] *V. Chan. Ct.*, 1833, *City Bank v. Bangs*, 2 *Edw.*, 95.

4. This principle applied where a number of persons claimed to share a reward. *Id.*

5. **A sheriff assumed** to offer a reward for the discovery of a criminal, and, several parties claiming it, he referred them to the board of supervisors. *Held*, that a claimant, by submitting his claim to the supervisors, instead of insisting on it against the sheriff, and by receiving from the supervisors an award of a part of the sum offered, was concluded from making any further claim against the sheriff. *Supreme Ct.*, 1856, *Prentiss v. Farnham*, 22 *Barb.*, 519.

As to General Principles regulating the right of compensation for **Services**, see **SERVICES**.

RIOT.

1. **Several must be concerned.** While defendant was committing mischief in the street, a crowd collected, but it did not appear that any person joined him in it. *Held*, that he was not guilty of riot. To constitute a

Rights.	Roads.	Robbery.	Rochester.	Rules.
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riot there must be an assemblage of two or more persons to do some illegal act. *Gen. Sess.*, 1817, Rodman's Case, 2 *City H. Rec.*, 88.

2. The mere circumstance of being present in a church in which a riot occurred, without taking an active part in suppressing it, is not sufficient to hold the defendant guilty of the riot. *Gen. Sess.*, 1817, Scott's Case, 2 *City H. Rec.*, 25.

3. Officers, &c., liable for. City or county within which property is destroyed by a mob or riot made liable to the injured party in an action brought within three months, if he used diligence to prevent the damage and notified the mayor of the city or sheriff of the county of the danger when himself informed. If such officers neglect to protect him, either they or the city, &c., may be held liable. *Laws of 1855*, 800, ch. 428.

4. Duty of military in case of riot. *Laws of 1854*, 1051, ch. 898, tit. 6, art. 2; 1862, 941, ch. 477.

RIGHTS.

Bill of, of citizens and inhabitants. 1 *Rev. Stat.*, 92.

ROADS.

HIGHWAYS; PLANK-ROAD COMPANIES; PRIVATE WAYS; RAILROADS; TURNPIKE COMPANIES.

ROBBERY.

1. Defined; and distinguished into first and second degrees. 2 *Rev. Stat.*, 678, §§ 55, 56.

2. Violence, or threats reasonably calculated to put a man in fear, essential to constitute robbery. Dayton's Case, 2 *City H. Rec.*, 167; 6 *Id.*, 86.

3. Obtaining money through the influence of a threat to prosecute that party on an unfounded charge may amount to robbery in the second degree. *Oyer & T.*, 1839, People v. McDaniels, 1 *Park. Cr.*, 198.

4. It is not necessary in such a case that the prisoner should have made the charge to the prosecutor in explicit terms, or in any particular form of language. It is enough that the language used was intended to communicate such a charge, and was so understood by the prosecutor at the time. *Id.*

5. Punishment of. 2 *Rev. Stat.*, 677, § 57.

As to Describing the property in the indictment, see INDICTMENT, 104.

ROCHESTER.

1. That the inhabitants, and not the Common Council, constitute the Corporation. *Supreme Ct.*, 1857, Clarke v. City of Rochester, 24 *Barb.*, 446; S. C., 5 *Abbotts' Pr.*, 107; 14 *How. Pr.*, 198; and see Lowber v. Mayor, &c., of N. Y., 5 *Abbotts' Pr.*, 325.

2. Proceedings for opening a street cannot be discontinued by the Corporation after the assessment of damages has been made and confirmed. [18 *Johns.*, 506; 20 *Id.*, 269.] *Supreme Ct.*, 1828, Hawkins v. Trustees of Rochester, 1 *Wend.*, 58.

3. How an ordinance for local improvement should be passed, under sections 188, 189, of the charter. People v. City of Rochester, 21 *Barb.*, 656.

4. Poor. The city of Rochester being by law in the condition of a town, in respect to the mode of supporting its poor at the county poor-house, the income of the poor-house farm of the county must be applied to the support, indiscriminately, of the county, town, and city poor, kept on the farm. *Supreme Ct.*, 1856, City of Rochester v. Supervisors of Monroe, 22 *Barb.*, 248.

5. The expenses incurred by the board of health in the execution of the general health act (*Laws of 1850*, ch. 324), and their regulations under it, are chargeable on the county, and are to be allowed by the supervisors, and collected by general tax. *Supreme Ct.*, 1854, People v. Supervisors of Monroe, 18 *Barb.*, 567.

6. Process of the Mayor's Court of Rochester may be tested on any day of the term, and made returnable on any other day of the same term, or at the next term. [*Laws of 1884*, 838; 2 *Rev. Stat.*, 210, § 11.] *Chancery*, 1886, Burns v. Morse, 6 *Paige*, 108.

RULES.

1. Former rules in civil actions abrogated, so far as inconsistent with the Code. *Code of Pra.*, § 469.

2. Judges of Supreme Court and of N. Y. Superior Court and Common Pleas to meet biennially to make and revise rules. *Code of Pra.*, § 470; and see SUPREME COURT.

3. Court cannot make rule inconsistent with the Code. *N. Y. Com. Pl.*, 1850, Lakey v. Cogswell, 8 *Code R.*, 116.

The Contract;—What Constitutes a Sale.

S.

SALES.

I. THE CONTRACT.

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I. THE CONTRACT.

1. *What Constitutes a Sale.*

1. *As to parties liable.* Though the goods were furnished to, and were for the benefit of, a third person, yet if they were furnished upon request of defendant, and upon his credit, the defendant is liable as upon a sale to himself. It is deemed an original undertaking. *Supreme Ct.*, 1852, *Baker v. Rand*, 18 *Barb.*, 152. *N. Y. Superior Ct.*, 1829, *Graham v. O'Neil*, 2 *Hall*, 474; 1857, *Rogers v. Verona*, 1 *Bosw.*, 417. *N. Y. Com. Pl.*, 1856, *Griffin v. Keith*, 1 *Hill.*, 58.

2. *So held*, even where there was a charge made in the seller's books against the third person. *Supreme Ct.*, 1836, *Porter v. McClure*, 15 *Wend.*, 187.

3. The superintendents of the poor obtained supplies, and which were charged by plaintiff to "the county poor-house," there being a fund in the treasurer's hands known as the "poor fund," on which the superintendents were accustomed to draw. *Held*, that a finding that the credit was given to the fund, and that the superintendents were not liable, should not be set aside. [1 *Car. & P.*, 16; 1 *Com. L.*, 301.] *Supreme Ct.*, 1850, *Hayes v. Symonds*, 9 *Barb.*, 260.

4. What is sufficient evidence of a ratification by the principal of his agent's purchase. *Vanderbilt v. Persse*, 3 *E. D. Smith*, 428.

5. Where a landlord, at the request of an agent of a tenant of lands, delivered some loads

of hay upon the premises, and the tenant, upon the bill therefor being presented to him, remarked that there was more than he should want, but that he would see about it;—*Held*, that the proof of the agent's authority to give the order being defective, the tenant should not be charged with so much of the hay as was left by him upon the premises at the termination of the tenancy. *Id.*

6. The assent of a sheriff to a sale by an execution debtor, of goods held under levy, gives no validity to the sale, so as to divest a previous purchaser from such debtor of his title. *Supreme Ct.*, 1829, *Frost v. Hill*, 3 *Wend.*, 386.

7. *Subject-matter.* The route of a newspaper carrier may be the subject of sale as a good-will. *Ct. of Appeals*, 1854, *Hathaway v. Bennett*, 10 *N. Y.* (6 *Seld.*), 108.

8. *Good-will.* But the sale of such route gives the purchaser no right of action against the proprietor of the paper, for refusing to furnish him with papers for the purchased route, although the proprietor has recognized him as carrier, has substituted his name on the books in place of the former carrier, and has furnished him for a time with papers. *Id.*

9. What agreement will amount to a sale of a slave. *Trongott v. Byers*, 5 *OW.*, 480. See *infra*, 28.

10. *What amounts to a contract.* Except for the Statute of Frauds, any words importing a bargain, whereby the owner of a chattel signifies his consent to sell and another person signifies his consent to buy it, at present, for a specified price, would be a sale and transfer of the right to the chattel. *Supreme Ct.*, 1808, *De Fonclear v. Shottenkirk*, 3 *Johns.*,* 170.

11. *Question of fact.* Whether a contract for the sale of chattels has been completely made, is a question of fact for the jury. *Supreme Ct.*, 1816, *De Ridder v. McKnight*, 18 *Johns.*, 294; and see *QUESTIONS OF LAW AND FACT*, 14.

12. *Instances.* If one sends an order to a merchant for a specified quantity of goods on a specified credit, and the merchant sends a

* Approved, *Chapman v. Campbell*, 3 *Gratt.*, 105.

The Contract;—What Constitutes a Sale.

less quantity, on a shorter credit, there is no agreement until the buyer assents to receive them, and if they are lost on the way, the seller must bear the loss. *Supreme Ct.*, 1808, *Bruce v. Pearson*, 8 *Johns.*, 584.

13. One indebted to plaintiff and defendant placed a carriage in the hands of defendant, to pay the debts. Defendant kept possession of the carriage for more than a year, used it as his own, and did not sell it. *Held*, that having had a reasonable time to sell, he might be regarded as a purchaser and as chargeable with the amount of the debt due to the plaintiff. *Supreme Ct.*, 1819, *Norton v. Squire*, 16 *Johns.*, 225.

14. An agreement to relinquish to a copartner the exclusive control of debts due the firm, in consideration that the copartner would collect such debts and pay over half of the proceeds, and should be responsible for such of them as should not be sold by a certain day. *Held*, not a sale of choses in action within the statute. *Ct. of Errors*, 1840, *Mersereau v. Lewis*, 25 *Wend.*, 248.

15. The owner of flour shipped it, taking a forwarder's receipt, and drew a bill against the shipment upon a consignee. He procured this bill discounted, delivering to the lender the forwarder's receipt, upon a parol agreement that it should be held as security for the acceptance of the draft. The consignee refused to accept the draft, being already in advance to the consignor, but received and sold the flour, keeping the proceeds. *Held*, in an action by the lender against the consignee, that the transaction between the original owner and the plaintiff amounted to a sale of the flour to plaintiff, in trust to deliver it to the consignee, in case he accepted the draft; otherwise, to sell it and pay the draft out of the proceeds, returning the surplus. That the consignee was therefore liable to the lender, in trover for the flour. *Ct. of Appeals*, 1851, *Bank of Rochester v. Jones*, 4 *N. Y.* (4 *Comst.*), 497; reversing *S. C.*, 4 *Den.*, 489.

16. A bill of sale, of goods in the possession of the bailee of the vendor, is not merely a transfer of a right of action, but of the goods themselves; unless, indeed, the bailee has already converted the goods to his own use, or contests the title of the vendor. *N. Y. Superior Ct.*, 1858, *Heine v. Anderson*, 2 *Duer*, 318. Compare *Thurman v. Wells*, 18 *Barb.*, 500.

17. Common carriers having in their possession property of H., and similar property of D., by mistake delivered to the defendant the property of H. upon the order of D. They subsequently paid H. the value of the property. *Held*, that they might as purchasers maintain an action against defendants for the value. *Supreme Ct.*, 1857, *Hudson River R. R. Co. v. Lounsbury*, 25 *Barb.*, 597.

18. Oral condition. Where the seller delivers a written contract of sale upon a condition imposed orally,—*a. g.*, that the buyer shall make a deposit,—the latter has a reasonable time to comply. If he tenders performance of the condition within such time, the written agreement becomes absolute. *N. Y. Superior Ct.*, 1852, *Scott v. Pentz*, 5 *Sandf.*, 572.

19. Date of sale. Where a sale and purchase of bills were agreed upon on the 18th, and the bills were drawn on that day, but the bills were not delivered until the 15th,—*Held*, that the sale was on the 15th; and the drawee having failed on that day, the buyer was entitled to rescind. *Supreme Ct.*, *Sp. T.*, 1848, *Leger v. Bonnaaffe*, 2 *Barb.*, 475; *S. C.*, less fully reported, 8 *N. Y. Leg. Obs.*, 285.

20. Provision for return of property. Leather having been delivered under an agreement in peculiar terms, to pay for it at certain rates, with a privilege of returning any on hand at time of settlement;—*Held*, that the transaction was a sale, and not a delivery to sell on commission; that parol evidence was inadmissible to explain the transaction, and that a destruction by fire was the loss of the buyer alone. *Supreme Ct.*, 1817, *Marsh v. Wickham*, 14 *Johns.*, 167.

21. The seller of a horse, on delivering the animal to the buyer and receiving the price, agreed that he would within a certain time take back the horse and refund the money, if the buyer should not in any way injure it,—*Held*, a conditional sale; and that the horse was at the risk of the buyer while in his possession. *Ct. of Errors*, 1836, *Taylor v. Tillotson*, 16 *Wend.*, 494.

22. Selling ale in barrels on the understanding that the barrels shall be returned, or if not returned, shall be paid for at a stipulated price, is not a sale of the barrels, but a bailment. *N. Y. Superior Ct.*, 1852, *Wescott v. Tilton*, 1 *Duer*, 58; *S. C.*, 10 *N. Y. Leg. Obs.*, 278. *Ct.*

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of *Appeals*, 1858, *Westcott v. Thompson*, 18 *N. Y. (4 Smith)*, 868.

23. What facts amount to a sale and delivery,—*e. g.*, of a slave, as distinguished from taking him on trial with a view to a sale. *De Fonclear v. Shottenkirk*, 8 *Johns.*, 170.

24. Product to be returned. Where a miller receives wheat, for which he engages to give in return a specified quantity of flour, there being no provision for keeping it separate from other wheat, or for making the flour from the identical wheat, the contract is a sale of the wheat, and not a bailment. *Supreme Ct.*, 1889, *Smith v. Clark*, 21 *Wend.*, 83; * overruling *Seymour v. Brown*, 19 *Johns.*, 44. *Ct. of Appeals*, 1849, *Norton v. Woodruff*, 2 *N. Y. (2 Comst.)*, 158.

25. Plaintiff delivered wheat to defendant under an agreement that plaintiff should deliver wheat at defendant's mill, and defendant should manufacture it into flour, and deliver to plaintiff, 196 pounds of flour for every 4 bushels and 15 pounds of wheat. Plaintiff was to furnish the barrels, and pay defendant so much per barrel. *Held*, not a sale of the wheat, but a bailment. *Ct. of Appeals*, 1850, *Mallory v. Willis*, 4 *N. Y. (4 Comst.)*, 76.

26. A receipt for wheat, "subject to order any day after, &c., without charge for storage," imports a bailment. Evidence of usage among millers and sellers of wheat, is not admissible to show that it imports a sale. *Ct. of Appeals*, 1851, *Wadsworth v. Allcott*, 6 *N. Y. (2 Seld.)*, 64.

27. W. delivered sheep to F. on an agreement that, at the end of the year, F. should deliver to W. an equal number. *Held*, the sheep originally delivered to F. became his absolute property. *Supreme Ct.*, 1816, *Ketchum v. Evertson*, 18 *Johns.*, 859; *S. P.*, 1827, *Hurd v. West*, 7 *Cow.*, 752.

28. Executed and executory agreements. Whether an agreement of sale is to be deemed executory merely, or executed so as to vest the title in the buyer, depends upon the intent of the parties as gathered from all the circumstances; and not upon the literal import of phraseology used in the agreement. *N. Y. Superior Ct.*, 1856, *Kelley v. Upton*, 5 *Duer*, 386.

* This decision was reversed in the Court of Errors; but not so as to shake its authority as to this point. The reversal is not reported. See *Baker v. Woodruff*, 2 *Barb.*, 520, 528.

29. Where cotton was to be brought to New York, weighed there and paid for by the plaintiffs,—*Held*, that as something was to be done before title to the cotton passed, the contract was executory. *Supreme Ct.*, 1829, *Russell v. Nicoll*, 8 *Wend.*, 112.

30. Goods "to arrive." A contract to sell certain cotton to be delivered on its arrival in New York, at any time after making the contract and before the first day of June,—*Held*, conditional upon its arrival before that day. *Id.*

31. If a part only arrives in New York before that day, the seller is not bound to deliver that. *Id.*

32. An agreement for the sale of goods on board a ship known to both parties to be not yet arrived, is an executory contract of sale, and does not pass the title. *Ct. of Appeals*, 1850, *Shields v. Pettie*, 4 *N. Y. (4 Comst.)*, 122; 1858, *Benedict v. Field*, 16 *N. Y. (2 Smith)*, 595; affirming *S. C.*, 4 *Duer*, 154.

33. The plaintiffs executed a memorandum that they had sold to the defendants a certain quantity of pig-iron of a specified quality, "on board the ship S.," it being understood by both parties that the ship was then at sea. On arrival of the ship, the defendants received part of the iron, but, on ascertaining it was of inferior quality, they refused to take the rest, and were unable to return what they had received. *Held*, that the writing was not a sale but an agreement to sell, conditioned on the arrival of the iron; and the iron being not of the quality required, the bargain was at an end. That defendant, therefore, stood as a purchaser of so much as he could not return, at the market price; and plaintiff could recover that price, notwithstanding it was above the price stipulated in the contract for iron of a better quality. *Ct. of Appeals*, 1850, *Shields v. Pettie*, 4 *N. Y. (4 Comst.)*, 122; affirming *S. C.*, 2 *Sandf.*, 262.

34. Validity. Where a sale was made and a bill of sale, and the property itself, delivered in another State,—*Held*, that the validity of the sale—*e. g.*, whether it was fraudulent against creditors—must be determined by the laws of that State. *Supreme Ct.*, 1856, *D'Invernois v. Leavitt*, 23 *Barb.*, 68.

35. Wager contracts. A contract to sell goods to be delivered in future, is not invalid because the seller has no such goods at the time, nor any expectation, nor means of ob-

The Contract;—Of the Statute of Frauds.

taining any, except by purchase. *N. Y. Superior Ct.*, 1849, *Stanton v. Small*, 3 *Sandf.*, 280; 1857, *Cassard v. Hinman*, 1 *Bow.*, 207.

36. But if it is proved to have been the intent of the parties that the goods should not be delivered, but the difference between the market price, on the day of delivery, and the contract price, should be paid by one party to the other, the contract is a mere wager, and void (under 1 *Rev. Stat.*, 662, § 8). The admission of such proof does not violate the rule excluding parol evidence. *N. Y. Superior Ct.*, 1857, *Cassard v. Hinman*, 1 *Bow.*, 207.

37. **Deceit.** Whether the buyer or seller of goods was guilty of deceit in inducing the sale is a question of fact for the jury. *Ct. of Errors*, 1838, *Taylor v. Tillotson*, 16 *Wend.*, 494. *Supreme Ct.*, 1818, *Woodworth v. Kissam*, 15 *Johns.*, 186; 1854, *Buckley v. Archer*, 21 *Barb.*, 585.

38. Whether false representations used to induce the sale were sufficient to mislead the party is a question of fact for the jury. *Ct. of Appeals*, 1853, *Moore v. Meacham*, 10 *N. Y. (6 Sed.)*, 207.

39. **Mistake.** A mere mistake or error as to the ability of the buyer to pay, although mutual, will not,—no fraud being shown,—invalidate a sale, even in equity, and as against a voluntary assignee. *Ct. of Errors*, 1830, *Lupin v. Marie*, 6 *Wend.*, 77.

Compare FRAUD.

40. **Increase of quantity.** The seller was to deliver between two future days; and the buyer had the right to give the seller notice to increase the quantity. *Held*, that a notice after the first day had passed, was too late. If the buyer wished an increased quantity, he should have given the notice a reasonable time before the first day. *Supreme Ct.*, 1826, *Topping v. Root*, 5 *Cow.*, 404.

41. **Distinct sales.** Plaintiff agreed by parol to deliver five hundred barrels of cider in parcels at future periods, each to be paid for on delivery, and accordingly delivered several parcels at different times, all of which were paid for except the last. In an action for the last,—*Held*, 1. That the delivery and acceptance of each parcel made so many several and distinct contracts of sale, upon each of which each party had all the actions and remedies incident to a sale. 2. The separate deliveries could not be regarded as one transaction, so as to entitle the buyer to have allowed him

damages, on the last parcel, for defects in the previous parcels. *N. Y. Superior Ct.*, 1848, *Seymour v. Davis*, 2 *Sandf.*, 289.

42. Where goods, amounting in the aggregate to upwards of \$100, are purchased at auction, in several parcels, upon distinct and separate bids, to be paid for in a note at a future day, the whole constitutes but one contract, and the delivery of some of the parcels is sufficient to take the case, as to the residue, out of the operation of the Statute of Frauds. *Supreme Ct.*, 1838, *Mills v. Hunt*, 20 *Wend.*, 481.

2. Of the Statute of Frauds.

43. **The statute.** Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless: 1. A note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby; or, 2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, 3. Unless the buyer shall at the time pay some part of the purchase-money. 2 *Rev. Stat.*, 136, § 3.

44. Of the alterations in the Statute of Frauds, introduced by the Revised Statutes. *Vaupel v. Woodward*, 3 *N. Y. Leg. Obs.*, 130.

45. **Executory agreements** for the sale of goods are within the Statute of Frauds, as well as other contracts. *Supreme Ct.*, 1818, *Bennett v. Hull*, 10 *Johns.*, 864.

46. **The value.** To enable defendant to object that the agreement of sale is avoided by the statute, it must distinctly appear, that the value was above the statute limit. *Supreme Ct.*, 1820, *Crookshank v. Burrell*, 18 *Johns.*, 58.

47. **Contract to manufacture.** A contract to deliver goods not yet in existence, but which are to be manufactured by the party agreeing to deliver, although they are to be made out of materials to be furnished by him, is not an agreement for the sale of goods within the statute; and it need not be in writing, although the value exceeds the statute limit. *Supreme Ct.*, 1820, *Crookshank v. Burrell*, 18 *Johns.*, 58; 1828, *Sewall v. Fitch*, 8 *Cow.*, 215; 1854, *Courtwright v. Stewart*, 19 *Barb.*, 455; 1857, *Donovan v. Willson*, 26 *Id.*, 188; *Sp. T.*, 1858, *Parker v. Schenck*, 28 *Id.*, 88. *N. Y. Superior Ct.*, 1850, *Robertson v. Vaughn*, 5 *Sandf.*, 1.

48. An agreement to deliver flour to be manufactured out of wheat which the party

Warranty.

agreeing to deliver the flour, has contracted for but has not yet received, is not a contract for the sale of goods within the statute. *Supreme Ct.*, 1851, *Bronson v. Wiman*, 10 *Barb.*, 406; affirmed on other points, 8 *N. Y.* (4 *Seld.*), 182.

49. If the thing sold exists at the time, in *solido*, the mere fact that something remains to be done to put it in a marketable condition, will not take the contract out of the statute; —e. g., where one agrees to sell his wheat, to be delivered after he has threshed or cleaned it. *Supreme Ct.*, 1840, *Downs v. Ross*, 28 *Wend.*, 270.

50. Nor will the mere fact that the delivery is not to be made until a future time, take the contract out of the statute. *Supreme Ct.*, 1850, *Jackson v. Covert*, 5 *Wend.*, 189.

51. Plaintiffs contracted to deliver cider to be bought of farmers, but refined for market by plaintiff,—*Held*, a contract for the sale of goods, and within the statute. *N. Y. Superior Ct.*, 1848, *Seymour v. Davis*, 2 *Sandf.*, 289.

52. The memorandum. An agreement of sale, signed only by the seller, but delivered to and accepted by the buyer, is valid under the statute, and will sustain the buyer's action for non-delivery. *Supreme Ct.*, 1804, *Roget v. Merritt*, 2 *Cai.*, 117.

53. The memorandum of a clerk of the seller, of sales by him at auction, is sufficient to bind the purchaser. *Supreme Ct.*, 1829, *Frost v. Hill*, 8 *Wend.*, 386.

54. Sale of judgment. An agreement to sell a judgment for a sum exceeding \$50, is within the statute. *Supreme Ct.*, *Sp. T.*, 1847, *People v. Beebe*, 1 *Barb.*, 379.

55. — of note. A promise to turn out a note in payment of a debt is not void by the statute as a sale, or a contract for the sale of the note. *Supreme Ct.*, 1854, *Taft v. Sergeant*, 18 *Barb.*, 320.

56. There must be an acceptance as well as a delivery to take the case out of the statute, but the acceptance may be by the agent of the buyer. *Supreme Ct.*, 1881, *Outwater v. Dodge*, 6 *Wend.*, 397.

57. Acceptance by a mere shop-boy, acting out of the scope of his employment, is not enough. *Supreme Ct.*, *N. P.*, 1806, *Smith v. Mason*, *Anth. N. P.*, 225.

58. Where a person as agent purchases goods and directs them to be shipped, a mere delivery on board of the ship is not sufficient

to take the case out of the Statute of Frauds. There must not only be evidence of delivery, but also of acceptance. *N. Y. Com. Pl.*, 1846, *Langeman v. Stevens*, 5 *N. Y. Leg. Obs.*, 19.

As to what amounts to a Delivery, or an Acceptance, see *infra*, IV. *Delivery*; and VI. *Acceptance*.

59. Subsequent delivery. A delivery, to take the case out of the statute, must be substantially concurrent in time with the sale. *N. Y. Superior Ct.*, 1848, *Clark v. Tucker*, 2 *Sandf.*, 157; 1848, *Seymour v. Davis*, *Id.*, 239. Compare *Denny v. Kemp*, 4 *Id.*, 147.

60. A delivery and acceptance of part of the goods will be sufficient to take the contract of sale out of the Statute of Frauds, notwithstanding they do not take place until after making the oral agreement. It is not necessary they should be simultaneous with it. *So held*, though the delivery was several months after the contract. *Ct. of Appeals*, 1851, *McKnight v. Dunlop*, 5 *N. Y.* (1 *Seld.*), 537. *S. P.*, *Supreme Ct.*, 1838, *Sprague v. Blake*, 20 *Wend.*, 61. *N. Y. Com. Pl.*, 1847, *Allen v. Aguirra*, 5 *N. Y. Leg. Obs.*, 380.

61. That a part-payment, to take the case out of the statute, must be made at the time of the contract. *Allen v. Aguirra*, 5 *N. Y. Leg. Obs.*, 380.

As to what amounts to a payment, see *infra*, VII. *Payment*; also, PAYMENT.

II. WARRANTY.

62. Title. A warranty of title is implied, in the sale of a chattel. *Supreme Ct.*, 1806, *Defreeze v. Trumper*, 1 *Johns.*, 274; 1810, *Heermance v. Vernoy*, 6 *Id.*, 5; 1821, *Vibbard v. Johnson*, 19 *Id.*, 77; 1824, *Rew v. Barber*, 8 *Cow.*, 272; 1848, *McCoy v. Archer*, 3 *Barb.*, 323; 1850, *Dresser v. Ainsworth*, 9 *Id.*, 619; 1851; *Edick v. Crim*, 10 *Id.*, 445; 1858, *Hopkins v. Grinnell*, 28 *Barb.*, 533. *N. Y. Com. Pl.*, 1854, *Beckmann v. Bormann*, 8 *E. D. Smith*, 409; and see *Swett v. Colgate*, 20 *Johns.*, 196; *Brewster v. Countryman*, 12 *Wend.*, 446.

63. A tenant representing himself to be the owner, sold certain fixtures on the demised premises,—e. g., a chimney and kitchen range,—in which he had no interest except the right to use, during the term of the lease. *Held*, that he became responsible to make good his title, and the purchaser might recover damages for the failure thereof. A purchaser is not bound to take notice of the

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vendor's title. *N. Y. Com. Pl.*, 1854, Beckmann v. Bormann, 8 *E. D. Smith*, 409.

64. **Seller not in possession.** The general rule that on the sale of a chattel there is an implied warranty of title, does not apply where the seller is not in possession of the chattel sold at the time of sale. [Reviewing many cases.] In general, a warranty should only be implied where good faith requires it. *Supreme Ct.*, 1848, McCoy v. Artoher, 3 *Barb.*, 323; 1851, Edick v. Crim, 10 *Id.*, 445; 1858, Hopkins v. Grinnell, 28 *Barb.*, 538.

65. This rule applied in a peculiar case, where the property was held by the sheriff under levy, known to the buyer. *Hopkins v. Grinnell*, 28 *Barb.*, 538.

66. One who buys with knowledge that the goods are claimed by a third person, and voluntarily pays the price of the goods to such person, cannot afterwards, in a suit brought by the seller for the price, set up a want of title in the seller. *Supreme Ct.*, 1821, Vibbard v. Johnson, 19 *Johns.*, 77.

67. **Incumbrance.** The warranty of title which the law implies extends to a prior lien or incumbrance; and it is immaterial whether the buyer, at the time of his purchase, knew of such incumbrance—e. g., a previous levy upon the goods by the sheriff—or not. *Supreme Ct.*, 1850, Dresser v. Ainsworth, 9 *Barb.*, 619.

68. **An executory contract to sell**, binds the seller to convey, on the payment of the purchase-money, not only his right to the property existing at the time of the contract, but the entire title. If he does not own it then, he is bound to procure it and vest it in the purchaser. *Supreme Ct.*, 1855, Tyler v. Strang, 21 *Barb.*, 198.

69. **Slave.** Warranty of title to a slave,—*Held*, broken. *Quackenboss v. Lansing*, 6 *Johns.*, 49; *Livingston v. Bain*, 10 *Wend.*, 884.

70. **Quality. Caveat emptor.** In general, upon an executed sale of chattels, where there is neither fraud nor an express warranty, the buyer of a chattel takes the risk of its quality and condition. No warranty can be implied from soundness of price; from the fact that the goods were sold as sound, &c. *Caveat emptor* is the rule of our law. *Supreme Ct.*, 1804, Seixas v. Woods, 2 *Cai.*, 48; 1806, Snell v. Moses, 1 *Johns.*, 96; 1809, Holden v. Dakin, 4 *Id.*, 421; 1810, Davis v. Meeker, 5 *Id.*, 854; 1822, Swett v. Colgate, 20 *Id.*, 196; 1828,

Welsh v. Carter, 1 *Wend.*, 185; 1834, Boorman v. Jenkins, 12 *Id.*, 566; 1838, Salisbury v. Stainer, 19 *Id.*, 159; *Sprague v. Blake*, 20 *Id.*, 61; 1845, Moses v. Mead, 1 *Den.*, 378; affirmed, 5 *Id.*, 617; 1849, Carley v. Wilkins, 6 *Barb.*, 557; *Deifendorf v. Gage*, 7 *Id.*, 18; 1857, Hotchkiss v. Gage, 26 *Id.*, 141. *Ct. of Errors*, 1837, *Wright v. Hart*, 18 *Wend.*, 449. *Ct. of Appeals*, 1851, *Hargous v. Stone*, 5 *N. Y. (1 Seld.)*, 73; *Beirne v. Dord*, *Id.*, 95. *N. Y. Superior Ct.*, 1857, *Eagle Works v. Churchill*, 2 *Boes.*, 166. *N. Y. Com. Pl.*, 1854, *Goldrich v. Ryan*, 8 *E. D. Smith*, 324; and see *Perry v. Aaron*, 1 *Johns.*, 129; *Defreeze v. Trumper*, *Id.*, 274.

71. Where the purchaser has an opportunity to inspect the goods but fails to do so, the seller, in the absence of fraud, is not answerable for latent defects. *Supreme Ct.*, 1838, *Salisbury v. Stainer*, 19 *Wend.*, 159.

72. Where the buyer had the same means of ascertaining the condition of the merchandise sold as the sellers had, and having examined so far as he deemed it necessary, purchased, and no fraud or representations amounting to a warranty were shown,—*Held*, a valid sale, and that, though a portion proved to be unsound, the buyer was liable for the contract price. *N. Y. Com. Pl.*, 1853, *Hyland v. Sherman*, 2 *E. D. Smith*, 234.

73. The rule is otherwise, where the buyer purchases on the representation of the seller, without opportunity of inspection. *Supreme Ct.*, 1822, *Swett v. Colgate*, 20 *Johns.*, 196.

74. **Instances.** Wood was advertised as *brasilletto wood*, and sold, both parties supposing it to be such; but it turned out to be only *peachum*. *Held*, 1. That the description in the advertisement did not amount to a warranty. 2. That without a warranty or fraud, the seller could recover nothing for the defect. *Supreme Ct.*, 1804, *Seixas v. Woods*, 2 *Cai.*, 48.

75. *So held*, where *kelp* was sold under an advertisement describing it as *barilla*. *Supreme Ct.*, 1822, *Swett v. Colgate*, 20 *Johns.*, 196.

76. Plaintiffs bought of defendants eight bales of India goods, called *blus guineas*, but the bales sent contained other sorts of goods of inferior quality, &c. *Held*, that no warranty could be inferred. *Supreme Ct.*, 1806, *Snell v. Moses*, 1 *Johns.*, 96.

77. The clerk of the seller sold *paints* of good Spanish brown and white lead, but they

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proved of inferior quality and much adulterated. *Held*, not sufficient to raise a warranty. *Supreme Ct.*, 1809, *Holden v. Dakin*, 4 *Johns.*, 421.

78. In a sale of a manufactured article—*a. g.*, flour—for a sound price, there is no implied warranty that the article is merchantable. *Ct. of Errors*, 1837, *Wright v. Hart*, 18 *Wend.*, 449; affirming 17 *Id.*, 287.

79. Where *hemp* is sold in bales, there is no implied warranty that the interior shall correspond with the exterior of the bales. *Supreme Ct.*, 1838, *Salisbury v. Stainer*, 19 *Wend.*, 159.

80. Where *casks* are sold as an article of merchandise, without fraud or express warranty, if they prove leaky, the purchaser and not the seller must bear the loss. *N. Y. Com. Pl.*, 1854, *Van Riper v. Ackerman*, 8 *E. D. Smith*, 58.

81. The fact that the article is *entirely spurious* and worthless, and a fraudulent imitation of a genuine article, does not render one who innocently buys it liable to one to whom he resells. It does not vary the rule as between an innocent vendor and vendee. *Supreme Ct.*, 1828, *Welsh v. Carter*, 1 *Wend.*, 185. *N. Y. Superior Ct.*, 1849, *Rudderow v. Huntington*, 3 *Sandf.*, 252.

82. Upon a sale of *corporate stock*, both parties believed it was fully paid up; but in consequence of a subsequent resolution of the directors, the buyer was compelled to make a payment upon it. *Held*, that there being neither fraud nor warranty in the sale, he could not recover from the seller. *Supreme Ct.*, 1816, *Cunningham v. Spier*, 18 *Johns.*, 392.

83. A sale was made of *bank-notes*, at a time when the bank had failed, but the failure was not known to either party. The seller, on being informed of it, promised to return the consideration. *Held*, that though the promise was not binding in law, it was conclusive evidence as an admission of fact, and the buyer could recover back. *Supreme Ct.*, 1854, *Houghton v. Adams*, 18 *Barb.*, 545.

84. On *executory contracts*. Where the contract is executory, to deliver an article not defined at the time, at a future day, whether the seller has one of the kind on hand, or it is afterwards to be procured or manufactured, there is an implied warranty that it shall be at least merchantable, or of medium quality

or goodness. If it comes short of this, it may be returned, after the seller has had a reasonable time to inspect it. [Reviewing many cases.] *Supreme Ct.*, 1840, *Howard v. Hoey*, 28 *Wend.*, 350. *N. Y. Com. Pl.*, 1854, *Van Riper v. Ackerman*, 8 *E. D. Smith*, 58.

85. The sale may be entirely defeated by giving notice to take back the goods, assigning the true cause. *Id.*

86. On a sale of "*French walnuts*," expected to arrive by ship then on her way,—*Held*, that the contract was executory, and that the seller undertook that the goods should be, on their arrival, merchantable, and such goods as are known in trade as French walnuts. *N. Y. Superior Ct.*, 1857, *Olen v. McPherson*, 1 *Bow.*, 480.

87. *Provisions*. In a sale of provisions for domestic use, there is an implied warranty that they are sound and wholesome. The seller is bound to know their quality. *Supreme Ct.*, 1815, *Van Bracklin v. Fonda*, 12 *Johns.*, 468.

88. Where provisions are sold as *merchandise*, and not for immediate domestic use, there is no implied warranty of their soundness. *Ct. of Errors*, 1846, *Moses v. Mead*, 5 *Den.*, 617. Followed, *N. Y. Com. Pl.*, 1858, *Hyland v. Sherman*, 2 *E. D. Smith*, 284. See, also, *Wright v. Hart*, 18 *Wend.*, 449.

89. A drover selling beef cattle to a butcher, does not impliedly warrant that they are not bruised. *N. Y. Com. Pl.*, 1854, *Goldrich v. Ryan*, 8 *E. D. Smith*, 324.

90. *What words will amount to a warranty*. No particular phraseology is necessary to constitute a warranty of quality. Any distinct assertion of the quality of the goods, made by the seller as an inducement to purchase, and relied on by the buyer, may be ground for finding a warranty. *Supreme Ct.*, 1822, *Chapman v. Murch*, 19 *Johns.*, 290; 1832, *Gallagher v. Waring*, 9 *Wend.*, 20; 18 *Id.*, 425; 1835, *Cook v. Moseley*, 18 *Id.*, 277; 1849, *Carley v. Wilkins*, 6 *Barb.*, 557; 1857, *Farrington v. Frankfort Bank*, 24 *Id.*, 554. *N. Y. Com. Pl.*, 1855, *Warren v. Van Pelt*, 4 *E. D. Smith*, 202; 1856, *Blakeman v. Mackay*, 1 *Hill.*, 266; and see *Moses v. Mead*, 3 *N. Y. Leg. Obs.*, 69; affirmed on other points, 1 *Den.*, 378; 5 *Id.*, 617.

91. It is not necessary the word "warrant" should be used. Any affirmation amounting to it is sufficient. *Supreme Ct.*, 1823, *Roberts v. Morgan*, 2 *Cow.*, 438; 3 *P.*, 1833,

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Whitney v. Sutton, 10 *Wend.*, 412; 1835, Cook v. Moseley, 13 *Id.*, 277.

92. No particular phraseology is necessary to constitute a warranty as to quality. But there must be some expression by the seller amounting to an unequivocal affirmation, relied on by the buyer, that the goods are of some certain quality. Mere expressions of opinion will not amount to warranty. *Supreme Ct.*, 1822, Swett v. Colgate, 20 *Johns.*, 196; 1825, Oneida Manufacturing Soc. v. Lawrence, 4 *Cow.*, 440; 1827, Duffee v. Mason, 8 *Id.*, 25; 1849, Carley v. Wilkins, 6 *Barb.*, 557; 1856, Rogers v. Ackerman, 22 *Id.*, 184; *Sp. T.*, 1855, Fiedler v. Tucker, 18 *How. Pr.*, 9. *N. Y. Superior Ct.*, 1857, Eagle Works v. Churchhill, 2 *Bow.*, 166. *N. Y. Com. Pl.*, 1858, Hyland v. Sherman, 2 *E. D. Smith*, 384; 1856, Blakeman v. Mackay, 1 *Hill.*, 266.

93. Question of fact. The question whether the words used were understood and intended by the parties as a warranty, is a question of fact for the jury. *Supreme Ct.*, 1827, Duffee v. Mason, 8 *Cow.*, 25; 1838, Whitney v. Sutton, 10 *Wend.*, 412; 1835, Cook v. Moseley, 13 *Id.*, 277; 1836, Stryker v. Bergen, 15 *Id.*, 490; 1844, Moses v. Mead, 3 *N. Y. Leg. Obs.*, 69; affirmed, 1 *Den.*, 878; 5 *Id.*, 617; 1856, Rogers v. Ackerman, 22 *Barb.*, 184. *N. Y. Com. Pl.*, 1856, Blakeman v. Mackay, 1 *Hill.*, 266.

94. Instances. The seller said the mare was not lame, and that he should not be afraid to warrant her;—*Held*, sufficient to sustain a finding of a warranty. *Supreme Ct.*, 1835, Cook v. Moseley, 13 *Wend.*, 277.

95. A representation by the seller that the flour was superfine, and worth a shilling a barrel more than common,—*Held*, a warranty of the quality. *Supreme Ct.*, 1849, Carley v. Wilkins, 6 *Barb.*, 557.

96. Upon a sale of goods, seller said they were French goods, new, in good order, and just imported from France. *Held*, not mere representations as to value, nor statements as to condition, which mere inspection could detect, but material averments by way of warranty, as the goods were a fancy article, depending in a great measure for their value upon the fact that they were French, just imported, and new. *Supreme Ct.*, 1851, Holman v. Dord, 12 *Barb.*, 386; *S. C.*, less fully reported, 1 *Code R., N. S.*, 381.

97. The plaintiff's agent called on the buyer

and described a kind of oil he was selling for plaintiff, stating that it was "machinery oil;" "was suited for machinery," &c. The plaintiff ordered a quantity, without having an opportunity to inspect it; and it proved unsuitable, and damaged his machinery. *Held*, that the representations of the agent amounted to a warranty, and defendant was entitled to prove the bad quality of the oil to reduce plaintiff's recovery of the price, notwithstanding he had never returned it. *N. Y. Com. Pl.*, 1855, Warren v. Van Pelt, 4 *E. D. Smith*, 302.

98. False assertion, that the seller had been offered a specified price for a chattel, by which the buyer was induced to pay that price,—*Held*, no ground of action, either for warranty or deceit. *Supreme Ct.*, 1810, Davis v. Meeker, 5 *Johns.*, 854. Compare RECOUPMENT, 12.

99. On a sale of oil "to arrive per ship M., sailed on or about March 15th ulto,"—*Held*, that the statement as to time of sailing was a mere representation and not a warranty; that defendants were bound to take and pay for the oil, though the vessel did not sail until the twenty-sixth; and so did not reach port until the spring trade in oil had ceased; and that evidence of loss to defendants on that account was not admissible in an action on the contract. *Ct. of Appeals*, 1850, Hawes v. Lawrence, 4 *N. Y. (4 Comst.)*, 345; affirming *S. C.*, 3 *Sandf.*, 198.

100. Plaintiff sold defendant a horse, representing him to be sound and kind, and agreed that defendant might try him, and if he did not prove satisfactory, he would take him back and return the due bill given for the price. After trying the horse, and having full knowledge that he had a crack in his hoof, defendant said the horse suited him; and never offered to return him. In an action on the due bill, defendant set up as a defence, a breach of warranty. *Held*, that there was no warranty. *N. Y. Com. Pl.*, 1858, Van Allen v. Allen, 1 *Hill.*, 524.

101. "It is yours, and I will see you out in it,"—*Held*, a warranty. *Supreme Ct.*, 1834, Brewster v. Countryman, 12 *Wend.*, 446.

102. What will amount to an express warranty of quality when damaged goods are sold by sample. Brower v. Lewis, 19 *Barb.*, 574.

103. Extent of warranty. A warranty of soundness does not extend to obvious defects. *Supreme Ct.*, 1804, Schuyler v. Russ, 2 *Cai.*, 202.

Sale by Sample.

104. That where an express warranty is given, a broader one cannot be implied. *Pren-tice v. Dike*, 6 *Duer*, 220.

105. The seller making improvements, after delivery, in a furnace sold under a warranty for a specified time,—*Held*, no extension of the time. *Supreme Ct.*, 1855, *Bristol v. Tracy*, 21 *Barb.*, 286.

106. Time when made. A warranty of goods is binding upon the seller, though made during negotiation, some days before the sale. *Supreme Ct.*, 1884, *Wilmot v. Hurd*, 11 *Wend.*, 584.

107. Where the sale is by written instrument, containing no warranty, the buyer cannot set up a parol warranty, made at the time of the transaction. *Supreme Ct.*, 1806, *Mumford v. McPherson*, 1 *Johas.*, 414. Followed, 1806, *Wilson v. Marsh*, *Id.*, 508.

108. A warranty made by parol, subsequent to the execution of the written contract, may be shown. *Supreme Ct.*, 1884, *Brewster v. Countryman*, 12 *Wend.*, 446.

III. SALE BY SAMPLE.

109. The warranty. Where a person sells goods by sample, he is presumed to warrant that the bulk is of the same kind, and equal in quality with the sample, in reference to which the contract is made. *Ct. of Errors*, 1827, *Waring v. Mason*, 18 *Wend.*, 425; affirming *S. C.*, *sub nom.* *Gallagher v. Waring*, 9 *Id.*, 20. *Ct. of Appeals*, 1851, *Beirne v. Dord*, 5 *N. Y.* (1 *Seld.*), 95. *Supreme Ct.*, 1825, *Oneida Manufacturing Soc. v. Lawrence*, 4 *Cow.*, 440; 1826, *Andrews v. Kneeland*, 6 *Id.*, 354; 1834, *Beebe v. Robert*, 12 *Wend.*, 418; *Boorman v. Jenkins*, *Id.*, 566; and see *Moses v. Mead*, 1 *Den.*, 378.

110. Upon a sale by sample, if the sample is a fair specimen of the bulk, and there is no deception nor warranty on the part of the seller, the buyer cannot rescind the sale, because the goods do not answer the purpose for which he bought them. *Supreme Ct.*, 1810, *Sands v. Taylor*, 5 *Johas.*, 395, 404.

111. Plaintiff employed a broker to buy cotton sheeting, intended for the Mexican market. The broker procured samples from defendant, only one of which was of the desired fineness; viz., 80 threads to the quarter inch. The broker ordered a quantity of the goods from defendant, of the quality of the sample;

but did not inform him that they were intended for the Mexican market, or that by the law of Mexico, such goods were not allowed to be imported of a lower fineness than thirty threads, &c. Defendant delivered goods under the order, which plaintiff, without examination, shipped to Mexico, where they were condemned and sold for violation of the excise law of that country. *Held*, that there was no warranty of the fineness of the goods, and defendant was not liable to plaintiff for the loss. *Ct. of Appeals*, 1851, *Hargous v. Stone*, 5 *N. Y.* (1 *Seld.*), 78.

112. Second sample. Where samples are submitted by the seller, or his agent, to the buyer, and at the buyer's request, fresh samples are drawn from the bulk, to test the truthfulness of the first, and a sale is afterwards made, it is none the less a sale by sample, and a warranty is implied. *Supreme Ct.*, 1832, *Gallagher v. Waring*, 9 *Wend.*, 20; * 1834, *Beebe v. Robert*, 12 *Id.*, 418.

113. What is a sale by sample. The mere circumstance that the seller exhibits a sample at the time of the sale, will not, of itself, make it a sale by sample, so as to subject the seller to liability on an implied warranty as to the nature and quality of the goods. Whether a sale is a sale by sample, or not, is a question of fact, on the evidence in each case; and to show such a contract, it must appear that the parties mutually understood they were dealing with the sample, on an agreement or understanding that the bulk corresponded with it. *Ct. of Appeals*, 1851, *Hargous v. Stone*, 5 *N. Y.* (1 *Seld.*), 78; *Beirne v. Dord*, *Id.*, 95.† *Ct. of Errors*, 1827, *Waring v. Mason*, 18 *Wend.*, 425.

114. The rules of law, regulating sales by sample, in general, considered. *Hargous v. Stone*, 5 *N. Y.* (1 *Seld.*), 78; *Beirne v. Dord*, *Id.*, 95.

115. Omission to inspect. Defendant agreed to procure for plaintiff goods corresponding with a sample; and delivered goods accordingly to plaintiff in New York, which plaintiff opened, repacked, and exported, but without sufficient examination to detect a certain departure from the sample. *Held*, that

* Affirmed, in effect, *sub nom.* *Waring v. Mason*, 18 *Wend.*, 425.

† See *S. C.* again, in the *N. Y. Superior Ct.*, 4 *Duer*, 69.

Delivery.

having had opportunity to inspect the goods, and not having done so, plaintiff had waived all objection to their quality. *Ct. of Appeals*, 1851, *Hargous v. Stone*, 5 *N. Y. (1 Seld.)*, 78.

116. Damaged goods. Though goods are sold as damaged goods; yet if they are sold by sample, the sample should be a fair specimen of the whole, of the bad as well as the good. *Supreme Ct.*, 1855, *Brower v. Lewis*, 19 *Barb.*, 574.

117. Question of fact. Whether a sale was a sale by sample,—*Held*, a question of fact. *Supreme Ct.*, 1826, *Andrews v. Kneeland*, 6 *Cow.*, 354; see *supra*, 113.

IV. DELIVERY.

118. Place of delivery. Where goods are to be delivered at one of two places at the option of the seller, he is bound to give the buyer notice of the place selected; if he leaves them at either place without giving notice, and the goods are lost, the loss falls upon him. *Supreme Ct.*, 1815, *Rogers v. Van Hoesen*, 13 *Johns.*, 221.

119. The rule that delivery is to be at the vendor's place is inapplicable where goods are a subject of general commerce and are purchased in large quantities for reshipment, and the purchaser resides at the place of reshipment, and has at such place a storehouse and dock for that purpose. In that case, the place of business of the purchaser is ordinarily the place of delivery. *Supreme Ct.*, 1849, *Bronson v. Gleason*, 7 *Barb.*, 472.

120. Time of delivery. Where no time for delivery is specified in a contract of sale, the seller has a reasonable time therefor. What time is reasonable is to be judged by the circumstances of the case, including accidents of weather, &c., interfering to delay delivery. *N. Y. Com. Pl.*, 1858, *Terwilliger v. Knapp*, 2 *E. D. Smith*, 86.

121. On a contract to deliver "on or about a specified day," the seller has a reasonable time after the day, to deliver. *N. Y. Superior Ct.*, 1850, *Kipp v. Wiles*, 8 *Sandf.*, 585.

122. Where seller is entitled to a reasonable time to deliver, what is a reasonable time is a question of fact for the jury, on all the circumstances of the case. *Ib.* See, also, *QUESTIONS OF LAW AND FACT*, 80–82.

123. What is a delivery is a question of law, and proof of a local custom cannot control

it. *N. Y. Superior Ct.*, 1848, *Suydam v. Clark*, 2 *Sandf.*, 188.

124. Words alone will not answer the requirements of the statute. Acts must be shown. *Supreme Ct.*, 1851, *Ely v. Ormsby*, 12 *Barb.*, 570; *S. O.*, 10 *N. Y. Leg. Obs.*, 54.

125. On a sale of goods at a distance from the parties, the seller said to the buyer, "I deliver you" the goods, and the buyer afterwards took them. *Held*, a sufficient delivery. *Supreme Ct.*, 1827, *Jennings v. Webster*, 7 *Cow.*, 256.

126. Concurrent act requisite. To constitute a delivery, to take the contract out of the statute, there must be some act in which both buyer and seller concur. Where the goods, when sold, were in possession of the seller's agent, and both buyer and seller wrote to the agent on the subject, but the letters were distinct and independent, and neither party concurred in that of the other,—*Held*, there was no delivery. *N. Y. Superior Ct.*, 1848, *Clark v. Tucker*, 2 *Sandf.*, 157.

127. What acts amount to delivery. In order that circumstances constituting a constructive delivery should be held equivalent to an actual delivery for the purpose of satisfying the Statute of Frauds, they should be unequivocal. *Supreme Ct.*, 1808, *Bailey v. Ogden*, 3 *Johns.*, 399.

128. An agreement with the seller relative to storage of the goods, and the delivery, by him, of the export entry to the agent of the buyer,—*Held*, not sufficiently certain to amount to a constructive delivery. *Ib.*

129. Where, upon a sale on time, a promissory note was given in payment, and the goods were suffered to remain in the possession of the seller, who afterwards showed them as the goods of the buyer,—*Held*, these facts were equivalent to an actual delivery, and that notwithstanding the buyer became insolvent, one who bought *bona fide* from him had a good title as against one who bought from the seller. *Supreme Ct.*, 1804, *Hunn v. Bowne*, 2 *Cai.*, 86.

130. Where, on a sale of cattle, no earnest was paid, nor any memorandum in writing made, and they were to remain in the possession of the seller, at the risk of the buyer, until he called for them, and the buyer afterwards came and took them away without saying anything to the seller,—*Held*, a sufficient delivery to satisfy the statute. *Supreme Ct.*, 1814, *Vincent v. Germond*, 11 *Johns.*, 288.

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131. Selecting goods and putting them one side in the seller's shop for the buyer,—*Held*, sufficient, under peculiar circumstances, to constitute a complete delivery. *Brewer v. Salisbury*, 9 *Barb.*, 511.

132. Question of delivery,—*Held*, to turn, under peculiar circumstances, on the question of fact whether the particular goods were set apart for the buyer. *Dows v. Morewood*, 10 *Barb.*, 183.

133. *Delivery of keys.* A delivery of the key of the warehouse in which goods sold are deposited, is a sufficient delivery to transfer the property. *Supreme Ct.*, 1810, *Wilkes v. Ferris*, 5 *Johns.*, 385.

134. Plaintiff sold defendant, by parol, a stock of goods in a store. He offered defendant the keys, which defendant declined, saying he had no insurance. Plaintiff said, "I will give you my policies;" whereupon defendant directed plaintiff's clerk to take the keys for him till morning, which the clerk did. *Held*, sufficient evidence from which the jury might infer a delivery and acceptance sufficient to take the agreement out of the statute. *Ct. of Appeals*, 1851, *Gray v. Davis*, 10 *N. Y.* (6 *Seld.*), 285.

135. — *of samples.* Merely taking a sample does not amount to a delivery, to take the contract out of the Statute of Frauds. If a symbolical delivery is relied on, it must appear to be a delivery by the seller and an acceptance by the buyer, with a view to change the possession. *Supreme Ct.*, *N. P.*, 1808, *Johnson v. Smith*, *Anth. N. P.*, 81. *N. Y. Com. Pl.*, 1855, *Carver v. Lane*, 4 *E. D. Smith*, 168.

136. — *of documentary evidence of title.* Upon a contract for the sale of sugars, the delivery of the export entry is not a delivery of the articles sold, within the meaning of the statute. *Supreme Ct.*, *N. P.*, 1808, *Johnson v. Smith*, *Anth. N. P.*, 81.

137. — *of bill of parcels.* Mere delivery of a bill of parcels is not sufficient to take a sale out of the Statute of Frauds. (1 *Rev. L.* of 1818, 75.) *Supreme Ct.*, *N. P.*, 1816, *Smith v. Mason*, *Anth. N. P.*, 225.

138. — *of order on custom-house.* Where the buyer of goods on credit knows his inability to pay for them, and fraudulently intends not to, the sale is void, and the seller can reclaim the goods, even though he has given an order for them upon the custom-house where

they are entered to the buyer, and the latter has in turn given a like order to a purchaser for value. It is only the transfer of a *bill of lading* which can operate as a complete delivery, to bar the right of stoppage. No other instrument can have that effect. *N. Y. Superior Ct.*, *Sp. T.*, 1857, *Ives v. Polak*, 14 *How. Pr.*, 411. See, also, *FRAUD*.

139. — *of order on storekeeper.* One who bought goods in public store, took an order on the storekeeper, and afterwards sold the goods by delivering the order to his vendee, who paid the storage, and had the goods remarked in his own name. *Held*, that the original owner had made a sufficient delivery to satisfy the Statute of Frauds, and to terminate his right to stop in transit. *Supreme Ct.*, 1805, *Hollingsworth v. Napier*, 3 *Cai.*, 182.

140. So, a delivery of the *receipt* of the storekeeper for goods in store, that being the documentary evidence of the title, transfers the property. *Supreme Ct.*, 1810, *Wilkes v. Ferris*, 5 *Johns.*, 385.

141. The seller tendered accepted warehouse orders for flour sold, and offered to turn out the flour on the walk, or cart it to the buyer's door, or take it to any other part of the city he would name, provided he would say he would take it. The buyer merely said, that he might do as he pleased,—*Held*, a sufficient delivery, or offer to deliver. *N. Y. Superior Ct.*, 1849, *Stanton v. Small*, 8 *Sandf.*, 280.

142. Proof of usage to sell flour by delivery of orders accepted by the warehouseman with whom it is stored, may be made, to sustain a delivery made in that manner. *Id.*

143. Where upon a sale of grain, in store, in the city of New York, a measurer appointed by the board of measurers, has measured the quantity, and the buyer has received an order upon the storekeeper for the grain, the delivery as between buyer and seller is complete. *N. Y. Superior Ct.*, 1856, *McCreedy v. Wright*, 5 *Duer*, 571.

144. The local custom of the city of New York, relative to measurement of grain, stated. *Id.*

145. — *of order on barge.* Flour being deliverable on a particular day, the delivery of an order on the barge containing the flour,—*Held*, not an actual delivery or tender of delivery of the flour, sufficient to entitle the seller to resell on account of the buyer. *N.*

Delivery.

Y. Superior Ct., 1848, *Suydam v. Clark*, 2 *Sandf.*, 183.

146. — to a carrier will not operate as delivery to the buyer, for the purpose of sustaining an action for goods sold and delivered, unless it was made by consent, expressed or implied, of the buyer, or he receives the goods. *Supreme Ct.*, 1842, *Hague v. Porter*, 8 *Hill*, 141.

147. When a party orders goods of a seller for a third person, and directs them to be forwarded to such third person, evidence that they were delivered pursuant to the direction, either at the store of a factor, or on board of a vessel, &c., is sufficient (in the absence of proof of the return of the goods to the seller) to take the case out of the operation of the Statute of Frauds. *N. Y. Com. Pl.*, 1855, *Dyer v. Forest*, 2 *Abbotts' Pr.*, 282.

148. Where the goods were packed, and the name and residence of the purchaser marked thereon, and by the purchaser's direction, they were sent on board a steamboat to be carried to his residence at his expense,—*Held*, a complete delivery, and the goods became the purchaser's. *Ct. of Errors*, 1885, *People v. Haynes*, 14 *Wend.*, 546; reversing 11 *Id.*, 557.

149. The seller has in such a case, however, the right of stoppage in transit in case of the purchaser's insolvency. *Ib.*

150. Plaintiffs agreed to sell goods, for which they were to have the buyer's drafts upon the person to whom they were to be consigned, but they began shipping before the drafts were signed, on the risk and account of the buyer. *Held*, an absolute sale. *V. Chan. Ct.*, 1885, *Harrison v. Williamson*, 2 *Edw.*, 480.

151. M. being indebted to his factors for advances on certain goods, delivered them to a carrier to be conveyed to them, agreeing with them that the goods should be sold on commission to pay the advances, and mailing an invoice. *Held*, that the property passed to the factors by delivery to the carrier; as against the sheriff who subsequently levied upon them an execution against M. *Supreme Ct.*, 1841, *Grosvenor v. Phillips*, 2 *Hill*, 147.

152. Where plaintiffs had made advances on consignments of flour to them, to be sold on commission, and the advances amounted to more than the value of the flour;—*Held*, that the moment the flour was shipped, the title to it vested in the plaintiffs, and the con-

signors had no right to change its destination. *Supreme Ct.*, 1848, *Stafford v. Webb*, *Hill & D. Supp.*, 213.

153. Under the custom of shipping merchants in the port of New York, to give the bill of lading to the holder of the ship's receipts for goods put on board a vessel, the title to goods ordered on credit and directed to be shipped to the buyer does not pass, as long as the seller holds the ship's receipts. Until he delivers those, or obtains and delivers a bill of lading, he can reclaim the goods, although they have been selected, packed, marked with the buyer's name, and put on board the vessel. *Supreme Ct.*, 1850, *Jones v. Bradner*, 10 *Barb.*, 193; affirming S. C., 5 *N. Y. Leg. Obs.*, 96.

154. Where the owner of goods ships them to a factor, notwithstanding he is indebted to such factor for advances to more than the value, he remains the owner, during the transit, so long as he retains the carrier's receipt or bill of lading, and invoice. The factor acquires no property until either the goods or the bill of lading, &c., come to his hands. Until then, the original owner can sell the goods to a third party, by transferring the bill of lading. *Ct. of Appeals*, 1851, *Bank of Rochester v. Jones*, 4 *N. Y. (4 Comst.)*, 497; reversing S. C., 4 *Den.*, 489.

155. Plaintiffs agreed to sell to L. & Co. 50 barrels of potash, to be paid for on delivery. L. engaged a vessel to transport it, and plaintiffs sent it on board, taking from the master shipping receipts, issued under a custom of the port, under which the bill of lading was delivered to the holder of the ship's receipts. L. thereafter stole the receipts from plaintiffs' store, presented them to the owners of the vessel, and received a bill of lading, on which he procured advances. Plaintiffs demanded the potash from the master, but he refused to redeliver, and transported it and delivered it pursuant to the bill of lading. *Held*, that the plaintiffs had not parted with their property. The shipping receipts being, under the custom proved, evidences of title, the act of L. in taking them was a felony, through which the master could not make title, and he was therefore liable to plaintiffs for a conversion. *Ct. of Appeals*, 1855, *Brower v. Peabody*, 13 *N. Y. (3 Kern.)*, 121; S. C., 1 *Abbotts' Pr.*, 311; 11 *How. Pr.*, 492; reversing S. C., 18 *Barb.*, 599.

Delivery.

156. Where goods are sold on a contract to pay cash on delivery on board ship, and the seller delivers them on board without notice to the master of his ownership or that the price has not been paid, and without taking ship's receipts or a bill of lading; and the buyer, although before the delivery is completed, obtains a bill of lading and indorses it to a purchaser in good faith and for value, the seller cannot afterwards reclaim the goods for non-payment of the price. As between him and the indorsee, the delivery must be deemed absolute. *Supreme Ct.*, 1858, *Blossom v. Champion*, 28 *Barb.*, 217.

157. Something remaining to be done. As long as any thing yet remains to be done by the seller to ascertain the *quantity* or quality of the goods, there is no delivery which can take the case out of the Statute of Frauds. *Supreme Ct.*, 1827, *Outwater v. Dodge*, 7 *Cow.*, 85.

158. The mere marking of the goods will not pass the title to the buyer, where something yet remains to be done by the seller. Though marking by the buyer may be evidence of an acceptance, it does not amount to a delivery, where the seller has afterwards, at his own expense, to transport the property to another place, for delivery to the buyer. *Supreme Ct.*, 1858, *Evans v. Harria*, 19 *Barb.*, 416.

159. So there is no delivery sufficient to pass the title, as long as any thing yet remains to be done by either party to ascertain the price. *Supreme Ct.*, 1881, *Ward v. Shaw*, 7 *Wend.*, 404.

160. *So held*, where cattle were sold to a butcher to be slaughtered, weighed, and paid for by weight. *Id.*

161. Plaintiff agreed verbally to sell some hogs to defendant, who was to slaughter them and pay for them by the hundredweight, by an approved note. The hogs being delivered and slaughtered, the note was tendered for the value, which exceeded \$50. *Held*, a full delivery of the property within the statute, vesting it in defendant; and plaintiff could not rescind. *Supreme Ct.*, 1853, *Gray v. Payne*, 16 *Barb.*, 277.

162. Where, upon a sale of a load of lumber, the measuring it is necessary to ascertain the price, and so is a part of the delivery, a measuring of part of the lumber does not pass title as to that part. [1 *Camp. N. P.*, 53; 6

J. B. Moore, 114; 9 *Barn. & Cres.*, 386.] *Supreme Ct.*, 1886, *Fitch v. Beach*, 15 *Wend.*, 221.

163. Variance from the order. Where, upon an order for goods, a shipment is made differing in kind, quantity, &c., from what is ordered, this does not operate as a delivery to the buyer, for the purpose of taking the case out of the statute. As the buyer is under no obligation to accept them, so, until they actually reach his hands and are accepted, he acquires no title. *N. Y. Com. Pl.*, 1855, *Ralph v. Stuart*, 4 *E. D. Smith*, 627.

164. Defendant having ordered 250 barrels of cement, plaintiff sent 260 barrels. In his action for the price,—*Held*, he could recover for 250 barrels, if it appeared the 260 were sent as a compliance with the order, and without intent to charge defendant with the excess. *Ct. of Errors*, 1843, *Downer v. Thompson*, 6 *Hill*, 208.

165. Cumbersome articles. Where the articles are ponderous or bulky, or cannot conveniently be delivered manually, it is enough that they are put under the absolute power of the vendee, or that his authority as owner is formally acknowledged, or that any act is done importing a surrender on one side and an acceptance on the other. [1 *East*, 192; 5 *Johns.*, 335; *Story*, of Sales, § 811; 12 *Mass.*, 800.] *N. Y. Superior Ct.*, 1849, *Stanton v. Small*, 3 *Sandf.*, 230.

166. The case of cumbersome articles is not an exception to the rule that in order to constitute a delivery and acceptance within the Statute of Frauds something besides mere words is necessary,—there must be some act of the parties amounting to a transfer of the possession and an acceptance thereof by the buyer. *Ct. of Appeals*, 1848, *Shindler v. Houston*, 1 *N. Y. (1 Comst.)*, 261.

167. Instances. Plaintiff and defendant bargained for the sale, by the former to the latter, of a quantity of lumber, piled apart from other lumber, on a dock, and in view of the parties at the time of the bargain, and which had before that time been measured and inspected. The parties having agreed as to price the plaintiff said to the defendant, "the lumber is yours," defendant then told plaintiff to get the inspector's bill and take it to one "H," who would pay the amount. This was done the next day, but payment was refused. The price was over \$50. *Held*, in an action to recover the price, that there was

Conditional Sale and Delivery.

no delivery and acceptance of the lumber within the meaning of the Statute of Frauds, and that the sale was therefore void. *Id.*

168. Where one bought all the stuff which could be made out of a quantity of logs lying at R.'s mill, at a specified price; and the logs were sawed and boards piled, and notice given to the purchaser;—*Held*, a sufficient delivery to make the sale valid, and to rest title in the purchaser, *Supreme Ct.*, 1838, *Bates v. Conklin*, 10 *Wend.*, 389.

169. Barley was sold to be paid for by weight. It was not weighed, but a bill was made out based on an estimate of the quantity taken from the vendor's books, and presented to the buyer, who paid part and promised the balance. The barley remained in the warehouse of the vendor, until he leased it to another person, with whom the buyer made an agreement for storage for the barley. It was shortly after destroyed in the burning of the warehouse. *Held*, that there had been a complete delivery, so as to throw the risk upon the buyer. *Supreme Ct.*, 1848, *Olyphant v. Barker*, 5 *Den.*, 379.

170. The owner of a brick-yard sold to defendant 48,000 brick, to be taken out of an unfinished kiln, containing a larger number, and delivered possession of the yard to defendant that he might burn the kiln, which he did; afterwards, before defendant had selected any brick, the owner sold to the plaintiff "all the bricks" in the kiln. *Held*, that defendant was, notwithstanding, entitled to select 48,000 brick, although they had not before been separated; and plaintiff could not maintain trespass against him for so doing. The delivery of the kiln and yard to defendant, in the first place, was a delivery of the whole with a privilege of selection. *Ct. of Appeals*, 1849, *Orofoot v. Bennett*, 2 *N. Y. (2 Comst.)*, 258.

171. On the sale of land, the vendee also agreed to purchase millstones, upon the land, and then entered into possession, the stones still remaining on the land;—*Held*, they were sufficiently delivered. *Supreme Ct.*, 1816, *De Ridder v. McKnight*, 18 *Johns.*, 294.

172. Sale and delivery of flour in a peculiar case,—*Held*, to be complete so that plaintiff could not replevin it. *Suydam v. Hotchkiss*, *Hill & D. Supp.*, 96.

173. After refusal to accept. The plaintiff made an article to order; and the customer refused to receive it upon tender. *Held*, that

the plaintiff might deposit it with a third person for the use of the customer, which would be equivalent to a delivery, to entitle him to sue for the price. *Supreme Ct.*, 1836, *Bement v. Smith*, 15 *Wend.*, 498.

174. Wrongful act. The act of the defendant in taking wheat wrongfully obtained by him, cannot, by a subsequent understanding, be converted into a delivery and acceptance of the property, so as to take the case out of the statute and render the contract valid. *Supreme Ct.*, 1852, *Baker v. Cuyler*, 12 *Barb.*, 667.

V. CONDITIONAL SALE AND DELIVERY.

175. Sale for cash. Upon a sale of goods for cash, to be paid on delivery, the title does not vest in the purchaser upon actual delivery without payment, unless the condition is waived. *Ct. of Appeals*, 1851, *Smith v. Lynes*, 5 *N. Y. (1 Seld.)*, 41; reversing *S. C.*, 3 *Sandf.*, 208. *Supreme Ct.*, 1842, *Strong v. Taylor*, 2 *Hill*, 326; 1857, *Fleeman v. McKean*, 25 *Barb.*, 474.

176. Stipulation reserving title. A delivery of property, on condition that title shall not pass unless the price is paid at a set time, and that if it is not, the seller may resume possession, does not transfer the title. *Ct. of Appeals*, 1857, *Herring v. Hoppock*, 15 *N. Y. (1 Smith)*, 409; affirming *S. C.*, 3 *Duer*, 20; 12 *N. Y. Leg. Obs.*, 167. *N. Y. Superior Ct.*, 1849, *Herring v. Willard*, 2 *Sandf.*, 418. Compare *Piser v. Stearns*, 1 *Hill*, 86.

177. Conditional delivery. Delivery of goods sold for cash is not necessarily a waiver of the condition. The seller has a right to explain the delivery by evidence. *Supreme Ct.*, 1857, *Fleeman v. McKean*, 25 *Barb.*, 474.

178. It is not necessary to a qualified or conditional delivery, that the qualification or condition intended to be annexed to the delivery, should at the time be declared by the vendor in express terms. The delivery will be conditional, if the intent of the parties that it should be so, can be inferred from their acts and the circumstances of the case. *Ct. of Appeals*, 1851, *Smith v. Lynes*, 5 *N. Y. (1 Seld.)*, 41; reversing *S. C.*, 3 *Sandf.*, 208. *V. Chan. Ct.*, 1881, *Buck v. Grimshaw*, 1 *Edw.*, 140.

179. Whether a delivery of goods, sold for cash on delivery, was absolute or conditional, is a question for the jury. *Supreme Ct.*, 1857, *Fleeman v. McKean*, 25 *Barb.*, 474.

Conditional Sale and Delivery.

180. *Instances.* Goods being sold and sent to the buyer's residence, upon condition that he would send back an indorsed note for the amount;—*Held*, that the seller retained a lien until the delivery of the notes, which could not be defeated by a subsequent sale or assignment for an antecedent debt. *Chancery*, 1829, *Keeler v. Field*, 1 *Paige*, 812; and see *Haggerty v. Duane*, *Id.*, 321.

181. Under an agreement to pay for the goods on delivery, part were delivered, and the purchaser said he would pay for the whole when the remainder were brought. *Held*, that the delivery was conditional, and on refusal to pay after delivery of the residue, the seller could reclaim the whole. *Ct. of Errors*, 1838, *Russell v. Minor*, 22 *Wend.*, 659.

182. On a sale of goods in New York city, for cash, delivery was completed too late on Saturday to send in a bill. Payment was demanded on Monday, when it was found the buyer had absconded. *Held*, that the seller's title was not divested. *Supreme Ct.*, 1840, *Acker v. Campbell*, 28 *Wend.*, 372.

183. On the sale of corn, for cash on delivery, several days were consumed in the delivery, and with the last parcel, a bill was furnished, and on the next morning, a demand was made of the price, but it was not paid. *Held*, that the property was not changed. *Supreme Ct.*, 1850, *Van Neste v. Conover*, 8 *Barb.*, 509.

184. On a sale of goods, to be paid for in cash on delivery, the seller sent the goods to the store of the buyer, who tendered a note made by the buyer to a third person, and indorsed by the payee in blank, in payment of the price. The seller refused to receive the note, and brought replevin for the goods. *Held*, he was entitled to recover. The mere sending the goods, in expectation of payment, did not constitute an absolute delivery. The buyer held the goods in trust for the seller, until payment was made or waived. *Supreme Ct.*, 1845, *Leven v. Smith*, 1 *Den.*, 571.

185. Where one who had sold bonds on behalf of a third person, was induced to deliver them to the buyer upon a fraudulent promise that the cash should be paid in a few minutes; instead of which, the buyer tendered him his own dishonored notes;—*Held*, that the property did not pass, and the original owner could reclaim the securities. *A. V. Chan. Ct.*, 1846, *Hays v. Currie*, 3 *Sandf. Ch.*, 585.

186. Plaintiff sold furniture conditionally that she should be paid therefor out of the rent of certain premises, retaining title to the furniture till paid in full. The buyer subsequently, with plaintiff's consent, assigned the rent in trust to pay his debts, including a balance due plaintiff for the furniture. *Held*, no waiver of the condition of the sale, and that it did not thereby become absolute. *Supreme Ct.*, 1848, *Staats v. Hodges*, *Hill & D. Supp.*, 211.

187. A sale "for cash on delivery, that is, within ten days," implies that the delivery is to be conditional. If the payment is not made there is no absolute transfer as towards the buyer or persons having claim to higher protection than he. *Supreme Ct.*, 1858, *Dows v. Dennistoun*, 28 *Barb.*, 393.

188. A conditional sale of goods accompanied by a delivery thereof to a third person, who is to hold the same, as the agent of the contracting parties, until the terms of sale are complied with, will not vest the property in the purchaser, until the condition precedent is fulfilled. *N. Y. Superior Ct.*, 1829, *Van Buskirk v. Purinton*, 2 *Hall*, 561; *Collman v. Collins*, *Id.*, 589.

189. This rule applied under peculiar circumstances. *Id.*

190. *Usage of trade.* Where it is proved that by the usage of trade, upon a sale of goods for cash to be paid on delivery, the goods are delivered to the purchaser at the time of the sale, and the vendor calls for payment in two or three days, the non-exaction of the payment before it can be claimed, consistently with the usage, cannot be considered a waiver of the condition. *Supreme Ct.*, 1857, *Fleeman v. McKean*, 25 *Barb.*, 474.

191. A usage on sales at auction for approved indorsed notes on time, to deliver the goods when sent for, and afterwards to send for the notes, makes such a delivery conditional.* *Chancery*, 1832, *Haggerty v. Palmer*, 6 *Johns. Ch.*, 437; 1839, *Haggerty v. Duane*, 1 *Paige*, 821. *N. Y. Superior Ct.*, 1829, *Cordlie v. Gardner*, 2 *Hall*, 345.

192. But an unreasonable delay, after delivery, to demand the notes, operates as a waiver of the condition, so that an assignee, although not for value, will acquire title. *V. Chan. Ct.*, 1836, *Mills v. Hallock*, 2 *Edw.*, 652.

* See as to the existence of such usage in New York City, *Mills v. Hallock*, 2 *Edw.*, 652.

Acceptance.

193. Absolute delivery. Although by the agreement the goods are to be paid for on delivery, yet if the goods are delivered without payment by the buyer, without any fraudulent contrivance on his part to obtain possession, the property passes. *Supreme Ct.*, 1836, *Chapman v. Lathrop*, 6 *Cow.*, 110. *Ct. of Errors*, 1880, *Lupin v. Marie*, 6 *Wend.*, 77; affirming *S. C.*, 2 *Paige*, 169.

194. Where goods are sold on condition that the price shall be paid or secured on delivery, an unconditional delivery free from fraud and without exacting at the time performance of the condition, is a waiver of the condition of the sale, and title passes to the purchaser. By such delivery, the seller is deemed to have abandoned the security he had provided for the payment of the purchase-money, and to have elected to trust to the personal security of the buyer. *Ct. of Appeals*, 1851, *Smith v. Lynes*, 5 *N. Y.* (1 *Seld.*), 41; reversing *S. C.*, 3 *Sandf.*, 208.

195. Instances. Where a seller voluntarily and without fraudulent inducement delivers goods, without reservation, and leaves them in the buyer's exclusive possession for any period of time, he waives simultaneous payment, and the title passes to the buyer. *N. Y. Com. Pl.*, 1851, *Ives v. Humphreys*, 1 *E. D. Smith*, 196.

196. Where goods sold for cash are carried to the buyer's house, and the seller is requested to send the bill to the buyer's store, he must elect whether to keep them until paid for, or to make the delivery expressly conditional, or to leave them without imposing a condition, in which case the right to payment on delivery is waived, and the property vests in the buyer. *Id.*

197. Where the goods were sold to be paid for in the buyer's notes, and were delivered to him without demanding the notes or annexing any condition to the delivery,—*Held*, that the condition of the sale was thereby waived, and absolute title vested in the buyer. *Ct. of Errors*, 1880, *Lupin v. Marie*, 6 *Wend.*, 77; affirming 2 *Paige*, 169.

198. Where two months had elapsed after the sale and delivery before demand was made for the note which was to have been given on delivery,—*Held*, that the condition must be deemed to have been waived. *Supreme Ct.*, 1841, *Hennequin v. Sands*, 25 *Wend.*, 640.

199. Rights of bona-fide purchaser. Af-

ter actual delivery (although as between the parties to the sale such delivery may be conditional) a bona-fide purchaser from the vendee gets a perfect title. *Ct. of Appeals*, 1851, *Smith v. Lynes*, 5 *N. Y.* (1 *Seld.*), 41; reversing *S. C.*, 3 *Sandf.*, 208; but compare *Palmer v. Hand*, 18 *Johns.*, 484.

200. A bona-fide transfer of a clear bill of lading to a purchaser for value, is equivalent to an unconditional delivery of the goods themselves, so far as to supersede any previous condition between the original owner and the consignee. *N. Y. Superior Ct.*, 1857, *Wardwell v. Patrick*, 1 *Bow.*, 406.

201. Where the sale was made for cash on delivery, and a part of the goods were delivered without exacting payment, and the buyer shipped them, and transferred the bill of lading in good faith to S.,—*Held*, that the delivery was absolute. *V. Chan. Ct.*, 1831, *Buck v. Grimshaw*, 1 *Edw.*, 140.

VI. ACCEPTANCE.

202. A question of fact. Whether there has been an acceptance of goods sold is a question of fact for the jury. *Supreme Ct.*, 1880, *Corning v. Colt*, 5 *Wend.*, 253; 1841, *Vanderbilt v. Eagle Iron Works*, 25 *Id.*, 665; and see *Gray v. Davis*, 10 *N. Y.* (6 *Seld.*), 285.

203. In case of departure from order. Where the buyer's order for goods was not strictly complied with, either as to the quantity of goods or the mode of transportation,—*Held*, that the seller, in order to hold him, must show an acceptance. *Supreme Ct.*, 1830, *Corning v. Colt*, 5 *Wend.*, 253.

204. Where, in such case, there is no evidence of acceptance, notice of refusal to accept is not necessary. *Id.*

205. Upon a sale of iron to be delivered in parcels at specified times, each parcel to be paid for on delivery, the seller was behind time in delivering the first parcels; but the buyer received the iron when delivered without objection, but failed to make the payments agreed on. *Held*, the receiving the iron without objecting was a waiver of the delay, and the buyer became bound to pay according to the contract. By his failure so to do, he absolved the seller from obligation to go on with his delivery; and the latter could sue for so much as had been delivered and accepted. *Supreme Ct.*, 1854, *Bailey v. Western Vermont R. R. Co.*, 18 *Barb.*, 112.

Payment.

206. Where the contract is to deliver merchantable wheat at a fixed price, and the purchaser accepts wheat delivered under it, though of an inferior quality, he having an opportunity of inspection, such acceptance is an assent that the terms of the contract have been fulfilled, and estops the purchaser from setting up that the wheat was of an inferior quality. *Supreme Ct.*, 1888, *Sprague v. Blake*, 20 *Wend.*, 61.

207. On a sale of 1,000 barrels of flour, 750 barrels to be delivered when it should arrive, not later than three days, the seller delivered the other 250 barrels. *Held*, that the acceptance of them by the buyer did not preclude him from refusing to take the residue if not delivered within the stipulated three days. *N. Y. Superior Ct.*, 1848, *Suydam v. Clark*, 2 *Sandf.*, 138.

208. Acceptance of goods. Where one who orders goods of a particular description, examines such as are tendered, and pays the price, and keeps them, the contract of purchase and sale is fully consummated, and he cannot afterwards recover damages on the ground that the goods delivered were not of the quality mentioned in the contract, unless fraud or express warranty is shown. *N. Y. Com. Pl.*, 1854, *Ely v. O'Leary*, 2 *E. D. Smith*, 355.

209. Nor can he resist or reduce the seller's recovery of the price, on such ground. *N. Y. Com. Pl.*, 1855, *Warren v. Van Pelt*, 4 *E. D. Smith*, 202.

210. He is bound to accept the goods as a performance of the seller's executory contract, or reject them on a discovery of their inferiority, and give notice of such rejection. *N. Y. Com. Pl.*, 1854, *Ely v. O'Leary*, 2 *E. D. Smith*, 355.

211. What acts amount to an acceptance of articles attempted to be delivered in fulfillment of a written contract. *Newcomb v. Cramer*, 9 *Barb.*, 402.

VII. PAYMENT.

212. To be concurrent with delivery. On a cash sale, payment and delivery are simultaneous acts, and title to the property sold does not pass until payment, unless waived. *Supreme Ct.*, 1826, *Chapman v. Lathrop*, 6 *Cow.*, 110; 1848, *Conway v. Bush*, 4 *Barb.*, 564.

213. Where the agreement is that the goods

shall be paid for on delivery, the buyer cannot recover for non-delivery without proving that he was ready, at the appointed place, to pay for the goods. *Supreme Ct.*, 1815, *Porter v. Rose*, 12 *Johns.*, 209; 1826, *Topping v. Root*, 5 *Cow.*, 404.

214. Where the buyer sues for the seller's breach of contract to deliver goods at a particular time and place, he must prove that he was ready and willing to pay for the goods; but need not prove a tender or demand. *Supreme Ct.*, 1841, *Coonley v. Anderson*, 1 *Hill*, 519. Followed, *Ct. of Appeals*, 1851, *Vail v. Rice*, 5 *N. Y.* (1 *Seld.*), 155; 1853, *Bronson v. Wiman*, 8 *N. Y.* (4 *Seld.*), 182. Compare *Chapin v. Potter*, 1 *Hill.*, 866.

215. Where grain sold was to be delivered at a specified time and place, and the buyer was to give security for the price on the delivery of the first load,—*Held*, that in order to entitle the buyer to recover for a breach of the contract, he must show his readiness to give the security, at the time and place fixed, or show that the giving of it was waived, or prevented by some act of the seller. *Supreme Ct.*, 1850, *Cornwall v. Haight*, 8 *Barb.*, 327.

216. On a sale for cash, the buyer is not entitled to delivery without making payment. An offer of his check is not enough. If he refuses to pay simultaneously with delivery, the seller may resell the goods and charge him with the difference. *Supreme Ct.*, 1824, *Clarkson v. Carter*, 8 *Cow.*, 84.

217. The seller's refusal to deliver, renders it unnecessary that the buyer should tender the price in order to entitle himself to sue for damages for non-delivery. *N. Y. Com. Pl.*, 1852, *Dana v. Fiedler*, 1 *E. D. Smith*, 468.*

218. Not so of a mere declaration by the seller to a third person, that he will not be able to deliver. *N. Y. Com. Pl.*, 1857, *Chapin v. Potter*, 1 *Hill.*, 866.

219. Delivery a condition precedent. Where the seller engages to deliver the goods at a particular place, the transportation to that place is a part of the value for which he is to be paid. He cannot demand payment until he has performed that transportation. When he has brought the property to the place for delivery, he may then insist on payment before he parts with possession. *N. Y. Com. Pl.*, 1851, *Vincent v. Conklin*, 1 *E. D. Smith*, 208.

* Affirmed, on other points, 12 *N. Y.* (3 *Kern.*), 40.

When Title Passes.

220. *So held*, where the goods required to be transported from one town to another, by the seller, before delivery. *Id.*

221. Where the chattels sold were to be delivered before the time fixed for the last payment,—*Held*, that a delivery was a condition precedent to the payment, although a portion of the purchase-money was to be paid before delivery. *Supreme Ct.*, 1853, *Evans v. Harris*, 19 *Barb.*, 416.

222. On an agreement to deliver, by a certain day, a quantity of hay for a fixed price, a part to be paid in advance and the balance when the whole was delivered;—*Held*, that the seller could not recover upon a delivery of less than the whole quantity, delivery of the whole not having been waived. *Ct. of Errors*, 1837, *Champlin v. Rowley*, 18 *Wend.*, 187.

223. Sale for approved notes. A sale of goods at auction for an approved indorsed note,—*Held*, conditional on the delivery of the note; and that upon failure to comply with this condition, the seller might treat the sale as for cash, and sue for the price. *N. Y. Superior Ct.*, 1829, *Corlies v. Gardner*, 2 *Hall*, 345.

224. On a sale for approved notes, if a note is tendered and the seller makes no objection to it, it is to be deemed sufficient. If he objects, it is for the buyer to show that the note was such as ought to have been received. *Ct. of Errors*, 1838, *Mills v. Hunt*, 20 *Wend.*, 431.

225. Accord and satisfaction of price. One who had sold cattle at so much per pound, the weight to be afterwards ascertained, agreed to accept a certain sum in gross. *Held*, he could not afterwards sue the buyer for the difference between such sum and the price by weight, even though the buyer had ascertained the exact weight, unknown to the seller. *Supreme Ct.*, 1857, *Gage v. Parker*, 25 *Barb.*, 141.

226. Price to be applied to debt. Where a sale of goods is made on an agreement that the price shall be applied to the payment of a precedent debt, such price must be actually applied by a receipt or otherwise, to bring it within the exception in the Statute of Frauds, founded on payment of all or a part of the price. *N. Y. Superior Ct.*, 1843, *Clark v. Tucker*, 2 *Sandf.*, 157. *S. P.*, *Supreme Ct.*, 1850, *Ely v. Ormsby*, 12 *Barb.*, 570; *S. C.*, 10 *N. Y. Leg. Obs.*, 54.

227. A. agreed to furnish B. with flour by a certain day, for sale, the avails to be applied

to the payment of bills to be accepted by B. *Held*, that the agreement did not extend to bills made payable after the day named. *Supreme Ct.*, 1843, *Boyd v. Towpsend*, 4 *Hill*, 183.

As to What constitutes payment generally, see PAYMENT.

VIII. WHEN TITLE PASSES.

228. The contract of sale, nothing remaining to be done by either party before delivery, transfers the property in the thing sold to the buyer. *Supreme Ct.*, 1843, *Olyphant v. Baker*, 5 *Den.*, 379; 1853, *Evans v. Harris*, 19 *Barb.*, 416. *S. P.*, *Ct. of Appeals*, 1853, *Joyce v. Adams*, 8 *N. Y.* (4 *Seld.*), 291; reversing *S. C.*, 2 *Sandf.*, 1.

229. When on the sale of a specific chattel, the purchase-money is paid, the property vests in the buyer, and if he permits it to remain in the custody of the seller, he cannot call upon the latter for any subsequent loss not arising from negligence. *Supreme Ct.*, 1806, *Lansing v. Turner*, 2 *Johns.*, 18.

230. Something yet to be done. On a sale of goods, as long as any act remains to be done by the seller before delivery, the property does not vest in the buyer. *Supreme Ct.*, 1818, *McDonald v. Hewett*, 15 *Johns.*, 349. *N. Y. Superior Ct.*, 1854, *Chapman v. Kent*, 3 *Duer*, 224.

231. The property of goods sold to be delivered at a foreign port does not pass until delivery there. *Ct. of Errors*, 1823, *New York Firemen Ins. Co. v. De Wolf*, 2 *Cow.*, 56.

232. As long as something yet remains to be done between buyer and seller, for the purpose of ascertaining the quantity or identity of the goods sold, the property in them does not pass;—*e. g.*, where out of a large quantity of an article, a smaller quantity is agreed for, without any selection being made. *Supreme Ct.*, 1826, *Rapelye v. Mackie*, 6 *Cow.*, 250.

233. On the sale of a large and cumbrous quantity of grain, the title will be deemed to pass if the acts of the parties clearly indicate an intent that it should, although there may have been no actual separation of the quantity sold from a larger mass with which it is mixed. *Ct. of Appeals*, 1859, *Kimberly v. Patchin*, 19 *N. Y.* (5 *Smith*), 330.

234. *So held*, where the owner of wheat, lying in a mass in his warehouse, sold six thou-

When Title Passes.

sand bushels thereof for a specified price, and executed to the vendee a receipt acknowledging himself to hold the wheat subject to the purchaser's order. *Id.*

235. Although there has been a delivery of the property, yet where any thing remains to be done,—*e. g.*, ascertaining the weight,—the seller does not part with his title, or lose his lien upon the property. *N. Y. Com. Pl.* (1844?), *Oalkins v. Wheaton*, 2 *N. Y. Leg. Obs.*, 425.

236. Instances. Defendant having 259 bales of cotton on storage, plaintiff agreed to purchase it from him, for cash on delivery, the cotton to be delivered in thirty days; and meantime plaintiff was to pay a deposit of \$5 per bale. The cotton before being weighed or manually delivered, was destroyed by fire. *Held*, that the property had not passed to plaintiff, but remained at risk of defendant, and plaintiff was entitled to recover back his deposit. *Ct. of Appeals*, 1858, *Joyce v. Adams*, 8 *N. Y. (4 Sold.)*, 291; reversing *S. C.*, 2 *Sandf.*, 1.

237. Plaintiff agreed to purchase 1,000 barrels of flour, being a part of a larger number in store, and the seller agreed to deliver them in good order, at any time, prior to a certain period, at a price agreed upon and paid. *Held*, that no title to the property passed, until the particular barrels had been ascertained and identified, and delivered to the purchaser. The contract was not a sale, but a special agreement to be executed in future. [2 *Bl. Com.*, 446; *Ross on Pur. & Vend.*, 1; 1 *Long on Sales*, 154; 5 *Taunt.*, 176; 5 *B. & Adol.*, 318; 6 *Cow.*, 250; 3 *N. H.*, 882; 18 *Pick.*, 213; 2 *Kent. Com.*, 498; 6 *East*, 626; 6 *B. & Ores.*, 360; 5 *Id.*, 857; 7 *Cow.*, 85; 18 *East*, 522; 2 *Maul. & Sel.*, 396; 2 *Hill*, 187.] *Supreme Ct.*, 1844, *Field v. Moore*, *Hill & D. Supp.*, 418.

238. Where hay sold by a collector of taxes, yet remained to be weighed, or otherwise ascertained and separated from the other hay of the owner,—*Held*, that title did not pass. The officer who makes a judicial sale must at the time separate the property he sells from the mass of property with which it is mixed. He cannot leave this to the subsequent act of parties. *Supreme Ct.*, 1850, *Stevens v. Eno*, 10 *Barb.*, 95.

239. Where the delivery, and payment of the price, are to be simultaneous, the title an-

til delivery or payment, remains in the seller. *N. Y. Superior Ct.*, 1856, *Kelley v. Upton*, 5 *Duer*, 836.

240. Under a contract for the payment of a specified sum in wagons, to be delivered within one year at C. landing,—*Held*, that it was the duty of the promisor, after the delivery at the storehouse at the landing, to notify the purchaser; and that until such delivery and notice, the promisee was not in circumstances to object to the quality, and therefore no title passed. *Supreme Ct.*, 1850, *Newcomb v. Cramer*, 9 *Barb.*, 402.

241. Plaintiff agreed to sell R. a quantity of soap, and agreed to take in exchange, as part-payment, a lot of damaged candles, but before plaintiff had delivered his soap, or had taken away R.'s damaged candles, R. failed and made an assignment. *Held*, that title to the candles did not pass to plaintiff, until he had completed the delivery of the soap; and plaintiff could not sustain an action for the value of the candles against a purchaser from R.'s assignee. *N. Y. Com. Pl.*, 1857, *Chapin v. Potter*, 1 *Hill.*, 866.

242. Chattel to be manufactured. Where an article agreed to be sold is yet to be manufactured, the title does not pass by the mere completion of the manufacture. There must be some act on the part of the seller which amounts to a delivery, and some act on the part of the buyer which amounts to an acceptance. *Supreme Ct.*, 1857, *Comfort v. Kiersted*, 26 *Barb.*, 472.

243. This rule applied in a peculiar case. *Id.*

244. Where one constructs a chattel—*e. g.*, a vessel—for another, to be delivered complete by a given day, at a fixed price, no title passes to the person for whom it is built, until it is completed and delivered. It makes no difference that the greater part of the purchase price is agreed to be, and in fact is, paid in instalments as the work progresses. *Ct. of Appeals*, 1854, *Andrews v. Durant*, 11 *N. Y. (1 Kern.)*, 85.

245. The English rule in respect to such cases, disapproved. *Id.*

246. Sale of canal-boat. S. agreed with D. to sell him a canal-boat, which D. was to pay for in transporting flour for S. Before the purchase-money had all been paid, the sheriff levied an execution against D. upon the boat, which was then held by him. *Held*, that the agreement was an executory contract of sale,

Stoppage in Transit.

with the implied qualification that D. was to have the use of the boat, for the purpose of performing the required transportation; but he acquired no property in the boat, until the purchase-money was all paid. *Supreme Ct.*, 1842, *Strong v. Taylor*, 2 *Hill*, 826. To nearly same effect are, 1849, *Tuthill v. Wheeler*, 6 *Barb.*, 862; 1851, *Williams v. Johnson*, 11 *Id.*, 501.

247. — of lumber. A contract of sale of lumber, to be paid for in instalments, provided that the seller should convey upon payment, and should hold the lumber as security for the payment of the instalments. *Held*, that no title passed until full payment was made; that meantime one who bought from the seller could hold the lumber as against attaching creditors of the buyer. *Supreme Ct.*, 1855, *Tyler v. Strang*, 21 *Barb.*, 198.

248. Subsequent purchase by seller. The principle on which a subsequent purchase of property by one who has previously assumed to sell it inures to the benefit of his vendee, is that of estoppel to avoid circuity of action, and the rule applies only where the first sale was with warranty. *Id.*

IX. STOPPAGE IN TRANSIT.

249. When the right arises. The right of stoppage in transit can never apply to a consignment to a creditor to whom the consignor is indebted to the full value of the goods. *Chancery*, 1832, *Clark v. Mauran*, 3 *Paige*, 373.

250. Where the buyer became insolvent, while the goods were on the way, and wrote to the seller that he might reclaim the goods, which he elected to do,—*Held*, that no question of stoppage in transit arose, the reclamation being by consent of the seller; but that the facts showed a rescission or resale, which invested the property in the seller, as against the sheriff who seized the goods on an execution, after the seller's election to reclaim had been made. *Supreme Ct.*, 1841, *Ash v. Putnam*, 1 *Hill*, 302.

251. How long it continues. The right of stoppage in transit does not cease on the arrival of the goods at the port of delivery, but continues until they come to the possession of the vendee, or of some one holding them as his agent. *Ct. of Errors*, 1846, *Mottram v. Heyer*, 5 *Den.*, 629.

252. Whether property which has arrived at the port of entry, and has been entered at

the custom-house, at the consignee's risk and expense, but on which the duties have not been paid; is to be considered delivered to the vendee, so as to terminate the right of stoppage. *Id.*

253. The time during which the right of stoppage in transit exists, is during the whole period of the transit from the seller to the buyer, and continues so long as the goods remain in the hands of a warehouseman, though at the place to which they were directed to be sent. *Ct. of Errors*, 1840, *Covell v. Hitchcock*, 23 *Wend.*, 611; reversing *S. C.*, 20 *Id.*, 167.

254. The general rule is that while the goods remain in the possession of persons concerned in transporting them to the place of destination, they are subject to the seller's right of stoppage in transit. It is not material whether they are in the hands of carrier, depositary, or agent for forwarding, nor by which of the parties such middleman is employed. The right to stop continues until the goods come to the hands of some one who holds them to the use of the buyer, unconnected with the business of forwarding them. *Ct. of Appeals*, 1858, *Harris v. Pratt*, 17 *N. Y.* (3 *Smith*), 249; affirming *S. C.*, *sub nom.* *Harris v. Hart*, 6 *Duer*, 606. *S. P.*, *Supreme Ct.*, 1886, *Buckley v. Furniss*, 15 *Wend.*, 187; *S. C.* again, 1887, 17 *Id.*, 504.

255. The right of stoppage is not terminated by the goods coming to the hands of a mere shipping agent, although he is appointed by the buyer, and though he is to await further directions respecting the time and manner of shipping the goods to the buyer, if such shipment is to be to a place previously fixed. *Id.*

256. How it may be devested. Though some parcels of the goods have reached the vendee, the residue may be stopped in transit. *Supreme Ct.*, 1887, *Buckley v. Furniss*, 17 *Wend.*, 504; affirming 15 *Id.*, 187.

257. The right of stoppage in transit is not devested by the goods being seized by virtue of an attachment or execution at the suit of a creditor of the purchaser, when the right is exercised before the transit is at an end. *Supreme Ct.*, 1886, *Buckley v. Furniss*, 15 *Wend.*, 187; *S. C.* again, 1887, 17 *Id.*, 504.

258. Demand. The defendants, in New York, ordered goods from the plaintiffs, in England. The goods arrived, were entered at the custom-house, and carried from the

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ship to the public store and stored at the defendants' risk; but before the duties were paid, defendants became insolvent. Plaintiffs made a demand upon the *defendants* for the goods.

Held, by the Supreme Court, that the entry of the goods, and storage at defendants' risk, gave them a constructive possession, and terminated the transit. 1845, *Mottram v. Heyer*, 1 *Den.*, 488.

Held, by the Court of Errors, that even if this were not so, the demand made by plaintiffs was not sufficient to re-vest the goods in plaintiffs. It ought to have been made, not upon defendants, but upon the customs officer having the goods in charge. 1846, *Mottram v. Heyer*, 5 *Den.*, 629.

X. REMEDIES BETWEEN BUYER AND SELLER.

259. Action for the price. Where a seller proves actual possession and control in himself, and the fact of sale and delivery, he is not bound to give evidence of his own title in order to sustain an action for the price of the property sold, and the purchaser cannot deny the seller's title after having actually enjoyed the benefit of the bargain. *N. Y. Com. Pl.*, 1855, *Fitzpatrick v. Caplin*, 4 *E. D. Smith*, 865.

260. An action will not lie for goods sold and delivered, where there has been no delivery. There must be an actual or constructive delivery. *Supreme Ct.*, 1858, *Evans v. Harris*, 19 *Barb.*, 416.

261. An order for goods given by defendant and in possession of plaintiff, is presumptive evidence sufficient to entitle plaintiff to recover the price. Orders for goods differ from orders for money, which are presumed to be drawn on funds of the drawer in hands of the drawee. *Supreme Ct.*, 1882, *Alvord v. Baker*, 9 *Wend.*, 328.

262. One who, on purchasing goods, takes a due-bill payable in goods, and they are selected by and delivered to his transferee, is liable in assumpsit for goods sold. *Supreme Ct.*, 1848, *Monroe v. Hoff*, 5 *Den.*, 860.

263. Where goods are sold to be paid for by a particular note, which is not delivered, the seller, though he cannot sue on the common counts for goods sold until the credit expires, may immediately maintain an action for breach of the agreement to deliver the note, and recover the value of the goods as dam-

ages. *Supreme Ct.*, 1839, *Hanna v. Mills*, 21 *Wend.*, 90; *Yale v. Coddington*, *Id.*, 175.

264. Defence. Where the property bought is received and retained, a defect in *quality* cannot be regarded as a failure of consideration. Even if there was a warranty of quality, the breach creates not a defence, strictly, to the action, on a note given for the purchase-money, but a counter-right of action in the vendee. *N. Y. Superior Ct.*, 1858, *Gillespie v. Torrance*, 7 *Abbotts' Pr.*, 462.

265. The purchaser of a specific lot of timber, warranted of first quality, cannot, if the whole lot that he bargained for is delivered to him and retained, claim a deficiency in *quantity*, on the ground that a part of the timber has proved to be refuse, and therefore he has not received as much first quality timber as he bargained for. That the entire purchase included some refuse timber as well as the first quality, makes no difference. *Id.*

266. Relief in equity. Where the article sold is of some value, and the sale is without fraud or warranty, chancery will not rescind the sale or relieve the purchaser upon the ground that he has paid a very extravagant price. *So held*, on a sale of corporate stock of a speculative character. *Chancery*, 1838, *Moffat v. Winslow*, 7 *Paige*, 124.

267. On warranty. A buyer of several articles under warranty gave three notes for the price. Having paid two, and being sued on the third,—*Held*, he might show a breach of warranty in respect to one of the articles, either to bar or reduce the recovery. *Supreme Ct.*, 1838, *Judd v. Dennison*, 10 *Wend.*, 513.

268. Where goods are sold under a warranty as to quality, and there is no fraud, nor any stipulation for a return, although the warranty is broken, the buyer cannot rescind the contract and return the goods and recover back the price. His remedy is by action on the warranty. *Supreme Ct.*, 1842, *Voorhees v. Earl*, 2 *Hill*, 288; 1848, *Oary v. Gruman*, 4 *Id.*, 625.

269. Otherwise, where the sale was merely executory, or fraud on the part of the seller is shown. In such case, buyer may rescind; but he must offer to restore the whole subject-matter of the sale. *Supreme Ct.*, 1842, *Voorhees v. Earl*, 2 *Hill*, 288.

270. When there is a warranty of quality, the buyer is not bound, on discovering a defect, to return the goods in order to sustain an

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action for a breach. It is doubtful whether he has the right to do this. He may, without offering to return, sue for his damages, or recoup them in the seller's action for the price. *Ct. of Appeals*, 1856, *Muller v. Eno*, 14 *N. Y. (4 Kern.)*, 597; reversing *S. C.*, 8 *Duer*, 421. *Ct. of Errors*, 1837, *Waring v. Mason*, 18 *Wend.*, 425.* *Supreme Ct.*, 1884, *Boorman v. Jenkins*, 12 *Id.*, 566.

271. To sustain an action upon a warranty, it is not necessary that all the representations made by the defendant should be false, or all actionable. If any part of the representations are so, it will suffice. *Supreme Ct.*, 1857, *Sweet v. Bradley*, 24 *Barb.*, 549.

272. Upon a warranty, a seller is accountable for any defect, whether he knew it or not. Upon a mere representation as to quality, he is not liable for damages unless he knew it to be false. *Supreme Ct.*, 1849, *Carley v. Wilkins*, 6 *Barb.*, 557. Compare *Edick v. Crim*, 10 *Id.*, 445.

273. Mere want of title in the seller of goods is not, though false assertions of title may be, a ground of action to recover back the price, if there has been no recovery by the true owner against the buyer. *Supreme Ct.*, 1840, *Case v. Hall*, 24 *Wend.*, 102.

274. Agreement for return. Upon the sale of a slave, it was agreed that if the purchaser did not like him, he might return him, and the seller would refund the purchase-money, — *Held*, obligatory upon the seller. *Supreme Ct.*, 1801, *Giles v. Bradley*, 2 *Johns. Cas.*, 258.

275. On the sale of a horse, it was agreed that the buyer might, within a reasonable time, return it and receive back the price, if returned in as good condition as at the time of delivery, the buyer afterwards returned the horse to the seller, who received it without objection and repaid the price. *Held*, that the seller could not afterwards sue the buyer for deterioration of the horse not arising from a secret injury. *Supreme Ct.*, 1816, *Lord v. Kenny*, 18 *Johns.*, 219.

276. The seller of a chattel agreed that the purchaser, if dissatisfied, might return it, within a certain time, and take another. The purchaser did return it, but refused to take another though offered. *Held*, he was not entitled to any abatement upon his note for the

price, for defects in the article originally furnished. *Supreme Ct.*, 1841, *Pinney v. Hall*, 1 *Hill*, 89.

277. Lien. The rule by which the vendor of land has a lien for the purchase-money as against the original vendee, is confined to sales of real estate. There is no such lien in favor of the seller of a chattel. *Ct. of Errors*, 1830, *Lupin v. Marie*, 6 *Wend.*, 77.

278. Where goods are sold and delivered conditionally, the buyer receives them as trustee for the owner, and the owner has an equitable lien upon them in the hands of the buyer or his voluntary assignee. *Chancery*, 1822, *Haggerty v. Palmer*, 6 *Johns. Ch.*, 437; *S. P.*, 1829, *Haggerty v. Duane*, 1 *Paige*, 321. *Supreme Ct.*, 1816, *Palmer v. Hand*, 13 *Johns.*, 484.

279. Resale. The buyer should, on the day fixed for the delivery, pay the price and take the goods away. If he fails, the latter may sell them, upon notice to him, and look to him for the deficiency, if any, by way of damages. *Supreme Ct.*, 1810, *Sands v. Taylor*, 5 *Johns.*, 395; 1836, *Bement v. Smith*, 15 *Wend.*, 493. Compare *Healy v. Utly*, 1 *Cov.*, 345.

280. Where, after the sale is so far completed that the property is changed, the buyer refuses to receive the goods, this constitutes the seller his agent to manage them; and the latter, giving the buyer notice, may sell the goods at auction, and recover the difference between the contract price and that realized at the sale, from the buyer. *Supreme Ct.*, 1810, *Sands v. Taylor*, 5 *Johns.*, 395, 404.

281. A seller after he has notified the buyer of his readiness to deliver, and has waited a reasonable time for the buyer to take away the goods, may resell the property, and the buyer will be liable to make good any loss that may arise on the resale. *N. Y. Com. Pl.*, 1852, *Bogart v. O'Regan*, 1 *E. D. Smith*, 590.

282. What is a reasonable time in such case. *Id.*

283. A sale of goods at a fixed price less four per cent. for cash, payable on a certain day, is a sale for cash, and not on a credit for the price. On the buyer's default on the day named, the seller may resell the goods on notice to the buyer, and look to him for the deficiency by way of damages for the breach of the contract. [5 *Johns.*, 395; 2 *Kent's Com.*,

* Compare *Sprague v. Blake*, 20 *Wend.*, 61.

Salt.

Salt-springs.

Salvage.

564; 15 Wend., 497; 8 Martin, 402; 8 Campb., 426; 4 Bing., 722.] *N. Y. Superior Ct.*, 1848, *Orooks v. Moore*, 1 *Sandf.*, 297; following 5 *Johns.*, 395.

234. The seller must dispose of the goods in good faith, and according to the usual mode. There is no rule requiring the resale to be at auction. *N. Y. Superior Ct.*, 1848, *Orooks v. Moore*, 1 *Sandf.*, 297.

235. The buyer is not entitled to specific notice of the time and place of the resale. *N. Y. Com. Pl.*, 1852, *Bogart v. O'Regan*, 1 *E. D. Smith*, 590.

236. If the buyer offers to return the goods, and the seller accepts them, and treats them as his own, this is a rescission of the sale; and the seller cannot afterwards recover a difference between the sum he resells them for and the contract price. *Supreme Ct.*, 1823, *Healy v. Utly*, 1 *Cow.*, 345.

237. Short measure in dry-goods, penalty of double the amount of deficiency imposed for. *Laws of 1850*, 678, ch. 307.

As to Auction Sales, see AUCTION AND AUCTIONEER.

As to sales on Execution, see EXECUTION.

As to Judicial Sales, see JUDICIAL SALE.

SALT.

The act of 1843—giving a bounty on salt exported from the State (repealed, 3 *Rev. Stat.*, 3 ed., 497, § 1)—is not to be construed as giving more than one bounty upon the exportation of the same salt. *Supreme Ct.*, 1844, *Exp. Burnet*, 6 *Hill*, 897.

SALT-SPRINGS.

1. Never to be sold or disposed of. Lands contiguous thereto, how disposed of. *Const. of 1846*, art. 7, § 7.

2. Statutes regulating use. 1 *Rev. Stat.*, 5 ed., 641-684.

3. Authority to sell. The provision of Laws of 1843, 468,—authorizing the commissioners of the land-office to sell “such portion of the Onondaga Salt-springs Reservation as are not occupied for the manufacture of salt, and which they shall deem unsuited for the purpose,”—makes them judges of the fact of unfitness, and a patent issued in pursuance of

a sale by them is conclusive of the fact. *Supreme Ct.*, 1850, *Parmelee v. Oswego & Syracuse R. R. Co.*,* 7 *Barb.*, 599.

4. Erection of works a condition precedent. Where lands are set apart to an applicant, by the deed or license of the commissioners of the land-office, for the purpose of erecting works thereon for the manufacture of coarse salt, pursuant to the provisions of art. 4, tit. 10, ch. 9, pt. 1, of the Revised Statutes, the interest of the licensees in such lands, is subject to the condition precedent of their erecting works thereon for the purpose of such manufacture within four years from the time when they are so set apart, and so far as the lands are not covered with such erections such interest ceases at the expiration of that time, by force of the breach and without an entry. *Ct. of Appeals*, 1851, *Parmelee v. Oswego & Syracuse R. R. Co.*, 6 *N. Y.* (2 *Seld.*), 74; affirming 3 *C.*, 7 *Barb.*, 599.

5. The licensees have no interest whatever in the unoccupied lands after breach; and cannot maintain ejectment against persons entering thereon under letters-patent issued by the State, whether issued in accordance with law or not. The validity of such letters-patent cannot be questioned by persons wrongfully in possession of the land. *Id.*

6. The diversion of an entire lot, and an appropriation of it to the purposes of keeping a tavern,—*Held*, to work a forfeiture of the lease, under the act of 1838. *Supreme Ct.* (1847?), *Williams ad. Marks*, cited in *Hasbrook v. Paddock*, 1 *Barb.*, 635, 641.

Otherwise, of a diversion of a part of a lot. *Sp. T.*, 1847, *Hasbrook v. Paddock*, 1 *Barb.*, 635.

As to the construction and effect of the constitutional provisions on this subject, see CONSTITUTIONAL LAW, 271, 300, 301.

SALVAGE.

1. The principle of the maritime law, that goods contained in a vessel sunk or abandoned at sea are derelict, and the finder who recovers them has by the maritime law a lien for salvage, applies to the case of loss in the waters of a river navigable from the sea, and within the ebb and flow of the tide, though

* Affirmed, *Ct. of Appeals*, 1851, 6 *N. Y.* (2 *Seld.*), 74.

In what Cases it should be ordered.

within the body of a county; and a vessel or its cargo may be derelict, and a salvage service may be rendered and a lien therefor acquired there, as well as upon the high seas. It is sufficient, if it be within the bounds of admiralty jurisdiction. *Ct. of Appeals*, 1853, *Baker v. Hoag*, 7 *N. Y.* (3 *Seld.*), 555.

2. That whether the thing is or not a legal derelict, only affects the question of the rate of salvage in the particular case. *Ib.*

3. Recapturing a vessel, which had been taken by a friendly power, raises no claim for salvage, for such a retaking is unlawful. [1 *Oranch*, 28.] *Supreme Ct.*, 1806, *Peck v. Randall*, 1 *Johns.*, 165.

4. When there is no express agreement, the circumstances of each case must govern in determining whether the services rendered are to be compensated on a *quantum meruit*, or as salvage. Where the vessel in peril was grounded in a river, but not derelict, and plaintiff was employed with others, and it did not appear that his compensation was dependent upon success;—*Held*, that the plaintiff was not entitled to recover a salvage compensation. *N. Y. Superior Ct.*, 1850, *Sturgis v. Law*, 8 *Sandf.*, 451.

As to jurisdiction of cases of salvage, see *SUPERIOR COURT OF N. Y.*; *SUPREME COURT*.

SATISFACTION OF PART OF PLAINTIFF'S CLAIM.

1. "When the answer of the defendant, expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy."* *Code of Proc.*, § 244, last paragraph.

2. Before this provision was enacted plaintiff was allowed judgment, on motion under § 246, for the part not denied. *Supreme Ct.*, *Sp. T.*, 1850, *Tracy v. Humphrey*, 5 *How. Pr.*, 155; *S. C.*, 8 *Code R.*, 190.

3. Payment to third party. Where it appears by the pleadings that the plaintiff deposited money with the defendant to pay for him to a third party (the defendant being surety for the payment thereof to such third party), which money is in defendant's possession,

the court will order it to be deposited in court, or paid to such third party. [*Code* of 1851, § 244, subd. 5.] *N. Y. Superior Ct.*, 1851, *Burhans v. Casey*, 4 *Sandf.*, 706.

4. Where a surviving partner, sued by the administrator of the deceased partner for an account, admits a balance in his hands due to such partner's estate, but makes claims against the decedent, and against the partnership, he may be ordered, under § 244 of the Code, to pay over such balance, less the contested claims against the decedent, on the administrator giving security to pay the decedent's proportion of the claims against the estate, and of the costs and expenses. *N. Y. Superior Ct.*, 1851, *Roberts v. Law*, 4 *Sandf.*, 642.

5. Part of claim. The power of the court to order satisfaction of that part of the plaintiff's claim admitted by the answer to be just, is not confined to cases in which one or more of several distinct items claimed is admitted, but such an order may be made where a part of a sum claimed is admitted to be due. *N. Y. Com. Pl., Sp. T.*, 1855, *Quintard v. Secor*, 3 *E. D. Smith*, 614; *S. C.*, 1 *Abbotts' Pr.*, 393; but see *Russell v. Meacham*, 16 *How. Pr.*, 193.

6. When a fund in litigation has been brought into court, and the answer of defendant admits a part of it to be due to the plaintiff, but disputes his claim to the residue—the court may order the sum admitted to be due to be paid over to the plaintiff without prejudice to his further claims. *N. Y. Com. Pl.*, 1855, *Merritt v. Thompson*, 3 *E. D. Smith*, 599; *S. C.*, 1 *Abbotts' Pr.*, 238; 10 *How. Pr.*, 428.

7. Previous offers by the defendant to pay that sum to the plaintiff in full satisfaction of his claims, form no reason why such an order should be refused. *Ib.* *N. Y. Superior Ct.*, 1855, *Dusenberry v. Woodward*, 1 *Abbotts' Pr.*, 448; qualifying *Smith v. Olsen*, 4 *Sandf.*, 711.

8. Previous offer. Present inability. The court will not order satisfaction of a part of the plaintiff's claim admitted by the answer, where the answer shows the defendant has frequently offered to pay the sum admitted, but the plaintiff has refused to receive it, and it does not appear that defendant is now able to pay it. *Supreme Ct., Sp. T.*, 1855, *St. John v. Thorne*, 2 *Abbotts' Pr.*, 166.

9. Where defendant by answer admits a part of plaintiff's claim to be just, an order

* The words in italics were inserted by the amendment of 1857, subsequently to many former decisions stated in the text.

In what Cases ordered; and how enforced.

requiring him to satisfy such part, will be made in the Common Pleas, notwithstanding that the defendant has made an offer in writing to allow the plaintiff to take judgment for the sum admitted to be due; and such an order will be enforced by attachment, if necessary. *N. Y. Com. Pl.*, 1855, *Myers v. Trimble*, 3 *E. D. Smith*, 607; *S. C.*, 1 *Abbotts' Pr.*, 220, 399; *Sp. T.*, *Quintard v. Secor*, 3 *E. D. Smith*, 614; *S. C.*, 1 *Abbotts' Pr.*, 398.

10. What is an admission. An answer denying plaintiff's claim, and averring that he is not entitled to more than a sum named, less than that in the complaint, is not such an admission that the court will order payment. *N. Y. Superior Ct.*, 1851, *Dolan v. Petty*, 4 *Sandf.*, 678.

11. Payment should not be ordered (under section 244, subd. 5), unless the answer contains a plain, explicit, and full admission that a definite sum is due to the plaintiff. This provision of the Code is regarded as going no further than the rule which prevailed in the Court of Chancery, under which it was settled that an application to order the payment of money into court, or to a party before final decree, must be founded upon a full and explicit admission by the defendant of the sum due. Such order will not be made, therefore, when, to ascertain whether a specific sum is due, a critical examination of the pleadings or of books and accounts is necessary. *N. Y. Superior Ct.*, 1858, *Coursen v. Hamlin*, 2 *Duer*, 518; but see the section as amended, *supra*, 1.

12. A concession in the answer that not more than a certain sum was due, is a sufficient admission of that sum as a part of plaintiff's claim. *N. Y. Com. Pl.*, *Sp. T.*, 1855, *Quintard v. Secor*, 3 *E. D. Smith*, 614; *S. C.*, 1 *Abbotts' Pr.*, 398.

13. It is not enough to authorize an order under the last clause of section 244 of the Code, that the defendants admit that they hold a part of the fund which the plaintiff seeks to recover, if they do not admit the plaintiff's right to the fund. *Supreme Ct.*, *Sp. T.*, 1856, *Bender v. Sherwood*, 15 *How. Pr.*, 258.

14. In an action upon a draft, the answer alleged that it was given for the price of goods sold by the plaintiff, and averred a breach of warranty, and claimed to recoup damages therefor to a part of the amount. *Held*, a proper case for an order, under section 244 of

the Code, directing the defendant to satisfy the residue of plaintiff's claim. *N. Y. Com. Pl.*, 1858, *Baker v. Nussbaum*, 1 *Hill.*, 549.

15. One of several claims. In an action upon several separate causes of action, arising on contract, if to one of them defendant interposes no defence, an order requiring him to pay the amount of that cause of action, to be enforced by execution, should be granted. *Supreme Ct.*, *Sp. T.*, 1858, *Russell v. Meacham*, 16 *How. Pr.*, 198.

16. Enforcing. The court have the power to enforce the order by imprisonment; though they should not do so where the debtor is unable to pay. *N. Y. Com. Pl.*, 1855, *Myers v. Trimble*, 3 *E. D. Smith*, 607; *S. C.*, 1 *Abbotts' Pr.*, 220, 399; *Sp. T.*, *Quintard v. Secor*, 3 *E. D. Smith*, 614; *S. C.*, 1 *Abbotts' Pr.*, 398.

Nor except to enforce payment of moneys held in a fiduciary capacity. *N. Y. Superior Ct.*, 1855, *Dusenberry v. Woodward*, 1 *Abbotts' Pr.*, 443; disapproving *Myers v. Trimble*, and *Merritt v. Thompson*, *supra*.

17. The plaintiff sued the buyer of goods for damages, charging him with a conversion of them, in having sold them as his own, when he had not complied with the conditions of the sale. Defendant denied the conversion, but admitted his indebtedness. *Held*, that an order under § 244, requiring payment of the indebtedness, should not be allowed. It would authorize defendant's imprisonment. *Supreme Ct.* (1855 f), *Slawson v. Conkey*, 10 *How. Pr.*, 57; reversing, *it seems*, *Slawson v. Conkey*, 1 *Abbotts' Pr.*, 228.

18. Satisfaction of a part of plaintiff's claim, admitted by the defendant's answer to be just, should not be ordered, where the claim is one on which the defendant is exempted from imprisonment by the Non-imprisonment Act of 1881; for in such case the order ought not to be enforced, as a provisional remedy, by attachment for contempt. *Supreme Ct.*, *Chambers*, 1855, *Lane v. Loee*, 11 *How. Pr.*, 860; *S. C.*, 2 *Abbotts' Pr.*, 129. Approved, *Gen. T.*, 1857, *Duncan v. Ainslie*, 26 *Barb.*, 199; and see *Russell v. Meacham*, 16 *How. Pr.*, 198.

19. Judgment. Under the Code, § 244, last clause, as amended, 1857,—allowing the order to be enforced as a provisional remedy, or as a judgment,—the court may direct judgment to be given for the plaintiff for the amount of the claim admitted to be just, without prejudice to

Saturday.

Savings-banks.

Scire Facias.

his right to proceed in the suit for the balance claimed by him. *Supreme Ct.*, 1857, *Duncan v. Ainalie*, 26 *Barb.*, 199.

SATURDAY.

1. Persons keeping it religiously, exempt from jury and militia^{*} duty thereon. *Laws of 1847*, 451, ch. 849, § 1.

2. Judgment. Under the Laws of 1839, 835, ch. 867,†—which provided that no process, judgment, &c., served or executed on Saturday, by or upon a person keeping that day religiously, should be valid,—service of process on another day returnable on that day, and judgment by default on that day, are not prohibited. Rendering a judgment is not serving or executing. *Supreme Ct.*, 1845, *Maxson v. Annas*, 1 *Den.*, 204.

3. Maliciously causing process to be served on such persons on that day, or returnable on that day, or procuring adjournment of suit against such person to such day, a misdemeanor. *Laws of 1847*, 451, ch. 849, § 2, 8.

SAVINGS-BANKS.

BANKING, 11—35, 183—189.

SCIRE FACIAS.

1. How far a new proceeding. Although for some purposes a *scire facias* is considered and treated as an action, still, if the object of the proceeding is to revive a judgment, it is a proceeding in the original action, and is but a continuation thereof. [1 *T. R.*, 888; 2 *Ohitt. Archb.*, 598; *Grah. Pr.*, 649.] *Chancery*, 1835, *Diekey v. Craig*, 5 *Paige*, 288. Compare *infra*, 19, 41.

2. Forfeiture of franchise. *Scire facias*, instituted by government, is the proper remedy against a corporation for a misuser or non-user of its privileges, which works a forfeiture. [5 *Tyng*, 280.] *Chancery*, 1821, *Slee v. Bloom*,‡ 5 *Johns. Ch.*, 866.

* But see the general militia act of 1862, *Laws of 1862*, 881, ch. 477, which enumerates exceptions not including this (§ 1), and repeals all inconsistent acts (§ 819).

† Repealed, 1847, 451, ch. 849.

‡ Reversed on the merits, 19 *Johns.*, 456.

3. If after a judgment in favor of husband and wife, on a bond to them jointly for their support, the husband dies, the interest survives to the wife, and on her subsequent death, her executors may bring a *scire facias* on the judgment. *Supreme Ct.*, 1813, *Schoonmaker v. Elmendorf*, 10 *Johns.*, 49.

4. Wherever there is a change of parties, by marriage, bankruptcy, or death, whereby other parties become interested in the execution of the judgment, a *scire facias* is necessary to make such new person a party to the judgment. [Tidd's *Pr.*, 1021.] *Supreme Ct.*, 1820, *Johnson v. Parmely*, 17 *Johns.*, 271.

5. In debt on a bond conditioned for payment in instalments, after judgment it is not necessary to have a *scire facias* to warrant an execution for subsequent arrears. *Supreme Ct.*, 1830, *Wood v. Wood*, 3 *Wend.*, 454. Followed, 1843, *Harmon v. Dedrick*, 8 *Barb.*, 192.

6. The provision of 2 *Rev. Stat.*, 2 ed., 808, §§ 2, 3,—that writs of *scire facias* shall be issued to continue a suit by or against the representatives of either party who shall have died in the progress of the suit,—is a mere declaration that such writs may issue, as theretofore they had done; and adds nothing to the law. *Supreme Ct.*, 1838, *Webber v. Underhill*, 19 *Wend.*, 447.

7. When issued. Under 2 *Rev. Stat.*, 477, § 2,—which requires that a *scire facias* to revive a judgment against the personal representatives of the defendant, must be issued "within a year after the cause for issuing it shall arise,"—the cause is the death of the defendant, but the year does not begin to run until the personal representative qualifies. *Supreme Ct.*, 1840, *Clark v. Sexton*, 28 *Wend.*, 477.

8. In ejectment, if after judgment for the plaintiffs, one of them dies, *habere facias* may issue, without any *scire facias*; but it must be in their joint names. [1 *Archb.*, 874; 2 *Saund.*, 72, K., n. 8; 1 *Ld. Raym.*, 244.] *Supreme Ct.*, 1840, *Howell v. Eldridge*, 21 *Wend.*, 678.

9. Stating judgment. A *scire facias* in the usual form, setting out that execution yet remains to be made, is sufficient, without showing in terms that the judgment is unsatisfied. *Supreme Ct.*, 1841, *Murphy v. Cochran*, 1 *Hill*, 339.

10. Assignment. A *scire facias* by an assignee in his own name must set forth the

Pleading.	Parties.	Scire Facias on Judgment.
assignment, with the circumstances of time and place; but need not aver notice of it to defendant. Reciting the assignment as under the assignor's hand and seal, sufficiently shows that it was made upon a valuable consideration. <i>Supreme Ct.</i> , 1841, <i>Murphy v. Cochran</i> , 1 <i>Hill</i> , 339.		land a party to the proceeding; and all the terre-tenants must be parties, that they may be made jointly contributory to the satisfaction and payment of the judgment. [2 <i>Saund.</i> , 51; <i>T. Raym.</i> , 26; 1 <i>Salk.</i> , 320.] <i>Supreme Ct.</i> , 1822, <i>Morton v. Croghan</i> , 20 <i>Johns.</i> , 108.
11. Justice's judgment. The provision of 2 <i>Rev. Stat.</i> , 177, 2 ed., § 129,—giving a <i>scire facias</i> on justice's judgments docketed,—does not apply to a judgment rendered before the enactment. <i>Supreme Ct.</i> , 1842, <i>Johnson v. Burrell</i> , 2 <i>Hill</i> , 288.		18. The plaintiff cannot enter a <i>nolle prosequi</i> as to those who have appeared and pleaded, and take judgment against such as have made default. Such <i>nolle prosequi</i> is a discontinuance of the whole proceeding, and upon it the plaintiff must pay costs. <i>Ib.</i>
12. A <i>scire facias</i> is a suit or action within the meaning of the act (2 <i>Rev. Stat.</i> , 2 ed., 274, § 5)—providing that the assignee, for value, of a chose in action, if the assignor be dead and there be no executors or administrators, or if they have no interest, &c., or refuse, &c., may sue and recover in his own name. <i>Supreme Ct.</i> , 1841, <i>Murphy v. Cochran</i> , 1 <i>Hill</i> , 339.		19. After the death of the testator, a judgment against him was revived by <i>scire facias</i> ; execution was issued, and the premises sold by the sheriff, who executed a deed therefor, and the defendants were in possession under that title. But the only parties on whom the <i>scire facias</i> was served were two surviving life-tenants. <i>Held</i> , that the judgment, execution, and sale had no effect upon the estates in remainder. Under 2 <i>Rev. Stat.</i> , 577, § 5, execution cannot be had upon the lands of a deceased judgment-debtor, without <i>scire facias</i> , to which all persons having an interest, and intended to be affected thereby, must be made parties by service of the writ upon them. <i>Ct. of Appeals</i> , 1858, <i>Campbell v. Rawdon</i> , 18 <i>N. Y.</i> (4 <i>Smith</i>), 412; and see a previous decision in <i>S. C.</i> , 19 <i>Barb.</i> , 494.
13. The assignee of an executor cannot proceed in his own name on notes payable to the decedent and assigned by the executor, unless the executor be dead, &c. <i>Supreme Ct.</i> , 1842, <i>Seeley v. Seeley</i> , 2 <i>Hill</i> , 496.		20. Old judgment. A <i>scire facias</i> issued to revive a judgment of more than ten years' standing, without a previous affidavit that the judgment is unsatisfied, is irregular and should be quashed. <i>Supreme Ct.</i> , 1812, <i>Lansing v. Lyons</i> , 9 <i>Johns.</i> , 84.
14. Title. In <i>scire facias</i> on the death of the plaintiff after issue, to prevent an abatement, and substitute those who have succeeded to his title, the parties bringing it must show that they have succeeded to such claim of title as he had; but need not show that he had title. <i>Supreme Ct.</i> , 1845, <i>Boynton v. Hoyt</i> , 1 <i>Den.</i> , 53.		21. Where a judgment is above ten, and under twenty years' standing, the plaintiff may apply to the court for leave to issue a <i>scire facias</i> , supported by an affidavit of its being unpaid and unsatisfied. [2 <i>Salk.</i> , 598.] If of more than twenty years' standing, there must be a service of a notice of the motion, &c., or a rule to show cause; and the court have a discretion to grant or refuse a <i>scire facias</i> . <i>Supreme Ct.</i> , 1819, <i>Bank of N. Y. v. Eden</i> , 17 <i>Johns.</i> , 105.
15. Parties. Where a judgment is revived by <i>scire facias</i> against the original defendant, it is not necessary to make the terre-tenants parties; but only where the original defendants are dead. [Tidd's <i>Pr.</i> , 1021; 2 <i>Saund.</i> , 7, n. 4.] <i>Supreme Ct.</i> , 1814, <i>Jackson v. Shaffer</i> , 11 <i>Johns.</i> , 518.		22. Second writ. There must be fifteen days between <i>teste</i> of first and return of second <i>scire facias</i> . <i>Supreme Ct.</i> , 1798, <i>Woodman v. Little</i> , <i>Col. & O. Cas.</i> , 60.
16. That to revive a judgment against a deviser, a <i>scire facias</i> against his heirs, when they took nothing by descent, is useless. <i>Ct. of Errors</i> , 1816, <i>Jackson v. Delancy</i> , 18 <i>Johns.</i> , 536; affirming <i>S. C.</i> , 11 <i>Id.</i> , 365; and see <i>Jackson v. Robins</i> , 16 <i>Id.</i> , 537; affirming <i>S. C.</i> , 15 <i>Id.</i> , 169.		23. Notice of entry of rule to appear need not be served. <i>Supreme Ct.</i> , 1803, <i>Neilson v. Cox</i> , 1 <i>Cai.</i> , 121.
17. Where a judgment-creditor proceeds to enforce his lien on the realty of the deceased defendant, and it becomes necessary for that purpose to revive the judgment, he must make every person having a fee in the		

Practice.

Defence.

24. Notice. Judgment. On the return of the writ, a rule for defendant to appear in four days may be entered, and without giving him notice; but judgment cannot be signed till four days after. *Supreme Ct.*, 1808, *Spencer v. Webb*, 1 *Cal.*, 118.

25. Four days allowed. Every writ of *scire facias*, of which notice must be given to the defendant, must be left in the office four days before the return, exclusive of the day on which the writ is lodged with the sheriff, and of the return-day also. [4 *Barn. & Ald.*, 357.] *Supreme Ct.*, 1828, *Cumming v. Eden*, 1 *Cow.*, 70.

26. Direction. A *scire facias* directed to the sheriff of the county of the venue in the original judgment, although the defendants resided elsewhere in the State,—*Held*, regular. *Supreme Ct.*, 1846, *Hammond v. Harria*, 2 *How. Pr.*, 115.

27. The copy served, must be certified by the officer serving it, with his name. [2 *Rev. Stat.*, 579, § 16.] The word "copy" merely is not enough. *Supreme Ct.*, 1845, *Henry v. Henry*, 1 *How. Pr.*, 167.

28. Return. Two *nilis* are equal to a return of *scire fesi*; and this rule applies where the *scire facias* is against heirs, devisees, and terre-tenants, provided they are named in the writ. If not named, the sheriff must return whether there are such persons in his bailiwick. Form of return. *Supreme Ct.*, 1828, *Cumming v. Eden*, 1 *Cow.*, 70.

29. Costs. Where a *scire facias* is prosecuted in good faith, and in a proper case, costs follow the recovery, no matter how small the amount. [2 *Rev. Stat.*, 613, § 8.] *Supreme Ct.*, 1884, *Hoyt v. Blain*, 12 *Wend.*, 188.

30. Discontinuance. If a plaintiff who sues out a *scire facias* to revive a judgment, does not proceed upon it within a year and a day, it is a discontinuance. So, if he does not sue out execution on a judgment in *scire facias*, within a year, he must revive it again. *Supreme Ct.*, 1812, *Vanderheyden v. Gardener*, 9 *Johns.*, 79.

31. Defences. In *scire facias* against devisees and ter-tenants, an objection that the heirs were not warned, or that they were not such ter-tenants as ought to have been summoned, must be taken by plea in abatement, and not by motion. [2 *Saund.*, 9.] *Supreme Ct.*, 1808, *Whitney v. Camp*, 3 *Johns.*, 86; 1828, *Cumming v. Eden*, 1 *Cow.*, 70.

32. To a *scire facias* on a judgment, whether had by confession, default, or otherwise, the defendant cannot plead any matter which he might have pleaded to the original action, or which existed prior to the judgment. Where the judgment is by confession, the proper remedy is by application by motion to the court. [*Gas. temp. Hardw.*, 220; *Cowp.*, 727.] *Supreme Ct.*, 1811, *McFarland v. Irwin*, 8 *Johns.*, 77.

33. The rule that nothing which was a defence to the original action can be pleaded in *scire facias*, applies only to the original parties or to privies, not strangers. A terre-tenant may plead to the *sci. fa.*, matter showing that the judgment was irregularly entered and is void.* *Supreme Ct.*, 1825, *Griswold v. Stewart*, 4 *Cow.*, 457.

34. Personal representatives. In *scire facias* to procure execution against personal representatives, a plea by the administrator that he has not accounted to the surrogate, is a bar. *Supreme Ct.*, 1824, *Dox v. Backenstose*, 12 *Wend.*, 542.

Otherwise, of a judgment against the decedent. 1840, *Clark v. Sexton*, 23 *Id.*, 477.

35. Plea of conveyance in trust. To a *scire facias* against the heirs and terre-tenants of a defendant who died in execution, a plea of a defendant who was in possession of the land belonging to the original defendant, at the time of docketing the judgment against him, stating a conveyance by the original defendant in trust to pay a debt due to the present defendant, and the surplus to other creditors, is sufficient, without setting forth who were the other creditors, or what was the amount of their debts. *Supreme Ct.*, 1817, *Velie v. Myers*, 14 *Johns.*, 162.

36. — of satisfaction. In *scire facias* to revive a judgment, a plea by the terre-tenant of the return of an execution satisfied, and an entry upon the docket pursuant to the statute,—*Held*, bad, inasmuch as it did not set forth a purchase from or under the judgment-debtor. *Supreme Ct.*, 1848, *Taylor v. Ranney*, 4 *Hill*, 619.

37. In *scire facias* to revive a judgment, a plea by the terre-tenant that the plaintiff issued a *fi. fa.* upon the judgment, and that in virtue thereof the sheriff caused to be levied "the damages, &c., on the goods and chattels,

* Denied in *Warden v. Tainter*, 4 *Watts*, 279.

Action substituted for Scire Facias.

Schuyler (County of).

Seal.

lands and tenements" of the defendant,—*Held*, not sufficient to show the judgment satisfied, and that the plea was therefore bad. Otherwise, had the allegation in the plea been, that the damages, &c., were levied of the goods, &c. *Id.*

38. Irregular. A *scire facias* irregularly issued to revive a judgment, or an execution issued after a year and a day without a *scire facias*, is voidable only, and cannot be called in question in a collateral action, so as to defeat the title of a purchaser under the execution. [8 *Cai.*, 270; 8 *Johns.*, 865.] And, it seems, that after twenty years, it cannot be avoided on a direct application for that purpose. *Ct. of Errors*, 1816, *Jackson v. Delancy*, 18 *Johns.*, 587; affirming S. C., 11 *Id.*, 365; 1819, *Jackson v. Robins*, 16 *Id.*, 537; affirming S. C., 15 *Id.*, 169.

39. The writ of scire facias abolished; and the same remedy now to be obtained by action;* but the abolition does not affect proceedings commenced, judgment rendered, or right acquired. *Code of Pro.*, § 428; and see *People v. Clarke*, 9 *N. Y.* (5 *Seld.*), 349; affirming S. C., 10 *Barb.*, 120.

40. Saving clause. The last clause of section 428 of the Code, relates only to proceedings by *scire facias* commenced before the Code took effect, whether judgment had been rendered thereon or not. *Supreme Ct.*, *Sp. T.*, 1847, *Catskill Bank v. Sanford*, 4 *How. Pr.*, 100.

41. Action now substituted. The writ of *scire facias* as known before the Code was both a public and a private remedy. Section 428 of the Code abolishes the writ as a public remedy. And since a *scire facias* was an action [Co. Lit., 290, b. 291; Wils. R., 251; 1 *Tenn. R.*, 267; 2 *Id.*, 46], it is abolished even as a private remedy by section 69 of the Code. In both aspects the writ is entirely abolished. The remedy now to be resorted to, as a substitute, is a new action. *Supreme Ct.*, 1855, *Alden v. Clark*, 11 *How. Pr.*, 209. To similar effect, *Sp. T.*, 1851, *Cameron v. Young*, 6 *Id.*, 372; 1854, *Thurston v. King*, 1 *Abbotts' Pr.*, 126.

* Under the Code of 1848, which did not contain this section, it was *Held*, that on a judgment in a suit commenced before July, 1848, *scire facias* might be issued to obtain execution after the lapse of two years from the entry of the judgment. *Supreme Ct.*, *Sp. T.*, 1849, *Anonymous*, 1 *Code R.*, 118.

SCHUYLER (County of).

The act of 1854 (*Laws of 1854*, 918, ch. 886),—erecting the county of Schuyler,—valid and constitutional. *De Camp v. Eveland*, 19 *Barb.*, 81; *Ramsey v. People*, 19 *N. Y.* (5 *Smith*), 41; 1859, *Lanning v. Carpenter*, 20 *N. Y.* (6 *Smith*), 447; affirming S. C., 23 *Barb.*, 402; 12 *How. Pr.*, 191.

SEAL.

1. What is. A seal is an impression upon wax, or wafer, or some other tenacious substance. A scrawl with a pen, at the end of the name, is not a seal. *Supreme Ct.*, 1810, *Warren v. Lynch*, 5 *Johns.*, 289; disapproving dictum in *Meredith v. Hinsdale*, 2 *Cai.*, 362; S. P., 1825, *Andrews v. Herriot*, 4 *Cow.*, 508; *q. v.*, *CONTRACTS*, 1014.

2. An actual seal—not mere words or lines in writing—stamped upon paper, of sufficient tenacity to receive and retain the impression, must be deemed technically and strictly a seal. *N. Y. Superior Ct.*, 1856, *Ross v. Bedell*, 5 *Duer*, 462. To similar effect, *Supreme Ct.*, 1853, *Ourtis v. Leavitt*, 17 *Barb.*, 809; but see affirmance of S. C., 17 *N. Y.* (8 *Smith*), 521, 541, 546; but to the contrary (1842) is *Bank of Rochester v. Gray*, 2 *Hill*, 227.

3. Private seals to be made on wafer, wax, or some similar substance. 2 *Rev. Stat.*, 404, § 62.

4. Official and judicial seals may be by impression on the paper. 2 *Rev. Stat.*, 276, § 10. *Id.*, 404, § 61.

As to **Corporate seals**, see *CORPORATION*, 91–95.

5. One seal will suffice for several grantors or obligors. [Sir W. Jones, 268; 4 D. & E., 313.] *Ct. of Errors*, 1805, *Ludlow v. Simond*, 2 *Cai. Cas.*, 1, 7, 42, 55. *Supreme Ct.*, 1812, *Mackay v. Bloodgood*, 9 *Johns.*, 285; and see *Warren v. Lynch*, 5 *Id.*, 289; *Townsend v. Hubbard*, 4 *Hill*, 351.

6. If two sign an instrument, a seal affixed opposite the name of one, is to be deemed the seal of both, if it is shown to have been fixed by the authority of both. [Perk., 59, § 184; Sir Wm. Jones, 268; 1 *Dall.*, 63; 3 *Monr.*, 376; 2 *Dev.*, 498; 4 *Hill*, 351; 9 *Johns.*, 285; 4 *T. R.*, 318; 1 *Bl.*, 102; 7 *Gill. & J.*, 284.] *Supreme Ct.*, 1851, *Van Alstyne v. Van Slyck*, 10 *Barb.*, 888.

Effect of Sealing Contract.

Shipping-articles.

7. A seal imports a consideration, and a sealed instrument is not within the Statute of Frauds. *Supreme Ct.*, 1809, *Livingston v. Tremper*, 4 *Johns.*, 416.

8. When the consideration of a deed is not illegal or corrupt, so as to render it void, *ab initio*, and when it is executed understandingly, and with a knowledge of its legal import and effect, no plea at law can impeach it. The party is concluded by the nature of the instrument, and cannot be permitted to aver anything against it. [2 *Johns.*, 177; 13 *Id.*, 430; 5 *Cow.*, 506; 8 *Id.*, 290.] *N. Y. Superior Ct.*, 1829, *Belden v. Davies*, 2 *Hall*, 438.

9. **Exception.** A seal is not, in itself, sufficient to support an agreement in restraint of trade; for such an agreement requires a peculiar consideration. *Supreme Ct.*, 1839, *Ross v. Sadgbeer*, 21 *Wend.*, 166.

10. **Seal not conclusive.** The provision of 2 *Rev. Stat.*, 406, § 77 (*q. v.*, EVIDENCE, 386),—making a seal only presumptive evidence of consideration,—modified the rule of the common law; and now a failure of consideration may be pleaded to an action on a sealed instrument. *Supreme Ct.*, 1833, *Case v. Boughton*, 11 *Wend.*, 106.

11. Under this statute, in cases where the suit, or the defence, rests upon a sealed instrument, the consideration may be impeached in the same manner and to the same extent, as if the instrument was without a seal. *Supreme Ct.*, 1835, *Johnson v. Miln*, 14 *Wend.*, 195; 1836, *Russell v. Rogers*, 15 *Id.*, 351. *Ct. of Errors*, 1840, *Tallmadge v. Wallis*, 25 *Id.*, 107.

But no further. It does not sanction parol evidence to contradict a writing. *Supreme Ct.*, 1835, *McCourtie v. Stevens*, 18 *Wend.*, 527; 1851, *Wilson v. Baptist Education Society*, 10 *Barb.*, 308, and see *Stearns v. Tappin*, 5 *Duer*, 294.

12. This provision is limited to actions and set-offs upon such instruments, and does not apply where a specialty is given in evidence for a collateral purpose. *Supreme Ct.*, 1848, *Gilleland v. Failing*, 5 *Den.*, 308, and see *Calkins v. Long*, 22 *Barb.*, 97.

13. That the consideration of a sealed instrument can be impeached at law only where the action is upon it, or where a set-off is founded on it; and not then unless the defence has been pleaded or notice given. *Supreme Ct.*, 1839, *Fay v. Richards*, 21 *Wend.*, 626.

14. A partial failure of consideration is within the statute; but it must be interposed by pleading, or by notice, according as it is in bar or in writing. *Supreme Ct.*, 1843, *Van Epps v. Harrison*, 5 *Hill*, 68. To similar effect, *Ct. of Errors*, 1840, *Tallmadge v. Wallis*, 25 *Wend.*, 107.

15. **Antecedent contracts.** That this statute must receive a restricted construction when applied to contracts made before it was enacted. *Supreme Ct.*, 1836, *Mann v. Eckford*, 15 *Wend.*, 502, and see *Wilson v. Baptist Education Society*, 10 *Barb.*, 308.

16. **Bonds of a municipal corporation**, which, though under seal, are payable to bearer, are negotiable instruments in such a sense as to exempt them, in the hands of a *bona-fide* holder, from a defence which might be available against the original payee. [8 *Paige*, 527; 2 *Hill*, 159, 177; 13 *N. Y.*, 625; 3 *Am. L. Reg.*, 423.] *Ct. of Appeals*, 1859, *Bank of Rome v. Village of Rome*, 19 *N. Y.* (5 *Smith*), 20.

Consult, also, **DEED**, I.-V.

17. **Seals of courts**, how provided and renewed. *Laws of 1847*, 341, ch. 280, § 72; 2 *Rev. Stat.*, 277, § 7.

18. **Effect of error in seals of process of courts of record.** *Laws of 1847*, 335, ch. 280, § 57.

19. **Functus officio.** A seal of court which has been once used, by being affixed to process which has been filled up, whether delivered to the sheriff or not, cannot be again used or attached to another writ. *Supreme Ct.*, 1821, *Filkins v. Brockway*, 19 *Johns.*, 170.

Followed in the case of an alteration of the teste and return-day of an attachment. 1823, *People v. Singer*, 1 *Cow.*, 41.

20. **Seals of State.** 1 *Rev. Stat.*, 164, § 4; 168, §§ 20, 21.

SEAMEN.

1. **Shipping-articles.** Though the master has no right to insert in the shipping-articles any stipulation or agreement repugnant to the laws of the United States, yet he may add any provision not inconsistent therewith. *Supreme Ct.*, 1816, *Webb v. Duckingfield*, 18 *Johns.*, 390.

2. Notwithstanding the provision of the act of Congress of 1790,—providing that if a mariner, having left the ship, returns within forty-eight hours, he shall forfeit three days' pay,

Shipping-articles.

Punishment.

Wages.

but if absent for a longer time he shall forfeit all the wages due,—a provision inserted, without fraud, in the shipping-articles, declaring a heavier forfeiture, is valid. *N. Y. Com. Pl.*, 1858, *Dunn v. Comstock*, 2 *E. D. Smith*, 142.

3. That a mariner can recover nothing not specified in the shipping-articles. [1 *Com. on Con.*, 869; 5 *Esp.*, 85; *Peake's N. P.*, 72; 2 *Bos. & P.*, 116.] *Supreme Ct.*, 1817, *Bartlett v. Wyman*, 14 *Johns.*, 260.

4. **Threats of desertion.** Where the crew of a ship, at an intermediate port on the voyage, compel the master, by threats of deserting, to make new articles, such articles cannot be enforced. *Id.*

5. **Indefinite term.** Shipping-articles signed by a seaman at Bremen, to go thence to New York, "or to any other place to which our destination may be, or our future voyages may be directed,"—*Held*, not to bind him to serve indefinitely. A voyage from Bremen to New York, and from thence to Buenos Ayres, and back again to New York, and thence to Bremen, is within the meaning of the contract. But for the vessel to go back again to Buenos Ayres after her return to New York, would be a departure. *N. Y. Com. Pl.*, 1853, *Shulenburg v. Wessels*, 2 *E. D. Smith*, 70.

6. **Signing.** The act of Congress requiring shipping-articles to be in writing or in print, does not require a formal signing thereof by the master. It is sufficient, in this respect, if they be signed by the seamen and mariners. *N. Y. Com. Pl.*, 1854, *Botker v. Towner*, 8 *E. D. Smith*, 182.

7. **Surety.** One who gives bond that a seaman receiving an advance shall go on the voyage or refund it, is liable thereon, where the cause of the seaman's leaving the vessel is his own insubordination; and the fact that the parties agreed to substitute another in his place, without any transfer of the security or of the advance, does not exonerate the surety. *N. Y. Com. Pl.*, 1854, *Woodside v. Pender*, 2 *E. D. Smith*, 390.

8. **Punishment.** The master of a ship may inflict moderate correction on his seamen for sufficient cause; but if he exceeds the bounds of moderation, and is guilty of unnecessary severity or cruelty, he is answerable as a trespasser. [2 *Bos. & P.*, 224; 3 *Day*, 285; *Abbot Shipp.*, 125.] *Supreme Ct.*, 1817, *Brown v. Howard*, 14 *Johns.*, 119.

9. **Who liable for wages.** Though the

owner is *prima facie* liable for wages of seamen engaged by the master, where the master engaging the seaman informed him that he was jointly interested with the owner, and that the seaman must look to him, the master, alone for his wages,—*Held*, that the seaman could not recover against the owner. *N. Y. Com. Pl.*, 1854, *Dougherty v. Gallagher*, 3 *E. D. Smith*, 570.

10. **The liability of the master** for the seamen's wages, arises only on his special contract, in hiring the seamen. A new or substituted master is not to be taken as assuming the contract of the original master, where he does not take upon himself the original voyage. *Supreme Ct.*, 1814, *Wysham v. Rossen*, 11 *Johns.*, 72.

11. **Wages dependent on freight.** It is the general rule of the marine law that freight is the mother of wages, and that the safety of the ship is the mother of freight. The reason of the rule is, that the seamen may have an interest in the safety of the ship. Where no freight is earned, no wages are due. A salvage of part of the cargo by the crew, makes no difference, for, as the part saved was not delivered by the ship, no freight was earned. *Supreme Ct.*, 1808, *Dunnett v. Tomhagen*, 8 *Johns.*, 154.

12. That if the freight be totally lost, by disaster, peril, or force, without fraud or misconduct of the master or owners, the seamen lose their wages. *Supreme Ct.*, 1814, *Icard v. Goold*, 11 *Johns.*, 279; 1812, *Porter v. Andrews*, 9 *Id.*, 350. *S. P.*, 1828 [citing, also, 4 *Abbot Shipp.*, ch. 3; 8 *Johns.*, 154; 11 *Id.*, 279; 12 *Id.*, 324; 9 *Id.*, 350; 1 *Pet. Adm.*, 142; 2 *Id.*, 264; 10 *Mass.*, 143], *Van Beuren v. Wilson*, 9 *Cow.*, 158.

13. **Fault of owner, &c.** The maritime law distinguishes between the cases in which the services of the seamen have not been rendered, in consequence of the perils of the sea, and those in which they have not been rendered, by reason of the act of the master or owner. If the voyage be interrupted and lost, by the act of the master or owner,—*e. g.*, where the master, under a false pretence of want of water, deviated in order to put into a port, on the way to which the vessel was captured and condemned,—the seamen have a valid claim for an adequate compensation. *Supreme Ct.*, 1808, *Hoyt v. Wildfire*, 8 *Johns.*, 518; *S. P.*, 1812, *Murray v. Kellogg*, 9 *Id.*, 227.

Freight the Mother of Wages.

14. If the contract of hire is not fulfilled, in consequence of the act of the master or owners, and not in consequence of the perils of the sea, capture by enemies, &c., the seamen are to be paid, at least for the time they are employed, and also for a reasonable time to be allowed for their return to the place of departure. [8 Johns., 520.] *Supreme Ct.*, 1814, *Sullivan v. Morgan*, 11 Johns., 66.

15. Civil process, issuing at the instance of an individual, for the purpose of trying his right to the vessel, is not that superior force which will exempt the owners from paying wages to the seamen, although it may break up the voyage, and prevent the earning of freight. The contingencies of lawsuits should fall on the owners and not the seamen; and the owners should be prepared to give security for the release of the vessel. *Supreme Ct.*, 1828, *Van Beuren v. Wilson*, 9 Cow., 158.

16. A vessel bound from Callao to Baltimore, after having encountered severe gales, was brought, by great exertion on the part of the seamen, into the harbor of Pernambuco, by which the cargo was secured in safety though the vessel had to be abandoned as a wreck. *Held*, that the seamen were entitled to their wages up to the time when their labor ceased in the landing, securing, and preservation of the cargo, a valuable proportion of freight having then been earned. *N. Y. Com. Pl.*, 1855, *Worth v. Mumford*, 1 Hilt., 1.

17. The cargo having been shipped by another vessel to Baltimore, by which the owners of the abandoned vessel became entitled to freight,—*Held*, that freight had been earned, though the cost of transporting the cargo from Pernambuco to the port of delivery amounted to a greater sum than the owners of the wrecked vessel were to receive if the original voyage had been completed. If any portion of freight is earned, whether it be large or small, the whole wages which are deemed to have been earned, are to be paid without deduction [8 Sumn., 50]; it is a matter of no consequence whether, in balancing accounts, the result will be a profit or a loss. *Id.*

18. The maxim that "freight is the mother of wages,"—discussed. *Id.*

19. Wages of the outward voyage are due if freight was earned by the delivery of the outward cargo. *Supreme Ct.*, 1812, *Murray v. Kellogg*, 9 Johns., 227.

20. During a long delay at an outward

port, chargeable to the act of the captain, the seamen should not lose their wages. *Id.*

21. Captured seamen. Where a ship, having been captured during the voyage and her crew taken out and detained as prisoners of war, was afterwards recaptured, and the master hired a new crew, proceeded with the voyage, and earned freight;—*Held*, that the seamen who were taken out, though never restored to the ship, were entitled to wages for the whole voyage, deducting only their proportion of the salvage paid to the recaptors. The rule that the law gives a seaman his whole wages, even when he has been unable to render his services, if his inability has proceeded from any hurt received in the performance of his duty, or from natural sickness happening to him in the course of the voyage, must apply with equal, if not greater force, to seamen forcibly taken from a vessel. [8 Bos. & P., 480; 4 East, 558; 2 H. Bl., 606, n.; Abbot, 854; Oleron, art. 6, 7; 1 Pet. Adm. Dec., 115, 123, 142, 157, n.; 2 Id., 184; 1 Bee, 255; 2 Mass., 89.] *Supreme Ct.*, 1815, *Wetmore v. Henshaw*, 12 Johns., 324.

22. Recovery for collision. Where a vessel is sunk by a collision, though the owner afterwards recovers the value of the vessel and cargo from the master of the colliding vessel, the seamen are not, therefore, entitled to their wages. *Supreme Ct.*, 1820, *Percival v. Hickey*, 18 Johns., 257.

23. Ill usage. If, during a voyage, a seaman is compelled to leave the ship, on account of ill usage and cruel treatment by the master, or through his agency, and for fear of his personal safety, it is not a case of a voluntary desertion, and he is entitled to recover his full wages for the voyage. [Abbot, 4, ch. 2, § 1; Poth. Louage des Matelots, n. 206; Laws of Hanse Towns, art. 42; 2 Pet. Adm. Decis., 420; 1 Id., 176, n.] *Supreme Ct.*, 1812, *Ward v. Ames*, 9 Johns., 188.

24. Refusal on ground of unseaworthiness. Repairs were made which the owners and workmen deemed sufficient; and the seamen, without applying for repairs under the law of the United States, took the opinion of journeymen-carpenters that the vessel was not seaworthy, and on that ground refused to proceed on the voyage. *Held*, that no freight having been earned, and the loss of the voyage not being imputable to the master or owners, the seamen were not entitled to wages.

Seamen.

Supreme Ct., 1812, *Porter v. Andrews*, 9 *Johns.*, 350.

25. Deviation. Putting into a port, through necessity, to make repairs, is not a "deviation" discharging seamen from their articles. *N. Y. Com. Pl.*, 1854, *Botker v. Towner*, 3 *E. D. Smith*, 132.

26. Unlading. The contract with a seaman continues in force until the cargo is finally discharged, and if he abandons the vessel before the cargo is discharged, and refuses to aid in unloading her, he forfeits his whole wages. *Supreme Ct.*, 1816, *Webb v. Duckingfield*, 18 *Johns.*, 390.

27. Promise to pay. The captain voluntarily discharged a seaman from the ship, expressing his regret that any difficulty had occurred during the voyage, and promising to pay him his wages. *Held*, that the promise, under the circumstances, operated as a waiver of any forfeiture of wages by disobedience of orders during the voyage. *N. Y. Superior Ct.*, 1828, *Austin v. Dewey*, 1 *Hall*, 238.

28. A seaman discharged by his own consent, in a foreign country, under the act of Congress (Cong. 7, Sess. 2, ch. 62, § 3), cannot maintain an action to recover his two-thirds of the extra three months' pay directed by that act to be paid by the master; for the act directs it to be paid to the consul. Certainly he cannot maintain such action against the owner. *Supreme Ct.*, 1815, *Ogden v. Orr*, 12 *Johns.*, 143. Followed, 1828, *Van Beuren v. Wilson*, 9 *Cow.*, 158.

29. Embezzlement. If negligence is not imputed to the crew, and the circumstances of the case do not fix the presumption of embezzlement upon any of them, they ought not to contribute. Where the first mate gave the crew permission to go on shore, requiring only that the second mate should return and sleep on board, which he failed to do, and a part of the cargo was stolen out of the vessel;—*Held*, that the crew were not liable to contribute out of their wages therefor. *Supreme Ct.*, 1808, *Lewis v. Davis*, 3 *Johns.*, 17.

30. Coming to demand wages. A seaman has a right to come on board the vessel to demand payment of his wages. And the master has a right to order him off, allowing a proper time for the demand, and if he does not go, may use sufficient force to turn him off; but not more than necessary. *Gen. Sess.*, 1822, *People v. Osborn*, 1 *Wheel. Cr.*, 97.

31. Exemption from militia duty. The master of a river sloop, enrolled as a coasting vessel, and sailing under a license, is not a mariner employed in the sea service, within the act of Congress of 1792,—giving such mariners exemption from militia duty,—but is liable to militia duty under the Laws of 1810, ch. 121, § 24. *Supreme Ct.*, 1811, *Brush v. Bogardus*, 8 *Johns.*, 157.

SEARCHES.

RECORDING DEEDS, 7-9.

SEARCH-WARRANT.

1. When and how issued, for the recovery of stolen or embezzled property, and how executed. 2 *Rev. Stat.*, 746, §§ 25-28.

2. Larceny. Of the necessity of a search-warrant in cases of felony. *City Bank v. Bangs*, 2 *Edw.*, 95.

3. Official books and papers, when issued to find. 1 *Rev. Stat.*, 125, § 54.

4. When to find child secreted by shakers. 2 *Rev. Stat.*, 149, § 5.

5. Form. A search-warrant under the hand and seal of a justice, reciting information on oath, that certain goods, describing them, had been stolen by A. and B., and were concealed in the house of C., and commanding the officer to whom it was directed, to enter the said house, in the daytime, and search for the articles stolen, and to bring them, with C., or the person in whose custody the goods should be found, before the justice,—*Held*, a legal and valid warrant. *Supreme Ct.*, 1818, *Bell v. Clapp*, 10 *Johns.*, 268.

6. It is not necessary that the owner of the goods be stated. *Id.*

7. Direction. Search-warrants must be directed "to the sheriff of the county or to any constable or marshal of the town or city" in which the stolen property is alleged to be secreted. [2 *Rev. Stat.*, 929, § 38.] Not to any constable of the county. *Supreme Ct.*, 1858, *People v. Holcomb*, 3 *Park. Cr.*, 656.

8. Seal. At common law, all warrants in criminal proceedings are required to be under the hand and seal of the magistrate who issues them; and a search-warrant, as it is not one of the cases in which our statutes have dispensed with a seal, is void if not under seal,

Before the Revised Statutes.

and affords no protection to an officer attempting to execute it. *Id.*; S. P., 1842, *Smith v. Randall*, 8 *Hill*, 495.

9. In the execution of a search-warrant, the officer, after a demand and refusal to open the outer or other door of the house, may break it open. [Hale's P. O., 151.] *Supreme Ct.*, 1818, *Bell v. Clapp*, 10 *Johns.*, 268.

10. Protection to prosecutor. A search-warrant, legally and regularly issued, and duly executed in the daytime, is a protection, as well to the party upon whose oath it issued, as to the officer who executed it, against an action of trespass. *So held*, where no force was used, and no malice shown. *Supreme Ct.*, 1881, *Beaty v. Perkins*, 6 *Wend.*, 382.

See, also, OFFICER; WARRANT.

SECOND OFFENCE.

1. Under Act of 1819, second offence of petit larceny must have been committed subsequent to conviction of the first. *Supreme Ct.*, 1824, *People v. Butler*, 8 *Cow.*, 847.

2. The true construction of former acts on the subjects of second offences,—considered. *Id.*

3. Increased punishment prescribed where persons after conviction and discharge from prison, either upon pardon or expiration of sentence, are convicted of an offence committed after such discharge. 2 *Rev. Stat.*, 609, §§ 8, 9.

4. Conviction abroad. Person convicted in another State or country, of an offence punishable by the law of this State by imprisonment in state-prison, and convicted of a subsequent offence in this State, punishable to same extent as if first conviction had taken place in this State. 2 *Rev. Stat.*, 700, § 10.

5. One cannot be punished for petit larceny as a second offence, where the first larceny was committed and the conviction had in another State. *Oyer & T.*, 1855, *People v. Caesar*, 1 *Park. Cr.*, 645.

SECRETARY OF STATE.

His office. Chosen at a general election, and holds office 2 years.* *Const. of 1846*, art. 5, § 1.

* The special provisions of the statutes relating to this and other particular officers, may be more conveniently consulted by reference to the latest edition of the Revised Statutes, than by any reference to them which the limits of this work would allow.

SECURITY FOR COSTS.

I. BEFORE THE REVISED STATUTES.

II. UNDER THE REVISED STATUTES AND THE CODE OF PROCEDURE.

1. When required.
2. The motion.
3. The security, and enforcing it.
4. The attorney's liability.

I. BEFORE THE REVISED STATUTES.

1. Divorce. The provision of the act of Sess. 86, ch. 102 (1 *Rev. L. of 1818*, 197),—relative to security for costs to be given by the plaintiff suing for a limited divorce,—does not apply to a bill which contains in addition to a charge of cruel and inhuman treatment, a charge of adultery. *Chancery*, 1815, *Pomeroy v. Pomeroy*, 1 *Johns. Ch.*, 806.

2. Assignees. When an insolvent had assigned over all his estate for the benefit of his creditors, and a judgment was recovered in his name, in the Court of Common Pleas, on which a writ of error was brought, the assignees, for whose benefit the suit was prosecuted, were ordered to give security for the costs. [7 T. R., 296.] *Supreme Ct.*, 1809, *Ketcham v. Clark*, 4 *Johns.*, 484.

3. Imprisonment of plaintiff in state-prison for a term of years, equivalent to absence from the State, on a motion for security for costs. *Anonymous*, 1 *Cow.*, 60.

4. After verdict for the defendant, it is too late to move for security for costs. *Supreme Ct.*, 1816, *Jackson v. Bushnell*, 18 *Johns.*, 330.

5. Waiver. Where the non-residence of the plaintiff appears on the face of the bill, if the defendant takes any step in the cause, he waives security for costs. [2 *Ves.*, 24; 10 *Ves. Jr.*, 287.] *Chancery*, 1818, *Goodrich v. Pendleton*, 8 *Johns. Ch.*, 520.

6. If the fact does not so appear, he must then apply as soon as the fact comes to his knowledge, in any stage of the suit. [2 *Ves.*, 24.] *Chancery*, 1814, *Long v. Majestra*, 1 *Johns. Ch.*, 202.

7. Notwithstanding the solicitor's liability, a non-resident complainant must give security for costs, if required; which should not exceed \$100, unless special circumstances are shown. *Chancery*, 1824, *Baldwin v. Williamson*, *Hopk.*, 117.

8. Amount of security. Where a non-

Under the Revised Statutes and Code;—When Required.

resident plaintiff becomes insolvent, and the security in \$100 required by rule, would be inadequate, the court will specially order him to give security for a larger amount. *N. Y. Superior Ct.*, 1829, *Bomeisler v. National Ins. Co.*, 2 *Hall*, 581.

9. The bond is not to be delivered by the clerk to the party except by order of the court; the application for which must state the due taxation of costs, the surety's name, and plaintiff's non-residence. *Supreme Ct.*, 1805, *Meiks v. Childs*, *Col. & C. Cas.*, 482.

10. Solicitor's Liability. Though Rule 54 of 1806, makes a solicitor filing a bill for a non-resident liable for costs to the amount of \$100, if security be not filed, the court will, on motion, stay proceedings until other security be furnished; unless the application is delayed until after answering or demurring. *Chancery*, 1814. *Long v. Majestre*, 1 *Johns. Ch.*, 202.

II. UNDER THE REVISED STATUTES AND CODE OF PROCEDURE.

1. When Required.

11. It is not necessary to make a case within the words of the statute, for the power to require security for costs is inherent in the court. If the nominal plaintiff is insolvent, the real party, being a non-resident, will be compelled to file security. *Supreme Ct.*, 1845, *Swift v. Collins*, 1 *Den.*, 659; *S. P.*, 1837, *People v. Oneida C. P.*, 18 *Wend.*, 652.

12. The power to require security for costs may be exercised independent of the statute, —*e. g.*, in a mandamus. *Supreme Ct.*, 1837, *People v. Oneida C. P.*, 18 *Wend.*, 652; *S. P.*, *Sp. T.*, 1847, *Dyer v. Dunivan*, 8 *How. Pr.*, 185.

13. It is not imperative on the court to make an order compelling a non-resident plaintiff to file security for costs. *Supreme Ct.*, 1845, *Robinson v. Sinclair*, 1 *Den.*, 628. *N. Y. Superior Ct.*, *Chambers*, 1858, *Florence v. Bulkley*, 1 *Duer*, 705; *S. C.*, 12 *N. Y. Leg. Obs.*, 28.

14. A defendant who has been let in to defend, after default and judgment, the latter standing as security, may require security for costs from a non-resident plaintiff. It is not a matter of favor, but of right. *N. Y. Superior Ct.*, 1849, *Gardner v. Kelly*, 2 *Sandf.*, 682; *S. C.*, 1 *Code R.*, 120.

15. Moving to make delay. Where pro-

ceedings to obtain security are resorted to for delay, or any improper purpose, they will be vacated. *Supreme Ct.*, 1845, *Robinson v. Sinclair*, 1 *Den.*, 628.

16. Suing in forma pauperis. Motions that plaintiff file security for costs, and that he be permitted to prosecute in forma pauperis, cannot both be granted. *N. Y. Superior Ct. Chambers*, 1858, *Florence v. Bulkley*, 1 *Duer*, 705; *S. C.*, 12 *N. Y. Leg. Obs.*, 28.

17. A motion of one of several defendants, for leave to appeal in forma pauperis, denied, because, 1. It was without notice to defendants. [1 *Paige*, 40; 6 *Hill*, 257; *Code*, § 414.] 2. Leave to appear in forma pauperis cannot be granted on application delayed till after judgment against the plaintiff on the merits. [1 *Duer*, 705.] 3. The statute does not extend to appeals. [2 *Hill*, 412; 2 *How. Pr.*, 85; 8 *Paige*, 278, 280.] The inability to sue must be shown to extend, and the leave must be granted, to all of several co-plaintiffs. *Supreme Ct.*, *Sp. T.*, 1857, *Ostrander v. Harper*, 14 *How. Pr.*, 16.

18. Removal of cause. Where a County Court of Common Pleas had ordered a plaintiff resident in another county to file security for costs, and the cause was by statute removed to the Supreme Court, the latter court refused in their discretion to vacate the order. *Dyer v. Dunivan*, 8 *How. Pr.*, 185.

19. — when may be required. In a suit in any court,

"1. For a plaintiff not residing within the jurisdiction of such court; or for several plaintiffs, who are all non-residents; or,

"2. For or in the name of the trustees of any debtor; or,

"3. For or in the name of any person being insolvent, who shall have been discharged from his debts, or whose person shall have been exonerated from imprisonment, pursuant to any law, for the collection of any debt contracted before the assignment of his estate; or,

"4. For or in the name of any person committed in execution for a crime; or,

"5. In the name of any infant whose next friend has not given security for costs;" defendant may require plaintiff to file security for costs. 2 *Rev. Stat.*, 620, § 1.

20. If, after suit commenced, plaintiff become a non-resident, or all the plaintiffs become non-resident or insolvent, and be discharged or exonerated as aforesaid, or be sentenced to state-prison for any term less than for life, defendant may require security. 2 *Rev. Stat.*, 620, § 2.

21. Courts not of record. The statute (3 *Rev. Stat.*, 620)—requiring security for costs in certain suits in "any court"—intend only

Under the Revised Statutes and Code;—When Required.

courts of record. It does not authorize justices of the peace to require security. *N. Y. Com. Pl.*, 1845, Southworth v. Straight, 4 *N. Y. Leg. Obs.*, 19.

Nor surrogates. *Chancery*, 1846, Westervelt v. Gregg, 1 *Barb. Ch.*, 469.

22. A foreign government suing in a court of this State, may be required, like any other non-resident plaintiff, to file security for costs. *N. Y. Superior Ct., Sp. T.*, 1856, Republic of Mexico v. Arrangois, 3 *Abbotts' Pr.*, 470.

23. Resident plaintiff insolvent. That security for costs cannot be required from plaintiffs where some are non-residents, and those who are resident are insolvent. *Supreme Ct., Sp. T.*, 1856, Ten Broeck v. Reynolds, 18 *How. Pr.*, 462; and see Gillispie v. Pfister, *Col. & Cas.*, 121; S. C., 3 *Johns. Cas.*, 2 ed., 470.

24. Becoming resident. A plaintiff who was a non-resident at the time of commencing his action, is not excused from filing security from costs, by the fact that he afterwards became a resident. *Supreme Ct., Sp. T.*, 1859, Ambler v. Ambler, 3 *Abbotts' Pr.*, 840.

25. Temporary absence. Where the suit is carried on for the benefit of others than the plaintiff, and he is insolvent and has removed from the State, the allegation that his absence is not to be permanent is no answer. *Chancery*, 1831, Gilbert v. Gilbert, 2 *Paige*, 603.

26. Not intending to continue permanently a non-resident not an excuse. Gelch v. Barnaby, 1 *Bow.*, 657; S. C., 7 *Abbotts' Pr.*, 19.

27. A bankrupt suing for a tort cannot be required to give security for costs. *Supreme Ct.*, 1843, Coryell v. Davis, 5 *Hill*, 559.

28. Local courts. In the New York Superior Court a defendant is entitled to security for costs where plaintiff resides out of the city; notwithstanding he has assigned his interest in the suit to a resident. *N. Y. Superior Ct., Chambers*, 1849, Phenix v. Townshend, 2 *Code R.*, 2.

29. A plaintiff in the New York Superior Court residing out of the city, but within the State of New York, must give security for costs, notwithstanding the act of 1840, allowing executions against property to any county in the State. *N. Y. Superior Ct.*, 1849, Gardner v. Kelly, 2 *Sandf.*, 682; S. C., 1 *Code R.*, 190. Questioned, but followed, *Sp. T.*, 1858, Hicks v. Payson, 7 *Abbotts' Pr.*, 326.

So held, also, of the New York Common Pleas.

N. Y. Com. Pl., 1843, Stephens v. Blair, 1 *N. Y. Leg. Obs.*, 284.

30. Where the real plaintiff is a non-resident, the plaintiff on the record, though a resident, must file security for costs. *Supreme Ct.*, 1846, Charles v. Waterman, 2 *How. Pr.*, 122.

So held, where the plaintiffs on the record were insolvent. Allen v. Collins, 1 *Id.*, 251.

31. Administrator, &c. A non-resident suing necessarily as administrator, may be required to give security for such costs as should be awarded *de bonis propriis*. *Supreme Ct., Sp. T.*, 1848, Murphy v. Darlington, 1 *Code R.*, 85.

32. Security for costs cannot be required of an executor, administrator, or trustee, in a case in which he would not be liable for costs on a judgment. *N. Y. Superior Ct.*, 1852, Darby v. Condit, 1 *Duer*, 599; S. C., 11 *N. Y. Leg. Obs.*, 154.

33. The fact that the estate is insolvent is not enough to require security, where the plaintiff is insolvent. *Id.*

34. Trustees. An assignee for the benefit of creditors, suing in the name of the assignor, is not a trustee within the provision of 2 Rev. Stat., 620, § 1, entitling defendant to security for costs, when the suit is for or in the name of the trustee of any debtor. Trustees proper, declared so by statute, are intended. *Supreme Ct.*, 1840, Ferriss v. American Ins. Co., 22 *Wend.*, 586.

35. Where a next friend, who sues for infants, is insolvent, he may be required to give security for the costs. *Chancery*, 1823, Fulton v. Rosevelt, 1 *Paige*, 178.

36. The next friend must give security for costs, although there is no suggestion that he is not abundantly able to pay. *Supreme Ct.*, 1843, Blanchard v. Nessler, 6 *Hill*, 256.

37. On substitution of next friend, security for the costs of the cause, required. Colden v. Haskins, 3 *Edw.*, 811.

38. In divorce. That if the next friend of a wife suing for a divorce is irresponsible, all proceedings may be stayed until security for costs is given, or a responsible person substituted. *Chancery*, 1832, Lawrence v. Lawrence, 3 *Paige*, 267.

39. Where a married woman, suing for a divorce, appears by her next friend, requiring the next friend to give security for costs is entirely in the discretion of the court, and un-

Under the Revised Statutes and Code;—The Motion.

der its control. It is enough to allow the wife to appear by any next friend whom the court may appoint on her application, without security, and to allow him to continue to act until some abuse occurs, and then to remove him and dismiss the complaint unless he give security, or another next friend be substituted, whose character and responsibility will be a protection against further abuse. *Supreme Ct.*, 1854, *Thomas v. Thomas*, 18 *Barb.*, 149; *S. O.*, 12 *N. Y. Leg. Obs.*, 274.

40. Involuntary departure. A plaintiff actually resident here, was carried involuntarily to a State from which he was a fugitive. *Held*, that his removal changed his residence, and the defendant might have the complaint dismissed, or security for costs given. *N. Y. Superior Ct.*, 1851, *Long v. Hall*, 3 *Sandf.*, 729.

41. In replevin, the bond given on commencing the action is sufficient security for costs. *Supreme Ct.*, 1833, *Rogers v. Hitchcock*, 9 *Wend.*, 462.

42. A non-resident plaintiff, in an action for chattels, took proceedings of claim and delivery in the action, under section 209 of the Code, and gave the usual undertaking; and, thereupon, the defendants obtained a return of the chattels, under section 211. *Held*, that the plaintiff might be required to file security for costs, notwithstanding he had already given one undertaking. *N. Y. Superior Ct.*, *Chambers*, 1853, *Gelch v. Barnaby*, 1 *Bow.*, 657; *S. O.*, 7 *Abbotts' Pr.*, 19.

43. A plaintiff in error who has given the security required on bringing error, need not give security for costs as a non-resident plaintiff. *Supreme Ct.* (1847?), *Kanouse v. Martin*, 3 *How. Pr.*, 24.

44. The Code of Procedure does not repeal the provisions of the Revised Statutes relative to security for costs. *N. Y. Superior Ct.*, 1849, *Gardner v. Kelly*, 2 *Sandf.*, 632; *S. O.*, 1 *Code R.*, 120.

45. Party suing in right of another may be required to give security for costs. *Code of Pro.*, § 317; amendment of 1852.

46. The power of the court to require security, under section 317 of the Code, is purely discretionary, and ought not to be exercised unless the imputation of bad faith is rendered at least highly probable. *N. Y. Superior Ct.*, *Chambers*, 1854, *Shepherd v. Burt*, 3 *Duer*, 645.

47. Foreign corporation. The neglect of

a foreign corporation plaintiff to file security, though it is an irregularity for which the proceedings should be set aside on a motion made in season, is one which could be cured at any time by filing the security. [19 *Wend.*, 10.] By delaying to move till after judgment against him, the defendant waives his right to security. *N. Y. Com. Pl.*, 1854, *Merchants' Bank v. Mills*, 3 *E. D. Smith*, 210.

48. The respondents are not entitled to an order that the appellants file security for costs on appeal from a judgment, although the latter are a foreign corporation. Though if the appellants would stay proceedings they must give security on the appeal, or the stay must be obtained from the court or a judge, upon such terms as may be just. *Supreme Ct., Sp. T.*, 1852, *Steam Navigation Co. v. Weed*, 3 *How. Pr.*, 49. Consult, also, *FOREIGN CORPORATION*, 7-10.

2. The Motion.

49. How made. The order to file such security, and that all plaintiff's proceedings be stayed until filed, and the sureties justify if excepted to, may be made by the court, or by judge in vacation, on due proof by affidavit. 2 *Rev. Stat.*, 620, § 3.

50. When. Under the Revised Statutes, the defendant may apply, in any stage of the suit. He is not to be held to applying at the first opportunity. *V. Chan. Ct.*, 1832, *Burgess v. Gregory*, 1 *Edw.*, 449.

51. Appearing in the suit, opposing the appointment of a receiver, and demurring to the bill, do not prevent the defendant from petitioning for security for costs. *V. Chan. Ct.*, 1847, *Micklethwaite v. Rhodes*, 4 *Sandf. Ch.*, 484.

52. Delay, and taking steps on the part of the defendant with knowledge, is not, in this State, a reason for refusing to require the plaintiff or relator, who removes from the State, to give security for costs. [3 *Cow.*, 57.] *Supreme Ct.*, 1837, *People v. Oneida C. P.*, 18 *Wend.*, 652.

53. When the application is not made until the cause has been referred and noticed for hearing, it will be denied, as unreasonably delayed. *N. Y. Superior Ct.*, 1853, *Florence v. Bulkley*, 1 *Duer*, 705; *S. O.*, 12 *N. Y. Leg. Obs.*, 28; *Chambers*, 1854, *Swan v. Mathews*, 3 *Duer*, 613.

54. A defendant held to bail must perfect his appearance by putting in special bail be

Under the Revised Statutes and Code;—The Security, and Enforcing it.

fore he can move for security for costs. *Supreme Ct.*, 1848, *Thomas v. Wilson*, 6 *Hill*, 257.

And the bail must be perfected. 1846, *Davidson v. Hackstaff*, 8 *How. Pr.*, 11.

55. Costs unpaid by defendant. After an order overruling a demurrer, with leave to answer on payment of costs, the defendant while in default of the payment is not entitled to security for costs from the plaintiff, if the plaintiff becomes a non-resident. *Supreme Ct.*, *Sp. T.* 1854, *Butler v. Wood*, 10 *How. Pr.*, 818.

56. Motion where made. Application for security for costs may be made to a judge at chambers, or to the court with notice to plaintiff. *Supreme Ct.*, 1880, *Champlin v. Pierce*, 8 *Wend.*, 445; 1848, *Blanchard v. Nessle*, 6 *Hill*, 256.

57. Form of order. An order made by a judge in vacation, that plaintiff file security for costs, should, by the settled practice, be in the alternative—requiring security to be filed in twenty days, or that plaintiff show cause. But an absolute order, being authorized by 2 *Rev. Stat.*, 620, § 8, is at most irregular. *Supreme Ct.*, *Sp. T.*, 1858, *Bronson v. Freeman*, 8 *How. Pr.*, 492.

58. On a rule absolute, to file security for costs within twenty days from the entry of the order, defendant must serve a copy on plaintiff's attorney in order to put him in default. *Supreme Ct.*, 1845, *Anderson v. Osborn*, 1 *How. Pr.*, 79.

59. Waiver of stay. If after obtaining an order to file security for costs, the defendant notices the cause for trial, it is a waiver of the stay of proceedings, and the plaintiff is at liberty to appear and prosecute the suit. *V. Chan. Ct.*, 1885, *Hay v. Power*, 2 *Edw.*, 494. *Supreme Ct.*, *Sp. T.*, 1858, *Boyce v. Bates*, 8 *How. Pr.*, 495.

60. Extending time to answer. The judge may make an order extending defendant's time to answer, a certain number of days, after the plaintiff files security for costs, and the sureties, if excepted to, shall justify. *Supreme Ct.*, *Sp. T.*, 1858, *Bronson v. Freeman*, 8 *How. Pr.*, 492.

3. The Security, and Enforcing it.

61. Security to be given by bond, in a penalty of at least \$250, with one or more sufficient sureties, to the defendant, conditioned to pay on

demand all costs that may be awarded to the defendant in such suit. Filing, &c., exception to sureties. 2 *Rev. Stat.*, 620, §§ 4, 5.

62. Plaintiff need not himself execute the bond. Two sufficient sureties will do. *Supreme Ct.*, 1845, *Wagner v. Adams*, 1 *How. Pr.*, 191.

63. One surety is enough, and the complainant need not join in the bond. *V. Chan. Ct.*, 1847, *Micklethwaite v. Rhodes*, 4 *Sandf. Ch.*, 484.

64. A solicitor may be surety. [5 *Paige*, 57.] *Id.*

65. Demand. In a bond given on behalf of a non-resident plaintiff, the obligors should be bound to pay on demand. Demand from plaintiff should not be required. *Supreme Ct.*, 1845, *Tallmadge v. Wallis*, 1 *How. Pr.*, 100.

66. Form. The bond for security for costs need not follow the precise words of the statute, but it will be sufficient as against defendant's objection, if equally favorable to the defendant. *N. Y. Superior Ct.*, 1849, *Smith v. Norval*, 2 *Code R.*, 14.

67. Notice that defendants "do not accept the bail put in," &c., is not sufficient notice of exception. *N. Y. Com. Pl.*, 1857, *Hartford Quarry Co. v. Pendleton*, 4 *Abbotts' Pr.*, 460.

68. Moving to increase. Where security for costs has been filed pursuant to an order, and the twenty days allowed for excepting to the sureties have elapsed, it is too late to apply to have the amount of the security increased. *N. Y. Superior Ct.*, 1851, *Castellanos v. Jones*, 4 *Sandf.*, 679.

69. Motion for an additional bond where the costs were large, denied. *Doty v. Brown*, 1 *How. Pr.*, 245.

70. Justifying. Within twenty days after notice of exception, the sureties must justify, by affidavit, that they are worth double the penalty over and above all debts. Copy of affidavit to be served on the defendant or his attorney. Such justification discharges the stay of proceedings. 2 *Rev. Stat.*, 620, § 6.

71. If defendant excepts to the surety, he must justify, notwithstanding an affidavit of justification was made with the bond, and a copy of it served. *Supreme Ct.*, *Sp. T.*, 1858, *Bronson v. Freeman*, 8 *How. Pr.*, 492.

72. Sureties in the penalty of \$350, should be required to justify in double the amount. *Chancery*, 1844, *Mount v. Mount*, 11 *Paige*, 888.

73. Justification of one surety. Where,

Attorney's Liability for Costs.

Who may Sue.

under an order upon the plaintiff to file security for costs, an undertaking executed by two sureties is filed, the justification of one of the sureties upon exceptions, is sufficient. *N. Y. Superior Ct., Sp. T., 1853, Riggins v. Williams, 2 Duer, 678.*

74. That if the surety becomes insolvent, another must be substituted. *V. Chan. Ct., 1834, Bridges v. Canfield, 2 Edw., 208.*

75. Leave of court to sue the security for costs is not necessary. *Supreme Ct., 1832, Higley v. Robinson, 7 Wend., 432.*

76. Motion for judgment as in case of non-suit, because security for costs is not filed, is irregular. It should be for an absolute order that plaintiffs file security for costs. *Supreme Ct., 1844, Olaborn v. Baker, 1 How. Pr., 37.*

4. The Attorney's Liability.

77. Where defendant, at commencement of suit, is entitled, under 2 Rev. Stat., 620, to security, plaintiff's attorney is liable for the costs, to an amount not exceeding \$100, until security be filed, whether required or not. How he may be relieved. 2 Rev. Stat., 620, §§ 7, 8.

78. The attorney is liable if the real plaintiff is non-resident, although the nominal plaintiff is a resident. [6 Wend., 660; 2 Cow., 460.] *Supreme Ct., 1834, Jones v. Savage, 10 Wend., 621.*

79. Where a plaintiff is a resident at the commencement of the suit, his subsequent removal will not make his attorney liable for costs, although he proceeds in the suit. *Supreme Ct., 1846, Alexander v. Carpenter, 3 Den., 266. N. Y. Superior Ct., 1851, Long v. Hall, 3 Sandf., 729.*

80. To enforce payment of costs against an attorney for a non-resident plaintiff, after an order requiring him to pay them, a new demand is necessary, and, on his refusal, a new application to the court (which may, however, be *ex parte*) for process to collect. *Supreme Ct., Sp. T., 1853, Bronson v. Freeman, 8 How. Pr., 492.*

81. In chancery, though a solicitor who commences a suit without giving security for costs where defendant is entitled to it, is liable himself to not exceeding \$100 (*Rule 16*), his liability should not be declared in the decree, but can only be enforced by summary proceedings under the rule. *Chancery, 1842, Sigourney v. Waddle, 9 Paige, 381.*

For other cases on the Attorney's Liability, see ATTORNEY AND CLIENT, 51-60.

SEDUCTION.

1. Who may sue. A person seduced cannot maintain an action for damages against her seducer. The only civil action which can be founded on a seduction, is an action by the parent or other person entitled to the services of the female, to recover for loss of service. *Supreme Ct., Sp. T., 1853, Hamilton v. Lomax, 26 Barb., 615; S. C., 6 Abbotts' Pr., 142.*

2. Nature of the action. Trespass for the seduction of a female is not, technically, an action for assault and battery. The gist of the action is the loss of service. *So held,* on a question of costs. *Supreme Ct., 1825, Shufelt v. Rowley, 4 Cow., 58.*

3. The relation of master and servant must exist between the plaintiff and the seduced at the time of the seduction, and there must be a loss of service to the plaintiff, or a charge brought upon him, in consequence of the seduction. *Supreme Ct., 1850, George v. Van Horn, 9 Barb., 528.*

4. What service must be shown. The slightest acts of service are sufficient to make out the relation of master and servant between the parent and child. *Supreme Ct., 1825, Moran v. Dawes, 4 Cow., 412.*

5. Residing with the parent, and rendering general assistance as a daughter naturally does, — *Held,* sufficient. *Id.*

6. Actual loss of service, expense, or damage, prior to the commencement of the suit, need not be shown; proof of seduction, pregnancy having ensued, and the daughter being a minor, and a member of her father's family at the time, is sufficient [1 Mood. & M., 328; Peake N. P., 55, 238; 2 Stark. Ev., 721; 9 Johns., 387; 2 Wend., 459; 7 Car. & P., 528];* and all the complicated circumstances come in by way of aggravation of damages, and this, though they transpire before suit brought. *Supreme Ct., 1839, Hewit v. Prime, 21 Wend., 79.*

7. The gist of the action is loss of service. Proof of slight loss of service is sufficient; but this must be shown to be the direct and proximate consequence of the wrongful act complained of. Thus, where the loss of service was the direct result of illness brought on by threatened exposure in a suit against defendant for the seduction, and not by pregnancy,

* Approved in *Lee v. Hodges, 13 Gratian, 726.*

Daughter in Service of third Person.

— in Service of Defendant.

&c.,—*Held*, that an action did not lie. *Ot. of Appeals*, 1856, *Knight v. Wilcox*, 14 *N. Y.* (4 *Kern.*), 413; reversing *S. C.*, 15 *Barb.*, 279; 18 *Id.*, 212.

8. An action for seduction can be sustained, although it be not shown that the minor daughter was actually in her father's service, or that he incurred any trouble or expense in her sickness; it is sufficient if he was legally entitled to her services. *Ot. of Appeals*, 1854, *Mulvehall v. Millward*, 11 *N. Y.* (1 *Kern.*), 343.

9. Daughter in the service of a third person. The fact that the father merely permits the daughter to remain with another person, so long as he has not divested himself of the right to reclaim her time and services, does not affect his right to sue. *Supreme Ct.*, 1812, *Martin v. Payne*, 9 *Johns.*, 387; 1829, *Clark v. Fitch*, 2 *Wend.*, 459.

10. Thus, where the daughter, being nineteen years of age, with the consent of her father, worked for her uncle for wages, and did not intend to return to her father, but there was no agreement for her continuing for any particular time; and she was seduced at her uncle's house, and returned to and was confined at her father's. *Held*, that the action was well brought by the father. *Supreme Ct.*, 1812, *Martin v. Payne*, 9 *Johns.*, 387.

11. Where the daughter was an apprentice at time of the seduction, but the indenture was cancelled, and she returned to her mother's house and was there confined,—*Held*, that the mother (the father being dead) could maintain an action. *Supreme Ct.*, 1825, *Sargent v.*—5 *Cow.*, 106.*

12. A father gave his daughter her time, and she was seduced while working for herself in the employ of a third person, and the expenses of her confinement were paid by her employer. *Held*, that the father might maintain an action notwithstanding. *Supreme Ct.*, 1829, *Clark v. Fitch*, 2 *Wend.*, 459.

13. The principle which allows a father to sue where the daughter was in the service of another person at the time of the seduction, applies only where the action is by the father, and where he still retained the legal right to her services. The gist of the action is the loss of service. *Ot. of Appeals*, 1850, *Bartley v. Richtmeyer*, 4 *N. Y.* (4 *Comst.*), 38.

14. It does not apply where the action is brought by the step-father. In such a case the relation of master and servant must have actually existed at the time of the injury. *Id.*

15. Nor where the action is by the mother. [Disapproving 5 *Cow.*, 106.] *Id.*

16. Nor when the action is brought by a brother, although standing in *loco parentis*. *Supreme Ct.*, 1828, *Millar ads. Thompson*, 1 *Wend.*, 447.*

17. The father of the girl seduced had not been heard of for fourteen years, and she had been brought up, with her mother's permission, by the plaintiff, as his child. *Held*, that he stood in *loco parentis*, and could maintain the action. The action depends on the relation of master and servant, and not of parent and child. *Supreme Ct.*, 1849, *Ingersoll v. Jones*, 5 *Barb.*, 661.

18. Daughter above 21. Where the daughter is above the age of twenty-one, the father cannot maintain an action, unless she is actually in his service. *Supreme Ct.*, 1813, *Nicheson v. Stryker*, 10 *Johns.*, 115; 1828, *Millar ads. Thompson*, 1 *Wend.*, 447; 1850, *George v. Van Horn*, 9 *Barb.*, 538.

19. The daughter was upwards of twenty-one, and in the actual service of another person, and her father was alive when she was seduced. The father died, and the daughter returned to and was confined at her mother's house. *Held*, that the mother could not sustain an action. *Supreme Ct.*, 1850, *George v. Van Horn*, 9 *Barb.*, 538.

20. Daughter in employ of defendant. Recovery by father sustained, though the seduction took place while the daughter was in the service of the defendant. *Supreme Ct.*, 1838, *Stiles v. Tilford*, 10 *Wend.*, 338.

21. Where an infant daughter left her father's house and went into the employ of defendant, but there was no surrender by the father of his right to her service, and she was seduced by defendant. *Held*, that the father could maintain an action, notwithstanding the defendant had paid the expenses of her sickness. *Ot. of Appeals*, 1854, *Mulvehall v. Millward*, 11 *N. Y.* (1 *Kern.*), 343.

22. Where a daughter is apprenticed to a third person, and is by him seduced during

* Disapproved in *Bartley v. Richtmeyer*, 4 *N. Y.* (4 *Comst.*), 38.

* Compare *Ingersoll v. Jones*, 5 *Barb.*, 661. Disapproved in *Bartley v. Richtmeyer*, 4 *N. Y.* (4 *Comst.*), 38, 47.

Connivance of Plaintiff.

the apprenticeship, the father cannot maintain an action. The gist of the action is loss of service, which does not arise in such a case. *Ct. of Appeals*, 1852, *Dain v. Wyckoff*, 7 *N. Y.* (3 *Seld.*), 191.

23. But in such case, proof that the defendant procured the daughter to enter his service with a view to her seduction, is an answer to the objection that the plaintiff was not entitled to her services. [3 *Seld.*, 191.] *Ct. of Appeals*, 1858, *Dain v. Wyckoff*, 18 *N. Y.* (4 *Smith*), 45.

24. **Connivance of plaintiff.** A father cannot maintain an action for debauching his daughter, if he consented to, or connived at her intercourse with the defendant. *Supreme Ct.*, 1804, *Seagar v. Sligerland*, 2 *Cal.*, 219; *S. P.*, 1857, *Travis v. Barger*, 24 *Barb.*, 614; and see *Fletcher v. Randall*, *Anth. N. P.*, 267; *Smith v. Masten*, 15 *Wend.*, 270.

25. The consent or connivance of plaintiff, being a complete bar to the action, must be pleaded as such. If not set up it cannot be shown in mitigation of damages. *Supreme Ct.*, 1857, *Travis v. Barger*, 24 *Barb.*, 614.

26. **Previous character.** The fact that the daughter was, previous to the seduction, of unchaste character, does not prevent the father from recovering the damages sustained by himself in loss of service, and expenses of confinement, provided he did not know or connive at her criminal intercourse with defendant. *Supreme Ct.*, 1806, *Akerley v. Haines*, 2 *Cal.*, 292; and see *Fletcher v. Randall*, *Anth. N. P.*, 267.

27. **The representatives of the father** cannot sue for the seduction of the daughter in his lifetime. The action dies with the person. *Supreme Ct.*, 1850, *George v. Van Horn*, 9 *Barb.*, 528.

28. **Expenses since suit brought.** Though according to the strict rules of evidence, proof of expenses and loss of service after the commencement of the suit might be inadmissible, yet its admission is not a ground for granting a new trial. *Supreme Ct.*, 1838, *Stiles v. Tilford*, 10 *Wend.*, 338.

29. **Offer to marry.** The action being founded on the master's loss of service, it is no ground of mitigation of damages that after the seduction defendant offered to marry the female, and she was willing, but the plaintiff refused his consent. *Supreme Ct.*, 1849, *Ingersoll v. Jones*, 5 *Barb.*, 661.

Criminal Prosecution.

As to Damages in these actions, see DAMAGES; NEW TRIAL.

30. **The criminal offence.** Any man who shall under promise of marriage, seduce, &c., any unmarried female of previous chaste character, shall be guilty of misdemeanor. *Laws of 1848*, 148, ch. 111.

31. Punishment therefor, prescribed. *Ib.*

32. **The promise.** It is a good defence to a prosecution under the act of 1848, that, at the time of the alleged seduction, defendant was married, and the marriage known to the prosecutrix. A married man can make no valid promise to marry, such as is required by the act, to be proved. There must be mutual and binding promises of marriage between the parties, to make a case within the act. *Oyer & T.*, 1851, *People v. Alger*, 1 *Park. Cr.*, 383.

33. The indictment need not aver that the promise was binding, or that it was mutual. A promise confided in by the prosecutrix would be sufficient, although the defendant used it as a false pretence, or knew it was not in his power to perform. In the indictment it is enough to follow the language of the statute. *Supreme Ct.*, 1858, *Orozier v. People*, 1 *Park. Cr.*, 453.

34. **Previous character.** The meaning of the phrase "previous chaste character," as used in the statute,—considered. *Safford v. People*, 1 *Park. Cr.*, 474. Compare ABDUCTION, 4.

35. **No conviction** therefor shall be had on the testimony of the female seduced, unsupported by other evidence; nor unless indictment shall be found within two years after the commission of the offence. *Laws of 1848*, 148, ch. 111.

36. **The corroboration** of the woman's testimony must be addressed to the ingredients necessary to constitute the crime. Where she was corroborated as to collateral matters, but not as to either the promise or the seduction,—*Held*, that there could be no conviction. *Oyer & T.*, 1849, *People v. Hine*, 8 *N. Y. Leg. Obs.*, 189.

37. A defendant committed to answer to a prosecution for seduction, should be discharged upon habeas corpus or certiorari, unless it is made to appear affirmatively on the part of the People—1. That the seduction was under promise of marriage; 2. That the female was of previously chaste character; and 3. That her testimony was corroborated, at least in some important respects, by other witnesses.

General Rules.

Recorder, at Chambers, 1858, *People v. Lomax*, 6 *Abbotts' Pr.*, 189.

38. In what respects, and to what extent, such corroborative testimony is required by the statute. *Ib.*

39. *Imitation*. Where the illicit intercourse between the prosecutrix and the defendant began more than two years before the indictment found, and continued until within two years,—*Held*, not a case of seduction within two years, and, therefore, not within the statute. *Supreme Ct.*, 1854, *Safford v. People*, 1 *Park. Cr.*, 474.

40. *Subsequent marriage* of the parties may be pleaded in bar of a conviction for seduction. *Laws of 1848*, 148, ch. 111.

SEIZIN.

1. *Of wild and uncultivated lands* in this country, the ownership is deemed a sufficient possession to constitute seizin. *Supreme Ct.*, 1811, *Jackson v. Bellick*, 8 *Johns.*, 262; 1817, *Jackson v. Howe*, 14 *Id.*, 406; 1818, *Jackson v. Gilchrist*, 15 *Id.*, 89; 1825, *Jackson v. Johnston*, 5 *Cow.*, 74; 1834, *Bradstreet v. Clarke*, 12 *Wend.*, 602.

2. *Fine*. Of the disseizin and seizin necessary to support a fine. *McGregor v. Comstock*, 17 *N. Y.* (8 *Smith*), 162; affirming *S. Ct.*, 16 *Barb.*, 427.

As to what constitutes seizin, see also *Englishbee v. Helmuth*, 7 *N. Y. Leg. Obs.*, 186; reversed, 8 *N. Y.* (8 *Comst.*), 294.

See, also, *CURTSEY*; *DESCENT*; *DOWER*.

SENTENCE.

1. *Presence of the prisoner*. It is not necessary because there is a discretion to sentence a defendant to corporal punishment, that he should be present. The rule is, that such a sentence shall not be imposed in his absence. Where the sentence is to be a fine merely, the defendant need not be brought into court. *Supreme Ct.*, 1846, *People v. Taylor*, 8 *Den.*, 91, note a.

2. Where the Court of Appeals has rendered a judgment in a capital case which avoids an order for a new trial, and has remanded the cause, with directions that sentence of death be pronounced, the court below will not refuse

to pronounce it, on the objection that the prisoner was not corporally present before the Court of Appeals. *Supreme Ct.*, 1852, *People v. Clark*, 1 *Park. Cr.*, 860.

3. In what cases a criminal punishable corporally must be present when judgment is rendered against him. *Ib.*

4. When the Oyer and Terminer may delay sentence for the purpose of having the decision reviewed by certiorari. *Colt v. People*, 1 *Park. Cr.*, 611.

5. *Expunging and correcting*. Where at the same term at which sentence is pronounced, and before the sheriff has proceeded to execute it, it is discovered that the sentence is irregular,—a. g., where sentence of imprisonment in state-prison will not expire between March and November (2 *Rev. Stat.*, 700, § 12),—the court has power to expunge the sentence and pass sentence anew, correctly. *Supreme Ct.*, 1853, *Miller v. Finkia*, 1 *Park. Cr.*, 874.
See, also, *PUNISHMENT*.

SERVICE (and Proof of).

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I. GENERAL RULES.

1. Where a statute prescribes giving notice as a condition precedent to the doing an act, and does not prescribe the mode of giving notice, personal service is necessary. [2 *Jones' Law R.*, 52; 6 *B. Mon.*, 146.] *Supreme Ct., Sp. T.*, 1857, *McDermott v. Board of Police*, 5 *Abbotts' Pr.*, 422; *Gen. T.*, 1854, *Rathbun v. Aoker*, 18 *Barb.*, 898.

2. Where—as in case of order in supplementary proceedings—the statute specifies no mode of service, personal service is good. *See*

General Rules.

preme Ct., 1851, *People v. Hulburt*, 5 *How. Pr.*, 446.

3. **Official meeting.** Under a statute requiring notice to be given to officers to meet for the purpose of appointing an officer, personal service of the notice is not necessary. That is required when the object is to bring a party into contempt, or to subject him to the jurisdiction of a court; not when it is to give him the opportunity of exercising a right. *Supreme Ct., Sp. T.*, 1856, *People v. Walker*, 28 *Barb.*, 804; *S. O.*, 2 *Abbotts' Pr.*, 421.

As to necessity of personal service to constitute "Due process of law," see CONSTITUTIONAL LAW, 186.

4. **Conditional.** Service of a notice of retainer conditionally,—*Held*, not service where the condition was not performed. *Supreme Ct.*, 1845, *Bronk v. Conklin*, 2 *How. Pr.*, 7.

5. **That attempts to evade service** do not dispense with the necessity for personal service. *Van Rensselaer v. Palmatier*, 2 *How. Pr.*, 24.

6. **Service of original process enough.** A decree which personally bound two defendants, in a suit in which process had been served on both, but neither had appeared, was erroneously satisfied, and the complainant moved to vacate the satisfaction and for new execution; and the papers for the motion were served on one only. The defendant not served with notice of the motion had removed from the State some years before the motion, and his residence was not then known. *Held*, that service of the papers upon the absent defendant was not necessary. After service of the first process upon the party, it was simply a matter of practice whether any and what notice should be given to him of any subsequent proceedings in the cause. *Ct. of Appeals*, 1853, *Suydam v. Holden*, *Seld. Notes*, No. 4, 16.

7. **Return-day.** The latest period allowed for the service of process is the day on which it is returnable. [2 *Cai.*, 244; 4 *Johns.*, 456.] *Supreme Ct.*, 1816, *Slingerland v. Swart*, 13 *Johns.*, 255.

8. **Blank.** If the copy of the subpoena delivered is in blank as to the return, the service may be treated as a nullity, for defendant is to be guided by the copy. *V. Chan. Ct.*, 1833, *Arden v. Walden*, 1 *Edw.*, 681.

9. **Beyond jurisdiction.** Personal service of a subpoena in equity, out of the jurisdiction,

is irregular. [10 *Wend.*, 592.] The irregularity may be waived, however, by appearing. *Chancery*, 1834, *Dunn v. Dunn*, 4 *Paige*, 425.

10. Service of process out of the territorial jurisdiction of the court from which it issues, at common law, is a nullity; and the defendant's admission of service, not showing that it was made within the State, is inefficacious. [4 *How. Pr.*, 275.] *Supreme Ct., Sp. T.*, 1850, *Litchfield v. Burwell*, 5 *How. Pr.*, 341; *S. O.*, 9 *N. Y. Leg. Obs.*, 132.

11. **In prison.** Personal service upon a defendant in state-prison for a term of years, on conviction of felony,—*Held*, regular. *Chancery*, 1838, *Phelps v. Phelps*, 7 *Paige*, 150.

12. **Elding service.** The sheriff found defendant in front of his house, and defendant ran away, the sheriff calling out to him when very near him, that he had two declarations to serve, naming the plaintiffs, and then left the declarations in the house. *Held*, not sufficient. They should have been delivered or offered to defendant within his reach, or laid down within his reach. *Supreme Ct.*, 1846, *Van Rensselaer v. Petrie*, 2 *How. Pr.*, 94.

13. **A mere manual delivery** of the summons and complaint, defendant returning them without being informed that he is entitled to keep them, is not sufficient. *Supreme Ct., Sp. T.*, 1849, *Beekman v. Outler*, 2 *Code R.*, 51; *S. P.*, 1855, *Niles v. Vanderzee*, 14 *How. Pr.*, 547.

14. **If a notice is taken back** from one to whom it was delivered by the party serving it, for the purpose of serving it on another person, the first delivery is no service. *N. Y. Com. Pl.*, 1854, *Earl v. Chapman*, 3 *E. D. Smith*, 216.

15. **Fraud.** Where, by a false statement, or fraudulent pretence, a party is brought within the jurisdiction and there served with process, the process will be set aside.* *N. Y. Superior Ct.*, 1850, *Carpenter v. Spooner*, 2 *Sandf.*, 717.

16. **Fraudulent concealment of process.** The object of the summons is to give defendant authentic and fair notice that an action has been commenced, and of the time allowed to interpose a defence, and any trick or device that deprives him of this notice and of his

* Compare *Matter of Wolfe*, 3 *N. Y. Leg. Obs.*, 383, where it is said that fraud in inducing the debtor to come within the jurisdiction, without force, is not ground for discharging him from arrest.

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right to apply for further time if necessary, is a fraud upon the statute, and on the rights of the party. Putting the summons into defendant's possession, enveloped so as to conceal from him the knowledge which it should communicate, is not a good service, though he subsequently discovers the contents of the summons when beyond the limits of the State. *Supreme Ct., Sp. T.*, 1858, Bulkley v. Bulkley, 6 *Abbotts' Pr.*, 807.

17. Witness. A resident of another State coming voluntarily into this State, in good faith, for the sole purpose of being examined as a witness here, is exempt from the service of summons; and if one is served under such circumstances, it will be set aside. [2 Johns., 294; 4 Cow., 381.] *N. Y. Superior Ct., Chambers*, 1854, Seaver v. Robinson, 8 *Duer*, 622.

18. Mistake. To constitute a service, there must be a delivery by some person authorized. Service on the wrong person by mistake, followed by his delivering the paper to the defendant, is not a valid service; and a judgment entered by default upon it, is to be set aside without reference to the merits. [1 Hill, 180; 12 M. & W., 502.] *Supreme Ct.*, 1858, Williams v. Van Valkenburg, 16 *How. Pr.*, 144; disapproving Anonymous, 4 *Id.*, 112. Compare Wallis v. Lott, 15 *Id.*, 567.

19. A variance in the copy served, whether of process or of papers, is not ground of objection, if the party served cannot be misled or prejudiced by the mistake. [3 Chitt. Gen. Pr., 229-232; 2 Johns., 479; 2 Wend., 283.] *Supreme Ct.*, 1842, Union Furnace Co. v. Shepherd, 2 *Hill*, 418.

20. Where publication is ordered, the statute must be strictly pursued; and if the publication is made in a different paper than that directed by the court, it is void, without reference to the question whether defendant was prejudiced. *Supreme Ct., Sp. T.*, 1847, Brisbane v. Peabody, 8 *How. Pr.*, 109.

21. Where three months' advertisement is required, weekly publication is sufficient. *Supreme Ct.*, 1805, Anonymous, 2 *Cai.*, 885.

22. That service prohibited by law is no service, and gives no jurisdiction, if the party does not appear. *Ct. of Appeals*, 1850, Hastings v. Farmer, 4 *N. Y.* (4 *Comst.*), 293.

23. Railroad corporations required to designate some person, residing in each county into which such railroad may run, on whom process to be issued by a justice of the peace may be served, and file such designation in county clerk's

office, and the service of such process upon the person so designated, in any civil action or matter of which such justice may have jurisdiction, is effectual as if on president or director. *Laws of 1854*, 613, ch. 282, § 14.

24. Where such designation is not made, and no officer of such corporation resides in the county on whom process can be served according to the existing provisions of law, such process may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station-keeper of such corporation, residing in such county, with the same effect. *Laws of 1854*, 614, ch. 282, § 15.

25. Foreign corporations doing business here. Service of process upon a foreign corporation, doing business in this State, may be made upon any person found within the State acting as their agent, unless by a designation filed in the office of the secretary of state they have appointed some person in the county in which they are doing business, to receive service. *Laws of 1855*, 470, ch. 279.

26. A foreign railroad corporation having their whole road and traffic without the limits of this State, and having no office here, are not a corporation doing business within the State, although tickets for passage over their road are sold by their agent here; and such an agent is not a managing agent or other officer, intended by section 184 of the Code. *N. Y. Superior Ct., Sp. T.*, 1859, Doty v. Michigan Central R. R. Co., 8 *Abbotts' Pr.*, 427.

27. Insurance companies. Appointment of attorneys by, &c., on whom process may be served, required from foreign life and health insurance companies. *Laws of 1862*, 506, ch. 300, § 2.

— from foreign fire insurance companies. *Id.*, 617, ch. 367, § 5.

28. The trustees of a religious corporation and officers appointed by them, whose elections and appointments were in conformity with the formalities prescribed by the statute, and who have in fact acted and are acting as such, are at least officers *de facto*, upon whom alone can a valid service of process be made. *So held*, on a motion to set aside proceedings, on affidavits denying the title of the officers who were served therein. *N. Y. Superior Ct., Sp. T.*, 1857, Berrian v. Methodist Society, 4 *Abbotts' Pr.*, 424.

29. Special order. Where defendant, a religious corporation, had no presiding officer or treasurer, and the secretary had left the State, service of the summons on a trustee was declared sufficient, by special rule. *Supreme Ct.*, 1887, Tom v. Methodist Episcopal Church, 19 *Wend.*, 24.

30. Service on day of default. Where

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the party waits and serves a paper on the day when his default for the want of it may be regularly taken, and the default is taken on that day, in good faith, and without knowing of the service, the court will not inquire or take notice of the fact that the service was at an earlier hour in the day than the taking of the default. [18 Wend., 655.] *Supreme Ct.*, 1844, *Brainard v. Hanford*, 6 *Hill*, 868.

31. Where on attempting to serve a paper on an attorney both his office and dwelling are closed, a regular service on the next day, though after the due time has passed, with notice of the facts, will be deemed regular. *Supreme Ct.*, *Sp. T.*, 1849, *Falconer v. Utoppell*, 2 *Code R.*, 71. Followed, *N. Y. Superior Ct.*, 1858 [citing, also, 8 *How. Pr.*, 28; 5 *Id.*, 337], *Lord v. Vandenburg*, 15 *How. Pr.*, 868.

32. Where the attorney, by designating his address, has fixed the place where papers are to be served on him, a party having attempted to make service there within the hours prescribed by law, and is unsuccessful, is not bound to send to another town to serve them at the attorney's real residence. *N. Y. Superior Ct.*, 1858, *Lord v. Vandenburg*, 15 *How. Pr.*, 868.

33. Subscription. On process or papers to be served, attorneys and parties appearing in person besides subscribing or indorsing name, must add thereto place of business; if he does not, papers may be served on him at his place of residence through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence. *Rule 10 of 1858*.

34. Illegible. That where the attorney's name on a declaration served is illegible or his residence not stated, defendant is held to some diligence to ascertain what it is. *Ferriss v. Merrill*, 8 *How. Pr.*, 20; *Watkins v. Stevens*, *Id.*, 28.

35. Partners. *It seems*, that where the attorney on record dissolves his partnership and leaves the State, but does not become a non-resident, service must still be made on him and not on his former partner. *Diefendorf v. House*, 9 *How. Pr.*, 243.

36. Where the solicitor of non-resident complainants died, the court directed the thirty days' notice to appoint another [2 *Rev. Stat.*, 287, § 67], to be sent to each one by mail. *Draper v. Holland*, 8 *Edw.*, 272.

37. A stranger to the suit who agrees to

pay the taxable cost the amount as tax copy of the tax. *Errors*, 1828, *Saff*

38. Repaying ant, having leave costs, serves an a complainant would ular, he must repa 1841, *Hoxie v. Sec*

39. Notice of i on indorser or dra where note or bill 889, ch. 416, § 3.

40. Advertisin the Laws of 1844, c that on the foreclo tissement, a notic sonally," or by d post-office, proper the said persons a residence,—the va does not depend up but parties residir service is made m of Appeals, 1854, (1 *Kern.*), 196; re

41. Where defe resides in this State found, avoids or eva be made personally, service of any paper at his residence, wit if admittance can be son found who will mittance cannot be person found who w ing the same to the residence, and by p properly folded or ei person to be serve into the post-office i defendant resides, a on. Affidavit of st county clerk. *Laws*

42. Not applic is only where a d either in or out of evades personal service under the act it is ordered when State is known, the *Supreme Ct.*, *Sp. T.*, 9 *How. Pr.*, 519; *G. 1 Abbotts' Pr.*, 458

43. Nor to de known. The prov tate the service of

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to cases where the defendant cannot be found either in or out of the State, or where, being found, he avoids or evades service. The plaintiff is not entitled to an order for substituted service where the papers show where the absent defendant may be found. *Supreme Ct., Sp. T., 1856, Foot v. Harris, 2 Abbotts' Pr., 454.*

44. If the order, under the act of 1858, directs service to be made by leaving a copy with some person of suitable age, &c., at defendant's place of residence,—it is irregular for variance from the mode prescribed by the statute. *Id.*

45. Election day. A declaration by which a suit is commenced is not "process" within the statute prohibiting the service of civil process on electors, on the day of any general election. *Supreme Ct., 1840, Corlies v. Holmes, 20 Wend., 681; but see Laws of 1842, infra.*

46. Under the Laws of 1842, 109,—providing that no civil process, or proceedings in the nature of civil process, shall be served on a general or special election day,—service of summons upon an elector on election day is void. *Supreme Ct., Sp. T., 1855, Meeks v. Noxon, 1 Abbotts' Pr., 280; S. C., sub nom. Weeks v. Nixon, 11 How. Pr., 189; 1856, Bierce v. Smith, 2 Abbotts' Pr., 411.*

47. That this statute does not apply to charter elections. *Wheeler v. Bartlett, 1 Edw., 323; and see ELECTIONS, 1.*

As to service on the Sabbath, see SATURDAY, and SUNDAY.

48. City of New York. The provision of 2 Laws of 1818, 342,—forbidding the service of civil process on the day of a charter election,—does not extend to an injunction or subpoena, but only to process causing duress. *V. Chan. Ct., 1832, Wheeler v. Bartlett 1 Edw., 323.*

49. New York bay. The counties of Kings, Richmond, and New York, for the purpose of serving processes, civil or criminal, have concurrent jurisdiction on the waters in the counties of Kings and Richmond, south of the bounds of that of New York. *1 Rev. Stat., 82, § 7.*

50. Seneca Lake. Process issuing to officers of the counties bordering on Seneca Lake, may be served upon its waters. *1 Rev. Stat., 83, § 8.*

51. Affidavit by one deceased. "Whenever it shall be necessary, on the trial of an action, or in any judicial proceeding, to prove the service of any notice, an affidavit showing such service to have been made by the person making such affidavit, shall be received as presumptive

evidence of such service, upon first proving that such person is dead or insane." *Laws of 1858, 894, ch. 244, § 1.*

52. A sheriff's certificate of service of summons and complaint does not lose its force by lapse of time, or by being used upon the entry of a judgment afterwards vacated. It may notwithstanding be used upon a second application for judgment. *N. Y. Com. Pl., 1856, Brien v. Casey, 2 Abbotts' Pr., 416.*

53. The sheriff's certificate is not proof of service of an order to appear and be examined in supplementary proceedings. It is not made evidence by the statute, and the order is not technically process. *Supreme Ct., Chambers, 1859, Utica City Bank v. Buel, 17 How. Pr., 498; S. C., 9 Abbotts' Pr., 885.*

54. The certificate of a sheriff, of service out of his county, is not proof. *Supreme Ct., Sp. T., 1859, Farmers' Loan & Trust Co. v. Dickson, 17 How. Pr., 477; S. C., 9 Abbotts' Pr., 61.*

55. Foreign sheriff. The official certificate of a sheriff of another State is not evidence in this State of service of papers from the courts of our State; his affidavit should be presented. *Supreme Ct., Sp. T., 1854, Thurston v. King, 1 Abbotts' Pr., 126; 1857, Morrell v. Kimball, 4 Id., 352.*

56. An affidavit of service is not conclusive upon the defendant. The Supreme Court has power on motion to inquire into the fact of alleged service of its own process. *Supreme Ct., 1852, Van Rensselaer v. Ohadwick, 7 How. Pr., 297; Sp. T., 1857, Wallis v. Lott, 15 Id., 567.*

57. The return of the sheriff is conclusive in the same action, subject to the power of the court to open defaults, for a defence on the merits. [Wats. on Shffs., 72; Dalt., 189; Allen on Shffs., 57; Cow. & Hill's Notes, 1087, 1090; 8 Wend., 252; 10 Id., 800; 5 Id., 209; 10 Id., 525; 15 East, 378; 1 Pet., 441; 8 Mass., 325; 19 Vin., 210; 1 Salk., 265; 2 Ld. Raym., 1072; Oode, § 188.] *Supreme Ct., 1853, Col. Ins. Co. v. Force, 8 How. Pr., 353.*

58. Summons against a railroad company was served on a freight agent, and the constable's return stated that no officer of the corporation resided in the county. The defendants appeared, and after the complaint was filed and an adjournment had, they appeared again upon the adjourned day, and

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objected that one of their directors resided in the county, and made proof of that fact. *Held*, that their motion to dismiss the action should have been granted. Such return is not evidence on the question whether the person served was one on whom the service was authorized to be made; and the justice acquired no jurisdiction of the action. *Supreme Ct.*, 1857, *Wheeler v. N. Y. & Harlem R. R. Co.*, 24 *Barb.*, 414.

59. The defendant's affidavit as to the time of service upon him is conclusive against a deputy sheriff's certificate. In such a case the sheriff is put to his affidavit. *Supreme Ct.*, 1845, *Campbell v. Self*, 2 *How. Pr.*, 35.

60. Return. It will be intended where the sheriff returns that he served a copy of the declaration on the defendant, that he served it personally. *Supreme Ct.*, 1884, *Central Bank v. Wright*, 12 *Wend.*, 190.

61. There need not be an affidavit that the copy was a copy of the declaration filed. *Id.*

62. To meet a positive denial that a paper was received, the affidavit in reply must state time and manner of service, so that an indictment for perjury can be maintained, if not true. *Supreme Ct., Sp. T.*, 1855, *Van Wyck v. Reid*, 10 *How. Pr.*, 366.

II. IN ACTIONS AT LAW.

1. In General.

63. Old rule. In every case of service on a party in a suit, except to bring him into contempt, leaving the paper at his dwelling-house is sufficient. [4 T. R., 465.] *Supreme Ct.*, 1803, *Johnston v. Robins*, 8 *Johns.*, 440.

64. In a suit commenced by declaration, the service must be personal on the defendant. *Supreme Ct.*, 1833, *Van Patten v. Volt*, 9 *Wend.*, 497.

65. Where an attorney is sued, the bill, or, where he is sued by writ, the writ must be served on him personally, or in some equivalent mode. *Supreme Ct.*, 1811, *Backus v. Rogers*, 8 *Johns.*, 346; 1819, *Brown v. Childs*, 17 *Id.*, 1.

The rule applies where he is sued with others. 1825, *Bank of Chenango v. Root*, 4 *Cow.*, 126.

That the rule does not apply to counsellors. 1828, *Sperry ad. Willard*, 1 *Wend.*, 32.

Service on his clerk in his absence is not enough. 1823, *Lawrence v. Warner*, 1 *Cow.*, 198.

66. He is also a party to the subsequent proceeding appeared for an Bridgeport Bank 1829, *Hitchcock*.

67. Omission on whom declares not read, and the read to him at that, it appearing service was sufficient. *Jackson v. Stiles*.

68. Service on the defendant's premises (2 *Rev. Held*, insufficient appeared. *Supreme Ct.*, 2 *How. Pr.*

2. Service

69. Whenever though it be too late to notice of *Supreme Ct.*, 1798, 1 *Cas.*, 56.

70. When plaintiff the expiration of been employed for a time, and notice served on defendant at usual place of abode. *v. Young*, 11 *Johns.*

71. At his office must first be on belonging there; on some one in the residence or the office there, the paper *Supreme Ct.*, 1798, *Johns. Cas.*, 186; and see *Anonymo Gardner, Id.*, 359.

72. Service on attorney, and where not sufficient, as if clerk in the office. *Ymoua*, 1 *Cas.*, 73.

73. Where a partner the attorney's office must be shown. *bone v. Blackford O. Cas.*, 260.

74. Service on a partner happened to be in

In Actions under the Code;—In General.

tempt for disobedience. *N. Y. Superior Ct.*, 1851, Coddington v. Webb, 4 *Sandf.*, 339. Followed, *Supreme Ct.*, *Sp. T.*, 1854, Watson v. Fuller, 9 *How. Pr.*, 425; but compare *CONTEMPT*, 12-17.

149. Injunction against Corporation. In an action by individual corporators of the city of New York, against the mayor, aldermen, and commonalty, to enjoin them from granting the right to construct a railroad in the city, the summons and complaint, with the affidavits and injunction obtained, were served upon the mayor, and the summons and injunction upon members of the two boards of the Common Council. *Held*, that this was a sufficient service to found proceedings for contempt for disobedience of the injunction by the members of the two boards. It was not necessary to serve the complaints and affidavits upon the individual members of the Common Council themselves. The effect of an injunction or decree restraining any acts of a corporate body, and addressed in the ordinary way to it, or its agents, &c., is to bind not only the intangible artificial being, but also all the individuals who act for the corporation in the transaction of its business to whose knowledge the injunction or decree comes. Unless this be so, it would be necessary, in order to effectually bind a corporation by an injunction, to make every person a party to the suit, who could by any possibility be its agent in doing the prohibited act. [1 *Barb. Ch. Pr.*, 636.] *Ct. of Appeals*, 1853, *People v. Sturtevant*, 9 *N. Y.* (5 *Seld.*), 268; affirming *S. C.*, *sub nom.* *Davis v. Mayor, &c.*, of *N. Y.*, 1 *Duer*, 451; *People v. Compton, Id.*, 512.

150. The fact that a copy of the affidavit was not served with the injunction renders the service irregular, and is ground for setting aside the service, but not for vacating the injunction. *Supreme Ct.*, *Sp. T.*, 1853, Penfield v. White, 8 *How. Pr.*, 87. To similar effect, in case of an order of arrest, 1854, *Courter v. McNamara*, 9 *Id.*, 255.

151. Where the service of an attachment is not accompanied with the affidavits, the party cannot be put in contempt for disobedience. *Supreme Ct.*, *Sp. T.*, 1854, *Watson v. Fuller*, 9 *How. Pr.*, 425.

152. Appeal from Marine Court. It is not necessary that notice of appeal to the Common Pleas from a judgment of the general term of the Marine Court should be served on

each of the justices, but service on the clerk is sufficient. *N. Y. Com. Pl.*, *Sp. T.*, 1857, *Irwin v. Muir*, 4 *Abbotts' Pr.*, 138; *S. C.*, 18 *How. Pr.*, 499.

153. The notice of appeal in such case must state the grounds of appeal. But an amendment may be allowed where the notice is deficient in this respect. *Id.*

154. Clerk's admission. Service made after the time has passed, upon a clerk who accepts the paper in ignorance of the fact that his principal had refused it as too late, is ineffectual. *Supreme Ct.*, *Sp. T.*, 1851, *O'Brien v. Catlin*, 1 *Code R.*, *N. S.*, 273.

155. Affidavit. Proof of service of a summons and complaint, not stating that it was in the cause, is insufficient. *Supreme Ct.*, *Sp. T.*, 1850, *Litchfield v. Burwell*, 5 *How. Pr.*, 341; *S. C.*, 9 *N. Y. Leg. Obs.*, 182.

156. Requisites of affidavit of service. *Rule* 18 of 1858.

157. Admission by party. If an admission of service is made by a party who is not an officer of the court, the signature must be proved to be genuine. *Supreme Ct.*, *Sp. T.*, 1850, *Litchfield v. Burwell*, 5 *How. Pr.*, 341; *S. C.*, 9 *N. Y. Leg. Obs.*, 182.

158. The want of an affidavit verifying an admission of service, must be objected to promptly; and the defect may be cured after judgment, by amendment. *Supreme Ct.*, *Sp. T.*, 1857, *Jones v. U. S. Slate Co.*, 16 *How. Pr.*, 129.

159. A party wishing to decline receiving a paper, has at least the whole of the same day to return it. *N. Y. Com. Pl.*, 1850, *McGown v. Leavenworth*, 2 *E. D. Smith*, 24.

160. On returning a pleading as defective,—*a. g.*, for not being verified,—the party must point out the defect. [2 *Sandf.*, 684.] *N. Y. Superior Ct.*, 1851, *White v. Cummings*, 3 *Sandf.*, 716.

161. Second return. A plaintiff's attorney, on whom an answer was served, handed it back to the messenger who brought it, telling him that it would not be received, because the time to answer had expired. The messenger, on returning, was sent a second time by defendant's attorney to re-serve it, which he did, and the plaintiff's attorney did not return it the second time. *Held*, that by once returning the answer, informing the messenger why it would not be received, the plaintiff's attorney did all which would be required.

was misled by an error, he may be relieved on the merits. *Supreme Ct.*, 1855, *Jacquerson v. Van Erben*, 2 *Abbotts' Pr.*, 815.

184. Omission to file complaint. Where the plaintiff omits to file the complaint before publication, and also to state in the summons, as published, the time and place of filing, his judgment entered against the defendant as upon failure to answer, is a nullity. An order subsequent to the judgment, that the complaint be filed *nunc pro tunc*, is unavailing. Amendment cannot create a judgment out of what in legal effect is nothing. And the defect of omitting to state in the summons, as published, the time and place of the filing, is of itself fatal to the judgment. *Supreme Ct.*, *Sp. T.*, 1857, *Kendall v. Washburn*, 14 *How. Pr.*, 380.

185. Such judgment is not aided by section 189 of the Code, and the fact that an attachment was issued in the proceeding. The jurisdiction arising on the allowance of a provisional remedy, is for the purpose of that remedy only; and notwithstanding that, the summons must be served, in order to authorize a judgment. [6 *How. Pr.*, 47; 18 *Barb.*, 412.] *Id.*

186. The complaint need not be published. *Supreme Ct.*, *Sp. T.* (1848?), Anonymous, 8 *How. Pr.*, 298; S. C., 1 *Code R.*, 102.

187. The deposit must be forthwith; and a delay for fifteen days, after the granting of the order, is an irregularity which affects the title under the judgment; and for which a purchaser will be relieved. *Supreme Ct.*, 1855, *Back v. Crussell*, 2 *Abbotts' Pr.*, 886.

188. A suit is not commenced, when service is by publication, until the expiration of the time of publication; but jurisdiction may be, meanwhile, sustained by a provisional remedy. *Supreme Ct.*, 1850, *More v. Thayer*, 10 *Barb.*, 258; S. C., 6 *How. Pr.*, 47; 8 *Code R.*, 176.

189. Personal service after publication. If, after commencing service by publication with an attachment, plaintiff's attorney intends to rely on a personal service, he should see that the delivery of the summons and complaint to defendant is understood as a personal service. Handing them to him, in answer to an inquiry, as to the amount of the demand, and allowing him to depart, leaving them with the attorney, is not enough. *Supreme Ct.*, *Sp. T.*, 1855, *Niles v. Vanderzee*, 14 *How. Pr.*, 547.

190. When at upon a non-reserved, if person effected, it is unpublication, and post-office. A of those steps. *Abrahams v. Mit* approving *Litch* 841; S. C., 9 *N*

191. Defendant and answer prescribed by though he is without the S 1851, *Tomlinson Pr.*, 199; S. C. *Abrahams v. 1* To the contrary 7 *How. Pr.*, 811

192. Statute where it is so making service the requirements such a service 1 *Supreme Ct.*, S burn, 14 *How. 17*.

8.

193. Direct place of residence Code, relates any particular package address without the a ber,—*Held*, su *Sp. T.*, 1855, O *Pr.*, 460.

194. Papers an attorney, designated by residence," pre with the rule i papers; and th 5) must be un name of the p be directed.

well v. McCorm pare *Lord v. V*

195. When be effectual as the post-office and not that o whose hand

continued a director, after rendering such services, made no claim for compensation.—*Held*, that a contract to pay could not be implied. *Supreme Ct.*, 1880, *Utica Ins. Co. v. Bloodgood*, 4 *Wend.*, 652.

5. Where one purchased a negro, both believing that the negro was a slave, and the negro worked for him as a slave; but it turned out that he was a freeman;—*Held*, that the negro could not recover for his services. A promise to pay for services rendered, will not be implied where it was understood by the parties that no compensation was to be made. [3 *Esp.*, 4.] *Supreme Ct.*, 1826, *Livingston v. Ackeston*, 5 *Cow.*, 581. Followed, 1885, *Griffin v. Potter*, 14 *Wend.*, 209; and see *Maltby v. Harwood*, 12 *Barb.*, 473.

6. **Void indenture.** Where an indenture of apprenticeship is not valid, but the parties voluntarily act under it, supposing it to be so, no obligation to reward the minor for his labor, in any manner varying from the indenture, can be implied. When it is made to appear, from the facts in the case, that compensation was not intended by the parties, the implication of a promise fails. [16 *Verm.*, 150; 14 *Wend.*, 209; 5 *Cow.*, 581; 3 *Comst.*, 812; 2 *Barb.*, 208.] *Supreme Ct.*, 1852, *Maltby v. Harwood*, 12 *Barb.*, 473.

7. Where, however, defendant received the services of plaintiff, supposing him to be an apprentice of a third person, and expecting to make compensation to the latter, and it proves that the indenture was void, he is liable to the servant for the services. If an employer agrees to render an equivalent for services performed, it is no defence to an action against him to recover compensation, that he agreed to pay some third person who has no legal claim to the service, or right to the compensation, especially where the defendant does not show that he has in fact paid such third person. *Supreme Ct.*, 1855, *Lewis v. Trickey*, 20 *Barb.*, 387.

8. **Void marriage.** One who rendered services in the supposed relation of lawful wife, cannot, on discovering that the marriage was void, recover for them on an implied promise to pay for them. *Supreme Ct.*, 1858, *Cropsey v. Sweeney*, 27 *Barb.*, 810; *S. Ct.*, 7 *Abbotts' Pr.*, 129.

9. **Brother's services.** Where one attended the store of his brother, and was boarded and clothed by him, and two years after the

brother's death estate for his se was implied. between memb sumption does *Ben. Munr.*, 64; 5 *Barb.*, 122; *Watts & Serg.*, *Y. Surr. Ct.*, 18 386.

10. **Children** availed himself of his children that compensat legacy, but wit that effect. *H* formal promise circumstances to execution of a favor of these by death, his ex pensation. In ence whether t contemplated i sign. *N. Y. St* 8 *Bradf.*, 192.

11. **Suppose** one believing h a slave, uses hi ply a promise t a better title, b allowing the for of ownership. *Seuzer*, 6 *Wend*

12. **Expects** rendered by a of a provision t express or imp tion cannot be standing of bo be remunerate no provision, t *Ct.*, 1808, *Jac* 199; 1885, *Mar* 1842, *Eaton v. Quackenbush v Patterson v. Pa*

13. **Employ** by the defendat physician on a that if he will pay therefor, a tendance by th such request an



